Original: 2077

Attachment A

TESTIMONY

Protective Services for Older Adults (Chapter 15)
Department of Aging Final-Form Regulations

Presented at the January 24, 2002 hearing of the
Independent Regulatory Review Commission (IRRC)

By

Shirley Walker
President and CEO

Pennsylvania Association of Resources
for People with Mental Retardation (PAR)
1007 North Front Street
Harrisburg, PA 17102
Phone: 717-236-2374
Fax: 717-236-5625

Good morning, My name is Shirley Walker. I am the President and CEO of the Pennsylvania Association of Resources for People with Mental Retardation (PAR). Our members support tens of thousands of children and adults with mental retardation throughout the Commonwealth. We provide the full range of mental retardation services and supports in nearly 3000 locations in PA in addition to providing numerous non-residential/day program and in-home supports.

Thank you for the opportunity to testify today.

Four years ago when the amendments to the Older Adult Protective Services Act (OAPSA) went into effect, there was no stir about it at all in the mental retardation community. In fact, the Bill had elicited no discussion even in the government advisory councils that I sit on where we carefully review anything like this that might affect people with mental retardation.

Why was there no discussion of the bill?

Because the bill was understood to pertain only to older adults and not to include services regulated or funded by the Office of Mental Retardation (OMR) which already had a system in place for reporting suspected abuse and neglect.

It certainly was not evident, in plain language, from reading the bill or from its title, that it could eventually be applied to persons of ALL ages, not just older adults, and to mental retardation agencies under the jurisdiction of the Department of Public Welfare. Indeed, even Attorney General Mike Fisher in his appeal of the Nixon decision this month, spoke only of older adults and nursing homes.

We in the mental retardation community were not part of any discussion about it before it became law and for 2 years after the law was in effect we heard nothing about it. Then an inquiry from an organization brought an interpretation that, whether intended or not by the legislature, OAPSA applied to persons of any age and covered mental retardation agencies.

The implementation of this interpretation through these regulations is very problematic in its practical application.

First, please understand that ALL of the reporting of suspected abuse and neglect is and was already required by the Office of Mental Retardation for community mental retardation agencies and already reported by those agencies to the OMR. And further, the Office of Mental Retardation operates a system for immediate response and investigation of suspected abuse and neglect.

When the interpretation was made 2 years ago that the statute applied to all mental retardation facilities and to persons of any age, we sought clarification from the Departments of Aging and the Welfare.

Did this mean that for persons of all ages we needed to report to an agency whose jurisdiction includes only adults 60 and older. Why? What was the compelling health and safety reason? We were already doing all of the reporting to another agency.

Actually, the duplication is not the worst of it. The most concerning issue about the reporting under OAPSA, as amended, is the confusion and added work for the direct care worker, for no corresponding benefit to the individual with mental retardation.

Our turnover of direct care workers is in excess of 40%. So nearly half of the workers are new each year. Say I am a new direct care worker. I have a substantial amount of learning about how to support people with very special needs. Then I have all of the bureaucracy -- paperwork and reporting -- that direct care workers call the 'hassle factor' that comes with the job.

If I, as a direct care worker, suspect abuse or neglect relative to an individual with mental retardation, do I report first to my supervisor, to the Area Agency on Aging – even for a young person, to the Office of Mental Retardation who does investigations, to the county who does investigations, to the regional office, to law enforcement, to the child abuse hotline? And I also need to enter the report into an electronic reporting system in addition to making phone calls. And, which definition of abuse and neglect do I report under. The definitions are not the same.

The hassle factor is one of the reasons direct care workers don't stay. High turnover correlates with low quality which, ironically, increases the risk of abuse and neglect.

If you look at one set of rules, like these regulations, it may not seem like much, but when you allow layer upon layer to be added, it becomes an overwhelming burden and its effect is to reduce protections, not increase them.

What did we do to try to make sense out of this?

We engaged in discussions with the Department of Aging to find practical solutions to the layered and circular reporting. And we wish to commend the Department of Aging, at this time, for their willingness to meet with us several times on the issues and their openness in discussing the issues.

One suggestion we made was for Aging to enter into a Memorandum of Understanding or other agreement with Welfare which would allow them to accept the report that already goes to the Office of Mental Retardation so the OAPSA reporting would not have to be added at the direct care level.

Aging responded by offering to coordinate a paper report they wanted to add with OMR's incident report form, but they did not believe that the statute gave them the authority to remove the multiple reporting that occurs at the direct care level.

Now, it is not a good public policy that prevents one state agency from working out an agreement with another state agency that will eliminate duplication. We in the regulated community thought that the Governor's Executive Order 1996-1 was intended to prevent situations exactly like this.

We asked the Department of Aging to include language in regulation that would allow for reporting and investigation of suspected abuse to be delegated to the Office of Mental Retardation for persons in those facilities, since the OMR already does this for these agencies. Aging responded that they do not believe that the statute gives them the authority to do that.

We believe that effective safeguards are ones that are simple to understand, that set up reporting directly to the state agencies who have the authority to investigate, that do not waste a direct care worker's time by requiring duplicate and confusing reporting requirements.

We believe that the Office of Mental Retardation, with its highly intensive reporting system which provides for immediate response, who is the agency

responsible for investigating suspected abuse and neglect for persons of all ages who receive those services, should be the responsible agency for reporting abuse and neglect either through regulation, agreement, or statute.

I have three concluding points:

1. These regulations are being promulgated under unique circumstances (i.e., the Nixon ruling, its appeal, the possibility that the prohibitive offenses are unconstitutional). The outcome of the appeal will directly impact the implementation of OAPSA, and that should be taken into consideration in your decision. And we always support a mechanism for appeal so that people like the petitioners in the Nixon case, whom no one disputed as qualified, should have the opportunity to see that the law is applied correctly. These regulations do not appropriately address this need.

2. The criteria for review set forth in the Regulatory Review Act that is the basis for the IRRC's existence, include two primary considerations: whether the promulgating agency has the statutory authority to enact the regulation and whether the regulation is consistent with the intent of the legislature.

Regarding the intent of the legislature, in reading the transcripts of the deliberations leading up to the passage of the amendment, we find no mention of mental retardation or any indication that mental retardation agencies and people of all ages were to be included in the Older Adult Protective Services Act.

3. The Regulatory Review Act also includes criteria such as consideration of adverse effects on productivity, direct and indirect costs, added reports and forms, clarity, feasibility and reasonableness, ambiguity, and need.

We request that the IRRC determine that these regulations, as applied globally to persons of any age receiving community mental retardation services, who are already under the stringent supervision of the Office of Mental Retardation, do not meet several criteria existent in the Regulatory Review Act.

Thank you for listening so carefully and for considering our recommendations.

MENTAL HEALTH ASSOCIATION IN PENNSYLVANIA

1414 N. Cameron Street, 2nd Floor ▪ Harrisburg, PA 17103
(717) 236-8110 ▪ fax (717) 236-0192

January 14, 2002

Original: 2077

Mr. Robert E. Nyce, Executive Director
Independent Regulatory Review Commission
333 Market Street, 14th floor
Harrisburg, PA 17101

Re: Final-form regulations on Older Adult Protective Services Act, IRRC No. 2077

Dear Mr. Nyce:

This letter sets forth the position of the Mental Health Association in Pennsylvania on the final-form regulations concerning the criminal history provisions of the Older Adult Protective Services Act (OAPSA).

Human service agencies that provide services to care-dependent people -- *individuals with mental illness and people with mental retardation, people with physical disabilities and substance abuse and recovery programs* -- as well as to the elderly have been negatively impacted by the enactment of OAPSA. People that receive mental health services have lost caregivers who have provided dedicated and responsible service to them and upon whom they have come to trust and rely. In addition, providers of mental health services have had to fire or deny employment to individuals with life experiences *(as in the case of drug & alcohol and mental health workers)* that uniquely qualify them to work in this field.

On December 11, 2001, in Nixon v. Department of Public Welfare, the Pennsylvania Commonwealth Court by a 5-2 vote held that the criminal records provisions of OAPSA violate Article I, Section I of the state Constitution, which guarantees an individual's right to pursue his or her livelihood. In the majority opinion, Judge Doris Smith noted the "draconian impact" of the statute's enforcement and stated that the facts "demonstrate the arbitrary and irrational nature of the challenged provisions [of the statute]." We have been informed that the Commonwealth appealed the decision this week.

In light of the Nixon decision, the Department of Aging has revised its regulations to require covered facilities to obtain background checks, but not to prohibit employers from hiring ex-offenders whom they determine to be fit. We think that this position

safely and fairly balances the needs of the care-dependent individuals and the rights of individuals who care for them. Given the liability for negligent hiring which an employer risks in knowingly hiring an ex-offender, the employer is unlikely to hire unless it is satisfied that an ex-offender warrants that trust.

In sum, we urge the IRRC to **approve** the final-form OAPSA regulations.

Should you require additional information, please feel free to contact me at 717/236-8110, est. 111. Thank you for your consideration of our position.

Sincerely,

Sue Walther
Executive Director

Original: 2077

IRRC

From: Sue Walther [swalther@paonline.com]
Sent: Monday, January 14, 2002 3:44 PM
To: IRRC
Subject: Final-form regulations on Older Adult Protective Services Act, IRRC No. 2077.

Attached are comments from the Mental Health Association in Pennsylvania re: *Final-form regulations on Older Adult Protective Services Act, IRRC No. 2077.* (Hard copy has been mailed.)

Sue Walther
MHAP
1414 N. Cameron Street
Harrisburg, PA 17103
telephone: 717/236-8110, ext. 111
fax: 717/236-0192
email: swalther@paonline.com

MENTAL HEALTH ASSOCIATION IN PENNSYLVANIA
1414 N. Cameron Street, 2nd Floor Harrisburg, PA 17103
(717) 236-8110 fax (717) 236-0192

January 14, 2002

Mr. Robert E. Nyce, Executive Director
Independent Regulatory Review Commission
333 Market Street, 14th floor
Harrisburg, PA 17101

Re: Final-form regulations on Older Adult Protective Services Act, IRRC No. 2077

Dear Mr. Nyce:

This letter sets forth the position of the Mental Health Association in Pennsylvania on the final-form regulations concerning the criminal history provisions of the Older Adult Protective Services Act (OAPSA).

Human service agencies that provide services to care-dependent people -- *individuals with mental illness and people with mental retardation, people with physical disabilities and substance abuse and recovery programs* -- as well as to the elderly have been negatively impacted by the enactment of OAPSA. People that receive mental health services have lost caregivers who have provided dedicated and responsible service to them and upon whom they have come to trust and rely. In addition, providers of mental health services have had to fire or deny employment to individuals with life experiences *(as in the case of drug & alcohol and mental health workers)* that uniquely qualify them to work in this field.

On December 11, 2001, in Nixon v. Department of Public Welfare, the Pennsylvania Commonwealth Court by a 5-2 vote held that the criminal records provisions of OAPSA violate Article I, Section I of the state Constitution, which guarantees an individual's right to pursue his or her livelihood. In the majority opinion, Judge Doris Smith noted the "draconian impact" of the statute's enforcement and stated that the facts "demonstrate the arbitrary and irrational nature of the challenged provisions [of the statute]." We have been informed that the Commonwealth appealed the decision this week.

In light of the Nixon decision, the Department of Aging has revised its regulations to require covered facilities to obtain background checks, but not to prohibit employers from hiring ex-offenders whom they determine to be fit. We think that this position

safely and fairly balances the needs of the care-dependent individuals and the rights of individuals who care for them. Given the liability for negligent hiring which an employer risks in knowingly hiring an ex-offender, the employer is unlikely to hire unless it is satisfied that an ex-offender warrants that trust.

In sum, we urge the IRRC to **approve** the final-form OAPSA regulations.

Should you require additional information, please feel free to contact me at 717/236-8110, est. 111. Thank you for your consideration of our position.

Sincerely,

Sue Walther
Executive Director

Original: 2077

PMHCA

Pennsylvania Mental Health Consumers' Association

Mr. Robert E. Nyce, Executive Director
Independent Regulatory Review Commission
333 Market Street, 14th floor
Harrisburg, PA 17101

Re: Final-form regulations on Older Adult Protective Services Act, IRRC No. 2077

Dear Mr. Nyce:

This letter establishes the position of the Pennsylvania Mental Health Consumers' Association on the final-form regulations concerning the criminal history provisions of the Older Adult Protective Services Act (OAPSA).

The Pennsylvania Mental Health Consumers' Association (PMHCA) is the only membership association founded and operated by consumers of mental health services in Pennsylvania. Governed and primarily operated by individuals who are diagnosed with mental illnesses, PMHCA represents individuals who are current or past recipients of mental health services. Our members have been severely impacted by OAPSA in that they have lost care-givers who have provided services to them and upon whom they have come to trust and rely.

On December 11, 2001, in Nixon v. Department of Public Welfare, the Pennsylvania Commonwealth Court by a 5-2 vote upheld that the criminal records provisions of OAPSA violate Article I, Section I of the state Constitution, which guarantees an individual's right to pursue his or her livelihood. In the majority opinion, Judge Doris Smith noted the "draconian impact" of the statute's enforcement and stated that the facts "demonstrate the arbitrary and irrational nature of the challenged provisions [of the statute]." We have been informed that the Commonwealth appealed the decision this week.

In light of the Nixon decision, the Department of Aging has revised its regulations to require covered facilities to obtain background checks, but not to prohibit employers from hiring ex-offenders whom they determine to be fit. We think that this position carefully balances the needs of the elderly and care-dependent and the rights of individuals who care for them. Given the liability for negligent hiring which an employer risks in knowingly hiring an ex-offender, the employer is unlikely to hire unless it is satisfied that an ex-offender warrants that trust.

In conclusion, we urge the IRRC to approve the final-form OAPSA regulations.

Should you require additional information, please feel free to contact me at 800-887-6422. Thank you for your attention to this matter.

Sincerely,

Shelley Bishop

Shelley Bishop
Executive Director

4105 Derry Street • Harrisburg, PA 17111
717-564-4930 1-800-88PMHCA fax 717-564-4708 pmhca@epix.net

Original: 2077

DENNIS M. O'BRIEN, MEMBER
ROOM 100 MAIN CAPITOL
HOUSE BOX 202020
HARRISBURG, PA 17120-2020
PHONE: (717) 787-5689
FAX: (717) 787-1339

PHILADELPHIA OFFICE:
9811 ACADEMY ROAD, LOWER LEVEL
PHILADELPHIA, PA 19114-1715
PHONE: (215) 632-5150
FAX: (215) 281-2094

EMBARGOED MATERIAL

COMMITTEES

CONSUMER AFFAIRS
CHAIRMAN
JUDICIARY
POLICY

House of Representatives
COMMONWEALTH OF PENNSYLVANIA
HARRISBURG

January 22, 2002

Independent Regulatory Review Commission
Robert Nyce, Executive Director
333 Market Street, 14th Floor
Harrisburg, PA 17101

Dear Mr. Nyce:

Enclosed are the comments I have on the Protective Services Regulations. If you have any questions please give me a call.

Thank you for your time and consideration.

Sincerely,

Dennis M. O'Brien

DENNIS M. O'BRIEN, Chairman
Health and Human Services Committee

DMO'B:ljb

The Older Adult Protective Service Act Regulations Inappropriately Gut Statutory Protections for Vulnerable Senior Citizens

Act 169 of 1996 and Act 13 of 1997 (both of which amended the 1987 Older Adult Protective Services Act) disqualified certain applicants from employment in certain covered facilities serving older adults, based on information contained in their criminal history reports. The Legislature took great pains to craft protections for residents of long-term care facilities and recipients of home health care. For the most part, these individuals are frail, vulnerable, and dependent on others for care. Constant news stories and other detailed reports on older adults being victimized in Pennsylvania's long term care facilities by persons with criminal backgrounds, reflected the need for protecting this population.

In *Nixon v. Commonwealth of Pennsylvania,* five Pennsylvanians challenged the statute as unconstitutionally infringing on their right to work. They argued that the statute banned any work in a covered facility (e.g. can't be a cook if previously convicted of abuse), there are no time limits on the disqualification (thus a person could be disqualified for a crime of 40 years ago), and there is no allowance for exceptions to the hard and fast rules or for consideration of situations on a case by case basis.

In December 2001, the Commonwealth Court reached a decision in *Nixon v. Commonwealth of Pennsylvania* regarding the application of the Act to these five individuals only. The Court held the criminal history reports provisions to be unconstitutional as applied to Nixon and his four co-plaintiffs. The Court did not find the Act itself unconstitutional, i.e., some persons with criminal background can and should be precluded from working with vulnerable elderly given their past relevant criminal conduct. On January 9, 2002, the state Attorney General appealed the Commonwealth Court decision to the Pennsylvania Supreme Court. Under the Pennsylvania Rules of Appellate Procedure, the appeal of the Attorney General automatically stays the decision of the Commonwealth Court until the Supreme Court rules on the case. Therefore, the Act remains in full force and effect until that time.

The Department of Aging issued final form regulations on the Older Adult Protective Services Act on December 27, 2001. In a misguided response to the *Nixon* decision issued earlier in the month, the Department of Aging removed from its proposed regulations both the listing of prohibited offenses and the use of information contained in the criminal history reports. Instead of addressing the concerns raised in *Nixon* about the breadth of the disqualifications, the Department's final proposed regulations eliminate the disqualification entirely. This is contrary to the Court's decision and fails to recognize that until the PA Supreme Court rules on this matter, the laws passed by the General Assembly remain in full force and effect. This eviscerates considerable protections for vulnerable persons without implementing any alternative protection. For example, while eliminating the enumeration and mandatory

disqualification, the Department didn't provide any guidance to covered facilities on how to make decisions in response to criminal history record findings. This is not what the *Nixon* Court required.

Consistent with the Court's holding, the Department should do the following:

1. Pull the regulations back until the Pennsylvania Supreme Court has ruled on this matter; or
2. Revise the regulations
   a. to state under what conditions **a person with one of the enumerated crimes on their criminal history report may be disqualified, suspended, or terminated from a position where they have direct contact or unsupervised access to older adults; (e.g. consideration of the nature of the crime, the nature of the work for which the applicant has applied, the applicant's employment experience, the nature/size of the facility, etc.) and**
   b. **to state that if a person is permitted to work despite the criminal background, what individual plan for supervision and observation for the individual should be required by the employer to safeguard older adult Pennsylvanians who will be relying on their care.**

It is clear that state law requires the Department to implement the Acts pending the appeal, however, if the Department feels it must implement *Nixon* in the interim, it should do so by issuing regulations establishing how employers should consider applicants with criminal backgrounds and what plans for supervision are required if such applicants are hired. This would clearly satisfy the concerns of the Court while implementing the good and appropriate protections of older adults intended by the General Assembly.

The final-form regulations should be tolled to allow the Supreme Court to decide the Nixon matter, or in the alternative, to permit the Department to amend the regulations to reflect a more reasoned and reasonable response to the *Nixon* decision. If the Department is not willing to do so, the IRRC should NOT approve the regulations. It is unconscionable to leave vulnerable, dependent older Pennsylvanians without any protections in place.

Pennsylvania Association of Resources
for People with Mental Retardation

ORIGINAL: 2077

1007 North Front Street
Harrisburg, Pennsylvania 17102
Phone • 717-236-2374
Fax • 717-236-5625

March 31, 2000

Robert F. Hussar
Chief
Division of Program and Regulatory Coordination
Department of Aging
555 Walnut Street, 5th Floor
Harrisburg, PA 17101-1919

Re: Comments by The Pennsylvania Association of Resources for Persons With Mental Retardation ("PAR") on the Proposed Rulemaking By the Department of Aging Published in The Pennsylvania Bulletin on November 27, 1999, 6 Pa. Code Chapter 15, Protective Services for Older Adults

Dear Mr. Hussar:

I want to thank you, as well as James Bubb, Jeffrey Wood and Jacqueline Welby, for the helpful discussion that Bill Lenahan and I had at your offices on January 28th and the follow-up discussions Mr. Lenahan has had with Mr. Wood and Ms. Welby and my follow-up discussion with you. We very much appreciate the openness and cooperation that we have encountered with everyone at the Department of Aging in responding to the comments I submitted on behalf of PAR. I especially appreciate your offer to contact me regarding those areas that are the main focus of PAR's December 21, 1999 and January 18, 2000 comments pertaining to Sections 15.131 through 15.137 and Sections 15.141 through 15.149 of the proposed rulemaking.

We remain concerned regarding the scope of the criminal history reporting requirements that impose a lifetime ban upon individuals who have shown themselves to be competent and caring staff in providing services at facilities for individuals with mental retardation. As you know, PAR has questioned the fundamental soundness of the statutory policy that imposes the lifetime ban on employment. We were encouraged by your willingness to consider adding the appeal provision for those applicants who are subject to the FBI background check that we suggested in our comments. We are also pleased that you have proposed an extension upon the timeframes specified in the statute for a new employee when the necessary Pennsylvania State Police or FBI report has not been returned within the established timeframes due to no fault of

the employee. While these sensible approaches will not resolve the underlying problem, in certain instances they will help avoid further unnecessary disruption in the provision of services.

Regarding the reporting suspected abuse provisions, we continue to request the revision of the proposed rulemaking or the adoption of an inter-departmental memorandum of understanding as discussed in our January 18, 2000 supplement to our comments. We believe such an agreement would avoid the delay and confusion which will be prompted by the duplicative requirements of reporting to the local Area Agency on Aging ("AAA"), as well as the agency that licenses the facility. PAR's position that mandating immediate reporting of suspected abuse to the local AAA does not serve the best interests of individuals who live in community mental retardation facilities is fully discussed in my December 21, 1999 comments. I am writing at this time to enclose the incident reporting requirements which will help illustrate the point made in the December 21, 1999 comments. As you will see from a review of the materials, the provider of services to individuals with mental retardation must meet exacting standards in reporting any suspected abuse to the licensing agency. The additional requirement of reporting to the local AAA does not add any additional protection to those that have been in existence and followed for some time. To the contrary, the additional requirements of the statute and proposed rulemaking will only prompt confusion and corresponding delay in reporting suspected abuse where none presently exists.

At Section 708 of the Older Adults Protective Services Act ("Act"), the General Assembly has directed the Department of Aging, the Department of Health and the Department of Public Welfare to promulgate regulations necessary to carry out the Act's reporting provisions. PAR asks the Department of Aging to coordinate this effort with the Department of Health and the Department of Public Welfare to find a common, practical solution to this circular reporting problem, rather than pursue a path that will make reporting suspected abuse more difficult. I realize that reaching such a solution may require discussion with the General Assembly about revisions to certain requirements of the Act. If that is necessary, PAR is prepared to work with you in that effort.

Lastly, I want to thank you for notifying us that the Department of Aging does not intend to pursue the provisions of Section 15.146 of the proposed rulemaking that would require facilities develop and submit generic supervision/suspension plans. We agree that a plan of supervision or suspension should be developed and implemented to fit the particular circumstances regarding a specific report of suspected abuse, rather than to meet a regulatory requirement which may or may not result in a plan that fits a specific situation. Likewise, in response to our inquiry regarding suspension or termination of employees, we are also pleased that the Department of Aging does not interpret the Act to require approval by the local AAA or the licensing Department before an employee may be suspended or terminated.

I thank you again for the opportunity to provide further comment upon these concerns that are so important to PAR member organizations and the individuals with mental retardation whom they serve.

Sincerely,

Shirley A. Walker

Shirley A. Walker
Executive Director

Enclosure

cc:
Jeffrey J. Wood, Esquire
Chief Counsel
Department of Aging

Jacqueline M. Welby, Esquire
Assistant Counsel
Department of Aging

James Bubb
Aging Specialist
Bureau of Home and Community-Based Services

John R. McGinley, Chairman
Independent Regulatory Review Commission

The Honorable Feather O. Houstoun, Secretary
Department of Public Welfare

The Honorable Robert S. Zimmerman, Secretary
Department of Health

Charles Zogby, Director of Policy
Office of the Governor

Howard A. Burde, Deputy General Counsel
Office of General Counsel

Senator Timothy Murphy, Chair
Senate Committee on Aging and Youth

Pennsylvania Association of Resources
for People with Mental Retardation

1007 North Front Street
Harrisburg, PA 17102
Phone 717-236-2374
Fax 717-236-5625

January 21, 2002

VIA HAND DELIVERY

John R. McGinley, Jr., Chairman
Independent Regulatory Review Commission
14th Floor Harristown II
333 Market Street
Harrisburg, PA 17101

Re: Final Order Adopting Regulations at 6 Pa. Code Chapter 15
Submitted by the Department of Aging December 27, 2001
IRRC No.: 2077

Dear Chairman McGinley:

I am writing to you on behalf of the Pennsylvania Association of Resources for People with Mental Retardation ("PAR"), an association composed of providers dedicated to serving the needs of people with mental retardation in Pennsylvania, to comment upon the amendments to Title 6, Chapter 15 of the Pennsylvania Code regarding Protective Services for Older Adults. PAR members provide a full range of services and supports to individuals with mental retardation of all ages at 3000 sites in Pennsylvania in addition to numerous non-residential and in-home supports.

To fully document PAR's interest in these proposed regulations since their promulgation as proposed rulemaking on November 27, 1999, I enclose PAR's written comments submitted to Robert F. Hussar, Chief, Division of Program and Regulatory Coordination for the Department of Aging ("Department") on December 21, 1999 (Tab 1), January 18, 2000 (Tab 2) and March 31, 2000 (Tab 3)

Although the tabbed enclosures provide PAR's prior written comments on the provisions submitted by the Department, I want to update our comments to discuss briefly where we are now that we are at the conclusion of the Department's regulatory promulgation process. Specifically, I want to summarize our position as of today on the effect of applying

the suspected abuse reporting and the criminal history reporting requirements to facilities serving people with mental retardation.

I believe the tabbed enclosures clearly set out PAR's concern about the duplication, delay and confusion that has resulted from adding another layer of suspected abuse reporting proposed at Sections 15.141 - 15.145 to the mental retardation system. The system for delivery of services to people with mental retardation is so highly regulated, including an already existing, stringently monitored system for reporting suspected abuse, that adding another layer of suspected abuse reporting will not provide any further benefit to people who reside in mental retardation facilities. Essentially, our belief is that one highly exacting and very responsive system for reporting suspected abuse is a critical component of a system of services provided to people with mental retardation, but that two systems generate no corresponding additional benefit.

We also are concerned that the imposition of duplication as proposed is not only unnecessary, but is counterproductive. Direct care workers who are already stressed are now expected to make fine distinctions about what to report where (to a supervisor, to AAA, to the Office of Mental Retardation, to law enforcement, to the child abuse hotline, etc.) and, to further complicate it, the definitions of abuse and neglect that they are reporting under are not the same in the different systems. There has been so much confusion that even the departments have had a difficult time producing a crosswalk of these reporting requirements and, to date, we have not seen one.

The duplication that has resulted from the Department of Public Welfare's interpretation of the statutory language, which occurred two years after the statute was enacted, has resulted in a reporting process which requires reports to an agency that simply refers the reports to another agency which already has the same reports from its own reporting system.

We believe the necessity to immediately report suspected abuse, under clear guidelines and directly to the agency responsible to investigate, demands more than this circular approach. We are aware that the system of services provided at facilities that serve people with mental retardation is very likely unique in the extent to which it is regulated and monitored and, therefore, do not assume that any other group might share PAR's concern regarding the confusion, delay and harm that might result from the proposed duplicative suspected abuse reporting requirements.

In an effort to address these concerns at a meeting on January 14, 2002, staff for the Department indicated that they are working with staff from the Department of Public Welfare to develop a common form for use in the written reporting of suspected abuse. Although this step is appreciated as one taken in the right direction to help reduce duplication in the investigation of suspected abuse, it does not address the duplication and circular reporting of suspected abuse that will continue.

Without an interpretation by the Department of Public Welfare (the licensing agency for mental retardation facilities) that removes the facilities from the requirements of the Older Adults Protective Services Act ("OAPSA") as the Department of Health concluded for residential drug treatment programs, a statutory change may be required to adequately respond to PAR's concerns. PAR is pursuing that resolution as well.

My second reason for commenting at this time is to update PAR's earlier suggestions regarding criminal history reporting and its effect upon hiring due to the confusion that has resulted from the changes in the hiring standards that are to be applied. The December 11, 2001 ruling of the Commonwealth Court in Nixon v. Department of Public Welfare, that certain portions of the criminal history reporting sections of OAPSA were unconstitutional, duly prompted the Department to revise significantly the list of offenses that may prohibit hiring at a facility. As a result, the regulations proposed at Sections 15.132 and 15.133 have been extensively revised to eliminate specific offenses from constituting a basis for denial of employment. Nonetheless, an appeal by the Attorney General on January 9, 2002 has had the effect of reinstating those provisions under OAPSA pending further action by the court or the outcome of the appeal.

With the Department of Aging poised to again follow those provisions of OAPSA as they existed before being struck as unconstitutional, the final form regulations will not conform with either the requirements of the underlying statute or the actions of the Department in implementing it. Although PAR supports the revisions made by the Department in these sections of the final rulemaking, we expect confusion will result from the conflicting authorities which will cause greater harm than implementing these regulations as submitted in final form. For that reason we encourage the withdrawal of these regulations until a clear direction regarding criminal history reporting and its effect upon hiring can be determined.

Thank you for the opportunity to comment and please contact me if you or the other Commissioners have any questions.

Very truly yours,

Shirley A. Walker

Shirley A. Walker
President and CEO

Enclosures

cc: Robert E. Nyce, Executive Director
Independent Regulatory Review Commission (w/encl.)

Mary Lou Harris, Senior Regulatory Analyst
Independent Regulatory Review Commission (w/encl.)

Mary S. Wyatte, Esquire
Chief Counsel
Independent Regulatory Review Commission (w/encl.)

Lori Gerhard, Deputy Secretary
Department of Aging

Jeffrey J. Wood, Esquire
Chief Counsel
Department of Aging

The Honorable Feather O. Houstoun, Secretary
Department of Public Welfare

The Honorable Robert S. Zimmerman, Secretary
Department of Health

Howard A Burde, Esquire
Deputy General Counsel
Office of General Counsel

Senator Timothy Murphy, Chair
Senate Committee on Aging and Youth

Senator Christine R. Tartaglione, Democratic Chair
Senate Committee on Aging and Youth

Representative Jere Schuler, Chair
House Aging and Older Adult Services Committee

Representative Frank Pistella, Democratic Chair
House Aging and Older Adult Services Committee

Representative Patricia H. Vance

Sharon Schwartz
Executive Director
House Aging and Older Adult Services Committee

PAR Document # 1999-286pm

Pennsylvania Association of Resources
for People with Mental Retardation

1007 NORTH FRONT STREET
POST OFFICE BOX 11820
HARRISBURG, PENNSYLVANIA 17108
TELEPHONE (717) 236-2374
FAX (717) 236-5625

December 21, 1999

Robert F. Hussar, Chief
Division of Program and Regulatory Coordination
Department of Aging
555 Walnut Street, 5th Floor
Harrisburg, PA 17101-1919

Re: Comments by The Pennsylvania Association of Resources for Persons With Mental Retardation ("PAR") on the Proposed Rulemaking By the Department of Aging – 6 Pa. Code Chapter 15, Protective Services for Older Adults -- Published in The Pennsylvania Bulletin on November 27, 1999

Dear Mr. Hussar:

I am writing to you on behalf of PAR, an association composed of service providers dedicated to serving the needs of people with mental retardation in Pennsylvania, to comment upon the amendments to Title 6, Chapter 15 of the Pennsylvania Code regarding Protective Services for Older Adults. PAR members provide a full range of services and supports to individuals with mental retardation of all ages at more than 2000 sites in Pennsylvania in addition to numerous non-residential and in-home supports.

SCOPE AND AUTHORITY
Section 15.1

Our first comment addresses the general issue regarding the applicability of these regulations to mental retardation service providers and their employees. As noted above, PAR members provide services to people of all ages who have mental retardation; however, the statements of scope and authority at Section 15.1 continue to emphasize the application of these provisions to older adults even though the training that has been provided by the Department of Aging regarding the applicability of the related statutes have included mental retardation providers of services to individuals age 21 and over. If the proposed rulemaking and this chapter are to apply to adults under age sixty (60), additional statements should be inserted to clarify their application. Otherwise, there will be confusion regarding the applicability of these regulations beyond older adults.

By making this recommendation, we are not suggesting that the proposed regulations need to be applied to facilities and employees that provide services to people with mental retardation in order to insure appropriate protections. Mental retardation service providers already are required to report not only allegations of abuse, but any unusual incidents encountered by facility residents to the Office of Mental Retardation ("OMR") of the Department of Public Welfare, among others, depending upon the location of the facility and the placement of the individual. For that reason, to apply the requirements to report suspected abuse at Section 15.141 through 15.145 to mental retardation service providers largely duplicates existing reporting requirements.

[redacted]

REPORTING SUSPECTED ABUSE
Sections 15.141-15.149

In addition, the requirement to make an immediate oral report to the local area agency on aging, or its designee that provides protective services for older adults in its service area, unfortunately serves to delay and confuse the system of reporting. Such incidents, and more, are already reported to OMR. While we intend to do all we can to protect the individuals who live in community mental retardation facilities, we do not believe their best interests are served through mandating immediate reporting to an agency that is neither trained or equipped to cope with the report. We believe the local AAAs will refer that report to OMR or the county MH/MR to whom PAR members also report, and in fact, in the absence of regulations, this has been occurring. We suggest that this suspected abuse reporting system will duplicate efforts and cause confusion that will slow the response by the appropriate agency. Instead of creating that confusion and delay, we suggest that the reporting system be revised by allowing designation of OMR by all of the local AAA's for reports by mental retardation services facility employees to help achieve the goals of uncovering and preventing any suspected abuse.

[redacted]

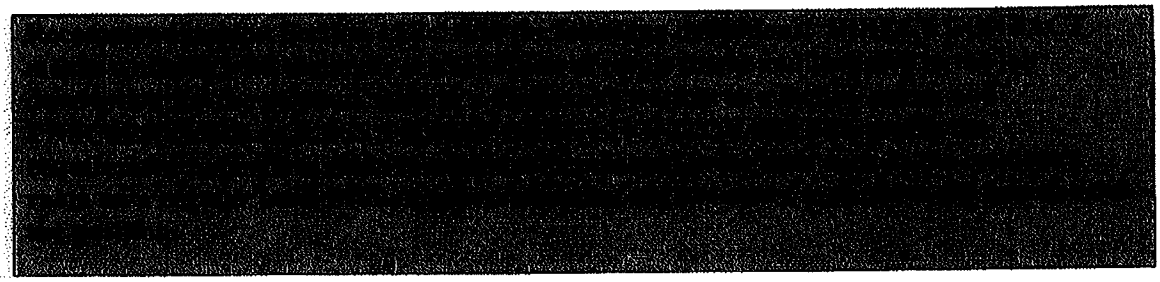
CRIMINAL HISTORY RECORD INFORMATION REPORTS
Sections 15.131-15.137

Our comments regarding criminal background checks do not question the wisdom of conducting criminal background checks of job applicants or employees who have direct contact with individuals who receive services at mental retardation facilities. Our initial concern focuses upon the requirements of Act 13 of 1997 and reiterated in the proposed regulations at Section 15.133 to implement a lifetime ban for an individual convicted of one of the listed offenses. While we agree that the life-time ban from employment for individuals convicted of offenses against people such as homicide, aggravated assault, kidnapping, rape and indecent assault may be appropriate, we do not believe that a lifetime ban should be imposed against individuals convicted of property offenses such as theft, forgery and securing execution of documents by deception or against individuals convicted of possession of illegal drugs.

We believe people convicted of any offense are capable of rehabilitation and that individuals convicted of these types of offenses should have the opportunity to seek and obtain employment at a facility as defined by the regulations. We believe the ten (10) year ban from employment for individuals convicted of offenses against property or under the Drug Device and Cosmetic Act contained in the law before the enactment of Act 13 of 1997, finds the right balance between protecting the interests of individuals served at facilities and promoting opportunity for rehabilitated individuals to obtain employment. There simply is no good reason to deny employment to a person who was convicted of two (2) misdemeanor counts of theft forty (40) years ago. The hiring discretion of the facility provider should not be so restricted to require that otherwise caring and competent individuals who made mistakes and paid for those mistakes decades ago may not help provide services today.

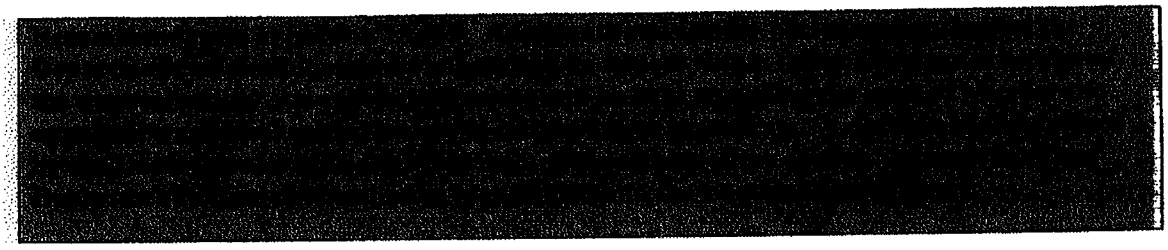
As regards the mechanics of the criminal background check procedure, mental retardation providers' main concern is the time required by the state police or FBI to process criminal record information requests. We are very pleased to see that Section 15.137(d) extends the period of provisional employment if processing by the state police or FBI is not achieved within the mandated time frames to address this concern. This will be of tremendous practical assistance to PAR members in conducting hiring and orientation.

We also ask for additional clarification regarding what constitutes "direct contact" with residents or clients and what constitutes "unsupervised access to their personal living quarters" in order to better determine to whom these regulations are to be applied. For example, do those qualifications apply only to administrators, operators and contract employees or do they also apply to a custodian worker who may need to repair plumbing in a bathroom used by facility residents on occasion or a person employed in an administrative capacity or office of a facility provider who may on occasion have contact with facility residents, although that is not the purpose of either position.



We also request clarification of the provision regarding the applicant's and facility personnel's opportunity to question the Department's determination at Section 15.134(g). Is requesting this review the same as appealing the accuracy of the criminal history record information? What is the purpose of this provision if it is not an appeal provision?

We favor the establishment of an appeal right that will permit applicants and facility personnel a prompt and inexpensive procedure to resolve their questions and correct errors. Otherwise, if an employee has been terminated to comply with these provisions and that position is filed, how can facility providers comply with the requirement to reinstate the employee to the employee's former position or an equivalent one as required at Section 15.136(b). We believe employees in those circumstances should have redress against the agencies that made the error, not the facility providers who had to implement it or violate the proposed rules.



I thank you for the opportunity to comment upon the proposed rulemaking and hope these comments will be helpful in those areas we have addressed, particularly with regard to clarifying the applications of these provisions to mental retardation services facilities and the individuals who receive their services.

Sincerely,

Shirley A. Walker

Shirley A. Walker
Executive Director

cc: John R. McGinley, Chairman
Independent Regulatory Review Commission

The Honorable Feather O. Houstoun, Secretary
Department of Public Welfare

Senator Timothy Murphy, Chair
Senate Committee on Aging and Youth

Senator Christine Tartaglione, Democratic Chair
Senate Committee on Aging and Youth

Representative Jere Schuler, Chair
House Committee on Aging and Youth

Representative Frank Pistella, Democratic Chair
House Committee on Aging and Youth

PAR Document #00-774: Addendum to PAR Comments on 6 Pa. Code Chapter 15, Protective Services for Older Adults 1.18.00
3 pages

Pennsylvania Association of Resources
for People with Mental Retardation

1007 North Front Street
Harrisburg, Pennsylvania 17102
Phone • 717-236-2374
Fax • 717-236-5625

January 18, 2000

Robert F. Hussar, Chief
Division of Program and Regulatory Coordination
Department of Aging
Commonwealth of Pennsylvania
555 Walnut Street, 5th Floor
Harrisburg, PA 17101-1919

Re: Addendum to the Comments by The Pennsylvania Association of Resources for Persons With Mental Retardation ("PAR") on the Proposed Rulemaking by the Department of Aging -- 6 Pa. Code Chapter 15, Protective Services for Older Adults -- Published in The Pennsylvania Bulletin on November 27, 1999

Dear Mr. Hussar:

I am writing to you again on behalf of PAR, an association composed of service providers dedicated to serving the needs of people with mental retardation in Pennsylvania, to provide an addendum to the comments upon the amendments to Title 6, Chapter 16 of the Pennsylvania Code regarding protective services for older adults that PAR submitted on December 21, 1999. The focus of one of our comments at that time, and again in this writing, is the duplication and confusion that will result from the provisions of the proposed rulemaking pertaining to reporting suspected abuse at Sections 15.141-149.

In our comments of December 21, 1999, we suggested that any reports of suspected abuse or suspected serious abuse be made to the agency ("AAA") or the facility licensing agency, as appropriate. We made that suggestion to eliminate unnecessary and duplicative steps that both slow the reporting process and delay the response to those reports by creating the need for an additional report to the local area agency on aging for individuals who live in community mental retardation facilities.

We write now to further support our suggestion that in order to coordinate the reporting and investigating of suspected abuse by the Department of Aging, the Department of Health and the Department of Public Welfare to implement the suspected abuse reporting provisions of the Older Adults Protective Services Act ("Act"), the three Departments also need to coordinate their regulatory development processes. Section 708 of the Act mandates that the three Departments shall promulgate the regulations necessary to carry out those provisions. We believe that in placing regulatory authority in all three Departments, the Legislature recognized that to

implement the provisions of the Act and avoid unnecessary and duplicative rulemaking that would establish rules without adding corresponding benefits, all three Departments need to work together and coordinate their rulemaking efforts. We fully support that sensible approach and reiterate our suggestion that the department which licenses the facility where abuse or serious abuse is suspected to have occurred is the appropriate department to receive and act upon that report. The protocol for coordination and sharing of information among the Departments could be worked out through a memorandum of understanding to ensure that all reports are received and acted upon promptly by the appropriate Department without the delay and duplication caused by referrals back and forth between those Departments that currently occurs.

We make these additional comments out of our strongly held belief that a coordinated regulatory approach will avoid duplication, delay and unnecessary costs in the provision of services at mental retardation facilities that will clearly benefit the individuals who receive those services. We thank you for the opportunity to comment again upon the proposed rulemaking and hope that these comments will be useful in developing a coordinated regulatory approach among the Department of Aging, the Department of Health and the Department of Public Welfare with regard to improving the system for reporting and investigating suspected abuse.

Sincerely,

Shirley A. Walker
Executive Director

cc: John R. McGinley, Chairman
Independent Regulatory Review Commission

The Honorable Feather O. Houstoun, Secretary
Department of Public Welfare

The Honorable Robert S. Zimmerman, Secretary
Department of Health

Charles Zogby, Director of Policy
Office of the Governor

Howard A. Burde, Deputy General Counsel
Office of General Counsel

Senator Timothy Murphy, Chair
Senate Committee on Aging and Youth

Senator Christine Tartaglione, Democratic Chair
Senate Committee on Aging and Youth

Representative Jere Schuler, Chair
House Committee on Aging and Youth

Representative Frank Pistella, Democratic Chair
House Committee on Aging and Youth

IRRC

ORIGINAL: 2077

From: Shirley Walker [shirley@par.net]

Sent: Tuesday, January 22, 2002 8:46 AM

To: IRRC

Subject: PAR's Comments to the IRRC on OAPSA Proposed

<<...>> <<...>> <<...>> <<...>>

Mr. McGinley,

Enclosed are our comments to the Department of Aging's proposed rulemaking. There are 4 attachments to this email. The first attachment is our comments to the final-form regulations and the next three are Tab 1, Tab 2 and Tab 3 that are referred to in our comments. Thank you very much for your consideration of our concerns and our recommendations.

Shirley Walker

President and CEO

Pennsylvania Association of Resources for People with Mental Retardation (PAR)

PEOPLE BEFORE PROFITS

An Association of Nonprofit Service Agencies

ORIGINAL: 2077

PANPHA

1100 Bent Creek Boulevard
Mechanicsburg, PA 17050

January 21, 2002

Robert Nyce
Executive Director
Independent Regulatory Review Commission
14th Floor, Harristown 2
333 Market Street
Harrisburg PA 17101

Dear Mr. Nyce:

PANPHA, a statewide association of 367 nonprofit long term care providers including personal care homes and nursing homes, recommends that the Department of Aging's submitted final rulemaking on the Protective Services for Older Adults be **disapproved**.

The sections dealing with mandatory reporting of alleged abuse and criminal background checks on applicants for employment to certain facilities have already been implemented. Given the uncertainty that regulators and providers have over criminal background checks because of the appeal of the Nixon decision, this final form regulation adds to the confusion.

Specifically, please note our following concerns:

1. Section 15.22 (d) is new language. Questions we have regarding this section include:
   - Does this cover the entire act or just the section on reporting of suspected abuse?
   - Are the notices left up to the facility to develop or will the department provide?
   - How does one operationalize "keep them informed"?

   Clearly if this regulation is approved, we would expect written guidance from all licensing departments regarding what is required.

2. Section 15.132 (3) (vi) is new language. We believe the language without the example was clear; however, the example, if we understand the intent of this new section should read, Example: An individual employed by a hospital which also has within it a FACILITY AND the individual is employed to work ONLY in the hospital.

3. Section 15.146 is a rewrite of this section in the proposed regulation. We believe the rewrite is more confusing than the proposed language. (A) indicates that the facility within 72 hours shall develop and implement an individual plan. There is no language here notifying interested parties what the various departments' time frame for approval

is; however (B) reads that following the agency's approval the faculty shall follow the plan. The question is are all licensing agencies and protective services agencies required to approve these plans with 72 hours?

We clearly support the intent of the Older Adult Protective Services Act and believe that implementation of the Act has occurred without regulations and that these regulations raise more questions than clarify existing ones. Additionally, when the Nixon case if finally settled there will probably be the need to have additional language to cover areas addressed by the litigation.

Sincerely,

Christine F. Klejbuk

Christine F. Klejbuk
Vice President/Public Policy
chris@panpha.org

cc: Lori Gerhard, PDA

Original: 2077

Service Employees International Union, AFL-CIO, CLC
Pennsylvania's Health Care Union

January 17, 2002

Robert Hussar, Chief
PA Department of Aging
555 Walnut Street
Harrisburg, PA 17101-1919

Re: Protective Services for Older Adults Regulation #001-017

Dear Mr. Hussar:

We are writing to you concerning the proposed regulations implementing the Protective Services for Older Adults Act. Our Union represents 16,000 health care workers of which over 5,500 are covered by the proposed final regulations.

We believe the Department has addressed our earlier comments and responded to the Court Decision in *Nixon v. Commonwealth of PA,* No. 359, (Pa. Commonw. 2001) in a positive manner. In light of this, we endorse the proposed regulations as written.

In our earlier comments we had raised objection to the definition of facility and the failure to make it clear that it applied only to a nursing home or a long-term care facility itself, and not to a larger entity of which that facility may be a unit (such as a hospital). In their final form, the regulations adequately address this concern.

Our Union is also pleased that the Department has agreed to exempt employees from background checks when their employer changes as the sole result of a transfer of ownership affecting their facility.

As a final note, we wish to comment on and support the changes made in light of *Nixon v. Commonwealth of Pa.* The long-term care industry faces a severe staffing crisis. Short staffing and the widespread use of mandatory overtime compromise the quality of care and put residents at risk. The new regulations allow employers the latitude to consider the severity and relevancy of criminal convictions. Employers may also consider an applicant's criminal background within the context of

District Office
1402 South Atherton Street
State College, PA 16801-6288
(800) 252-3894 • (814) 234-0713
FAX (814) 237-2755

www.seiu1199p.org

Harrisburg Office
1500 North Second Street, 2nd Floor
Harrisburg, PA 17102
(717) 238-3030
FAX (717) 238-8354

their actions prior to and after their conviction. This is particularly important in cases where a criminal conviction occurred ten to twenty years earlier.

Employers retain the ability to reject applicants whose criminal background indicates that they are a possible risk to their residents or clients. Concerns over potential liability will ensure that employers give careful consideration to information contained in the criminal background checks.

Sincerely,

Jeff Hunsicker
Political Program Coordinator

JH:bg

cc: John McGinley, Chair IRRC
file (2)

Original: 2077

One Logan Square
27th Floor
Philadelphia, PA 19103-6933
215-568-0300/facsimile

20 Brace Road
Suite 201
Cherry Hill, NJ 08034-2634
856-616-2170/facsimile

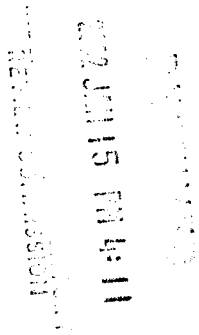
www.hangley.com

HANGLEY ARONCHICK SEGAL & PUDLIN

Attorneys at Law | A Professional Corporation

Direct Dial: 215.496.7036
E-mail: dwolfsohn@hangley.com

January 15, 2002



VIA FACSIMILE (717.783.2664) AND REGULAR MAIL

Robert E. Nyce, Executive Director
Independent Regulatory Review Commission
333 Market Street, 14th floor
Harrisburg, PA 17101

RE: **Final Form Regulations on Older Adult Protective Services Act, IRRC No. 2077**

Dear Mr. Nyce:

I am writing to comment on the final-form regulations concerning the criminal records provisions of the Older Adult Protective Services Act (OAPSA), IRRC No. 2077.

This firm represents the five workers and one employer who successfully challenged the constitutionality of OAPSA's criminal records provisions in Nixon v. Department of Public Welfare. On December 11, 2001, the en banc Commonwealth Court of Pennsylvania, by a 5-2 vote, held in Nixon that the criminal records provisions of OAPSA violate Article I, Section 1 of the Pennsylvania Constitution, which guarantees an individual's right to pursue his or her livelihood. Writing for the majority, Judge Doris Smith noted the "draconian impact" of the statute's enforcement and stated that the facts "demonstrate the arbitrary and irrational nature of the challenged provisions [of the statute]." As you may know, last week the Commonwealth appealed the decision to the Supreme Court.

In light of the Nixon decision, the Department of Aging has revised its regulations to require covered facilities to obtain background checks, but not

to prohibit employers from hiring ex-offenders whom they determine to be fit. We think that this position safely and fairly balances the needs of the elderly and care-dependent and the rights of individuals who care for them. Given the liability for negligent hiring that an employer risks in knowingly hiring an ex-offender, the employer is unlikely to hire unless it is satisfied that an ex-offender warrants that trust. There is community support for this position among employers, labor, consumer advocates, and others.

We also strongly support the exceptions to the criminal history report requirement, which are contained in Section 15.132. This construction of the scope of the statute is both within the Department of Aging's authority to interpret the statute and is sound policy.

In sum, we urge the IRRC to approve the final-form OAPSA regulations.

Should you require additional information, please feel free to contact me at the above number. Thank you for your consideration of these remarks.

Sincerely,

David J. Wolfsohn

One Logan Square
27th Floor
Philadelphia, PA 19103-6933
215-568-6200
215-568-0300/facsimile

20 Brace Road
Suite 201
Cherry Hill, NJ 08034
856-616-2100
856-616-2170/facsimile

www.hangley.com

HANGLEY ARONCHICK SEGAL & PUDLIN

Attorneys at Law | A Professional Corporation

TELECOPY TRANSMITTAL SHEET

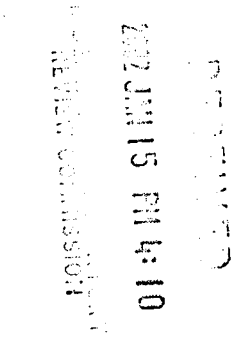
Date: January 15, 2002

From: David J. Wolfsohn **Telephone No.** 215-496-7036

HASP Client/Matter No. 99999/098 **Telecopier No.** 215-568-0300

Total Number of Pages Transmitted including this Cover Sheet: 3

To	Telecopy No.	Telephone No.
Robert E. Nyce	(717) 783-2664	



Message:

Date Sent: _____ **Time Sent:** _____ **By:** _____

If you have any problems receiving this telecopy call the sender.

Original: 2077

CARIE

January 17, 2002

John R. McGinley, Jr. Esq., Chairman
Independent Regulatory Review Committee
333 Market Street, 14th Floor
Harrisburg, PA 17101

Re: Regulation #1-17 (IRRC #2077)
Protective Services for Older Adults Regulations
Pennsylvania Department of Aging

Dear Chairman McGinley:

On behalf of CARIE, I am writing to request that the Independent Regulatory Review Commission (IRRC) vote to disapprove the final form regulations relating to the Older Adults Protective Services Act, scheduled for a vote at your meeting on January 24, 2002.

CARIE was pleased to see that the Pennsylvania Department of Aging (PDA) made important clarifications in the final form regulations and appreciate the revisions they made based upon the comments received. However, CARIE strongly objects to PDA's revision of policy related to criminal background checks. PDA weakening of the legislative intent of criminal background checks is reason to reject the final form regulations. The regulations appear to be in violation of Act 13 of 1997 and would clearly place frail older adults at risk of abuse.

We are aware of the Commonwealth Court decision in Nixon et al. v. the Commonwealth of Pennsylvania (359 M.D. 2000) that found the "criminal records provisions of the Act are unconstitutional as applied to the Petitioners." This decision no doubt led to PDA's policy interpretation to continue with doing criminal background checks but leaving the decision as to hire or retain an employee at the complete discretion of the provider.

CARIE believes that PDA's final form regulations are in violation of Pennsylvania law for the following reasons. First, we understand that Attorney General Mike Fisher has appealed the Nixon case to the Pennsylvania Supreme Court and that this appeal stays the Commonwealth Court order. Therefore, Act 13 remains in effect and the regulations must conform to the law.

The Center for Advocacy for the Rights and Interests of the Elderly
100 North 17th Street, Suite 600 Philadelphia, PA 19103
T: 215.545.5728 F: 215.545.5372 W: www.carie.org

A United Way Agency

In addition, the original Older Adult Protective Services Act, Act 79 of 1987, clearly expresses the legislature's intent to protect older vulnerable adults. It states:

> "It is the declared policy of the Commonwealth of Pennsylvania that older adults who lack the capacity to protect themselves and are at imminent risk of abuse, neglect, exploitation or abandonment shall have access to and be provided with services necessary to protect their health, safety and welfare."

Allowing providers to have full discretion as to hire or retain an employee who has been convicted of a serious crime goes against the state's obligation to protect vulnerable older adults.

Reynolds v. Commonwealth of Pennsylvania (cited as 131 Pa.Cmwlth.514, 570 A.2d 1373), also presents relevant arguments against the adoption of these final form regulations. The case involved a domiciliary care home operator who was convicted of grabbing an 81 year-old man while drunk and dropping him from a second story balcony causing the older man serious bodily injury. The Court found in favor of PDA in all aspects of the case. The Petitioners claimed that the Secretary of Aging did not have the statutory right to decertify the home. The Court disagreed and stated that the PDA "must insure that the program complies with the area agency's obligation to protect the health, safety and welfare of older persons and adults who lack the capacity to protect themselves." Since the residents were exposed to "a threat of violence, the Secretary acted within her authority by affirming the home's decertification in the interest of the residents' safety."

The Petitioners further argued that the wife, of the abuser, who is also an operator, had a "protected interest in operating the home, which prohibits decertification of the home without a compelling reason." The Court found "the Secretary decertified the home to protect from a potential threat of violence the aging and dependent adults who reside in the home."

CARIE provides complaint handling and general advocacy services for approximately 7,500 residents in 140 nursing and personal care homes located in Philadelphia. CARIE also helps homebound individuals and their caregivers through its CARIE LINE service. Through our experience with the Long-Term Care Ombudsman Program and CARIE LINE, we have helped thousands of victims of elder abuse. Preventing convicted criminals of serious crimes from working with this vulnerable population is an important safeguard to preventing abuse.

Founded in 1977, CARIE is a non-profit organization dedicated to improving the quality of life for frail older adults. CARIE's focus of concern spans the long-term care continuum of needs from those who are homebound to those who are institutionalized. Older adults who experience physical or psychological impairment frequently have difficulty advocating for themselves and are often a silent group. CARIE works to protect their rights and promote awareness of their special needs and concerns.

If you need any further clarification regarding these comments, please do not hesitate to contact me at (215) 545-5728, extension 244 or at menio@carie.org.

Sincerely,

Diane A. Menio
Executive Director

100 North 17th Street. Suite 600
Philadelphia, PA 19121
Phone: (215) 545-5728
Fax: (215) 546-9963

CARIE

Fax

To: IRRC **From:** Diane Menio

Fax: (717) 783-2664 **Date:** 1/17/01

Phone: (717) 783-5417 **Pages:**

Re: Protective Services Regulations **CC:**

☐ **Urgent** ☑ **For Review** ☐ **Please Comment** ☐ **Please Reply** ☐ **Please Recycle**

•Comments:

We have also mailed this letter to you today expressing our comments regarding the "Protective Services for Older Adults" regulations to be discussed at your Jan. 24, 2002 meeting.

IRRC #2077 (#1-17)
DEPARTMENT OF AGING
Protective Services for Older Adults

Honorable Richard Browdie, Secretary

Malaika Diallo

Date: 1/28/00

PHONE: (717) 783-5417
FAX: (717) 783-2664
irrc@irrc.state.pa.us
http://www.irrc.state.pa.us

INDEPENDENT REGULATORY REVIEW COMMISSION

333 MARKET STREET, 14TH FLOOR, HARRISBURG, PA 17101

January 28, 2000

Honorable Richard Browdie, Secretary
Department of Aging
555 Walnut Street, 5th Floor
Harrisburg, PA 17101

Re: IRRC Regulation #1-17 (#2077)
Department of Aging
Protective Services for Older Adults

Dear Secretary Browdie:

Enclosed are our Comments on the subject regulation. They are also available on our website at http://www.irrc.state.pa.us.

Our Comments list objections and suggestions for consideration when you prepare the final version of this regulation. We have also specified the regulatory criteria which have not been met. These Comments are not a formal approval or disapproval of the proposed version of this regulation.

If you would like to discuss these Comments, please contact Mary Lou Harris at 772-1284.

Sincerely,

Robert E. Nyce
Executive Director

REN:kcg
Enclosure
cc: Jeffrey J. Wood
Office of General Counsel
Office of Attorney General
Lee Ann Labecki

COMMENTS OF THE INDEPENDENT REGULATORY REVIEW COMMISSION

ON

DEPARTMENT OF AGING REGULATION NO. 1-17

PROTECTIVE SERVICES FOR OLDER ADULTS

JANUARY 28, 2000

We have reviewed this proposed regulation from Department of Aging (Department) 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 in determining whether a regulation is in the public interest. In applying these criteria, our Comments address issues that relate to statutory authority, fiscal impact, consistency with the statute, reasonableness and clarity. We recommend that these Comments be carefully considered as you prepare the final-form regulation.

1. Section 15.1. Scope and authority. – Statutory authority and Clarity.

Subsection (a)

This subsection provides that this Chapter applies to protective services for "older adults." However, provisions added to the Department's regulations at Sections 15.141 – 15.149, under the heading "Reporting Suspected Abuse" apply to all individuals regardless of age. Under "Scope and authority," the Department should add a provision to clearly state the broader application of Sections 151.141 – 15.149.

Subsection (b)

This subsection states: "This chapter applies to the Department (of Aging), the Pennsylvania Department of Health (Health), the Pennsylvania Department of Public Welfare (DPW)."

Section 10225.504 of the Older Adult Protective Services Act (Act) (35 P.S. § 10225.504) states: "The Department, **in consultation with** the Department of Health and the Department of Public Welfare, shall promulgate the regulations necessary to carry out this chapter." (Emphasis added.) Section 10225.708 of the Act states: "The Department (of Aging), **the Department of Health and the Department of Public Welfare** shall promulgate the regulations necessary to carry out this chapter" (relating to reporting suspected abuse by employees). (Emphasis added.)

We recognize that the Department is statutorily authorized to consult with Health and DPW or to jointly promulgate regulations with the aforementioned Departments relating to reporting suspected abuse by employees. However, we question the Department's statutory authority to unilaterally promulgate regulations that apply to Health and DPW.

2. Section 15.2. Definitions. – Statutory authority and Clarity.

General

This section defines twenty-seven terms that are also defined in the Act. Some of the definitions are identical; some are not. The Department should reference the definitions in Section 10225.103 of the Act, rather than reiterate or change the Act's definitions in the regulation.

We object to the definitions of the following terms which differ from the definitions contained in the Act. If the Department does not reference the statutory definitions in the final regulation, it should justify the changes.

Abuse and *Neglect*

In the regulation's definitions of these two terms, the following sentence, excerpted from the Act's definition of "neglect," has not been included:

> "No older adult who does not consent to the provision of protective services shall be found to be neglected solely on the grounds of environmental factors which are beyond the control of the older adult or the caretaker, such as inadequate housing, furnishings, income, clothing or medical care."

If the foregoing is not included in the final regulation, the Department should explain the omissions.

Caretaker

The definition of "caretaker" does not include the following sentence from the Act: "It is not the intent of this act to impose responsibility on any individual if such responsibility would not otherwise exist in law." The Department should explain why this sentence was not included in the regulation's definition.

Client assessment

The Department has added the phrase "using the instruments and procedures established by the Department for this purpose." It should explain why this sentence was added. Additionally, what are the "instruments and procedures established by the Department" within this definition?

Employee

The definition replaces the Act's language "to provide care to a care-dependent individual for monetary consideration in the individual's place of residence," with "in the individual's place of residence for a fee, stipend or monetary consideration of any kind." The Department should explain why the statutory language was not used.

The Department should also clarify the meaning of the phrases "direct contact with residents" and "unsupervised access to their personal living quarters."

Facility

The Department includes the phrase, "including those entities licensed as personal care homes who publicly advertise, promote or otherwise hold themselves out to the public as assisted living facilities." The Department should explain why this phrase was added.

FBI

In existing regulations at Subsection 15.121(b)(2), the full name of the "Federal Bureau of Investigation" is used. New provisions, such as Section 15.131, in this proposed regulation use the abbreviation "FBI." The regulation should include a definition of "FBI" as meaning the Federal Bureau of Investigation and should use the abbreviation consistently.

Home health care agency

In Subsection (ii) of the definition of "home health care agency," the Department has included the following additional language:

> "The term includes private duty home care providers, homemaker/home health aide providers, companion care providers, registry services, intravenous therapy providers, or any other entity which supplies, arranges for, or refers personnel to provide care for which that entity receives a fee, consideration or compensation of any kind."

The Department should explain why this language was added. Also, does this definition and the definition of "facility" apply to unlicensed facilities?

Protective services

There are three differences between the definition of the term "protective services" in the proposed regulation and the Act. First, the Department added the phrase "subsequent to an investigation." Second, the word "detect" was deleted. Third, "and" was replaced by "or" in the list of actions protective services seeks to prevent. In the preamble to the final regulation, the Department should explain why these additions, deletions and substitutions were made.

Criminal history record information (CHRI) and *Federal Bureau of Investigation national criminal history record check*

Throughout the proposed regulation, the Department uses terms such as "criminal background check," "criminal history record information," "clearance," or "criminal history record information report." In the situations where these terms are referring to the same document or report, we recommend that the Department use a statutory term consistently. In our Comments on this proposal, we will use the term "CHRI report" or "FBI check" when referring to criminal history record required under Sections 10225.502(1) and (2) of the Act.

3. Section 15.12. Administrative functions and responsibilities of area agencies on aging. – Clarity.

Subsection (b)

The proposed regulation deletes Paragraph (2) of the existing regulations. We understand that the Department did not intend to delete this section. The Department should restore this paragraph in the final regulation.

4. Section 15.13. Organization and structure of protective services functions. – Reasonableness.

Subsections (b) and (c)(4)

The proposed regulation deletes Subsections (b) and (c)(4) in the existing regulations. The current language of this subsection prohibits assigning the roles of protective services caseworker and ombudsman to the same person. A protective services caseworker is an investigator and enforcement officer. In contrast, an ombudsman serves as an advocate for older adults by negotiating with facilities on their behalf. Will assigning both roles to the same person create a conflict of interest or undermine their effectiveness in either role? The Department should address this concern.

5. Section 15.21. General reporting provisions. – Clarity.

Subsection (b)

This subsection contains the phrase "emergency involuntary intervention." For greater clarity, the Department should consider cross-referencing Section 15.71 (relating to involuntary intervention by emergency court order).

6. Section 15.25. Report form and content. – Clarity.

Subsection (a)

Subsection (a) requires that an initial report "shall be committed to writing on the standardized report form." However, the name or reference number of the "standardized report form" is not included or referenced in this section. Is this a reference to the "report of need" form required in 15.24? For clarity, the Department should include the name or reference number of the form in the final regulation.

7. Section 15.26. Screening and referral of reports received. – Reasonableness and Clarity.

Subsection (a)

This subsection allows "a person" to screen and assign incoming reports. For clarity, the Department should include minimum requirements for a person who is to carry out these duties.

Subsection (b)

Subsection (b)(4) of the existing regulation covers reports of an older adult in need of protective services made from outside an agency's planning and service area. This report "shall be referred to the agency which has the designated responsibility for protective services in the planning and service area in which the older person...is located at the time of the report." Is there a mechanism for confirmation and follow-up between the two agencies? The Department should explain.

8. Section 15.41. Reports required to be investigated. – Clarity.

Subsection (a)

Subsection (a) states: "Where applicable, reports and investigations shall comply with Sections 15.141 – 15.147." When will reports and investigations not have to comply with the aforementioned sections? The Department should explain these situations.

9. Section 15.42. Standards for initiating and conducting investigations. – Clarity.

Subsection (a)(4)

Subsections (a)(1) and (a)(3) use the term "investigator" to describe the person investigating the report. Subsection (a)(2) uses the term "agency investigator." Finally, Subsection (a)(4) uses the term "protective services caseworker." Are all three positions the same? The Department should either define all three terms, or use one consistently throughout this section.

Subsection (e)

What constitutes "interference?" Is there an existing definition for the term? If not, for clarity, the Department should include a definition. Also, the Department should distinguish "interference" from "intervention."

10. Section 15.45. Situations involving State-licensed facilities. – Clarity.

Subsection (a)(4)

Paragraph (4) includes "In situations where ombudsman services are determined to be appropriate, the agency shall request those services from the ombudsman." What are examples of "ombudsman services?" For clarity, the Department should either give examples of ombudsman services, or provide a cross-reference to state or federal statute and regulations or another source of information on ombudsmen.

Subsection (c)

What are the "procedures jointly developed by the Department and the Department of Public Welfare?" Are these procedures published? The Department should reference these procedures in this subsection.

11. Section 15.61. Access to persons. – Consistency and Clarity.
Section 15.81. Rights of protective services clients. – Consistency and Clarity.

Subsection (c) (Section 15.61)

Subsection (1) (Section 15.81)

The term "protective services caseworker" is used in Section 15.61(c) while Section 15.81(1) uses the term "protective services worker." One term should be used consistently throughout the regulation.

12. Section 15.91. General. – Clarity.

Subsection (a)

Subsection (a) is amended to state that protective services are provided to older adults under the act **subsequent to an investigation.**" (Emphasis added.) The final regulation should clarify whether the latter phrase means subsequent to the initiation or the completion of an investigation.

13. Section 15.93. Service plan. – Clarity.

Subsection (d)

Under the Act, "service plan" is the defined term and should be used consistently throughout the regulation, instead of the terms "service care plan" and "care plan."

14. Section 15.95. Case management. – Protection of public welfare and Clarity.

Subsection (c)(2) provides that a reassessment shall be done before a case "is terminated, transferred or it is the agency's judgement that a reassessment is appropriate." The intent of Subsection (c)(2) is unclear and should be reworded. Further, the Department should address whether a reassessment will be made if there is a change in a client's condition.

15. Section 15.96. Termination of protective services. – Clarity.

Subsection (c)

In Subsection (c), the requirement that the agency secure, where possible, a signed statement of understanding is deleted. We request the Department explain why the statement will no longer be required.

16. Section 15.105. Limited access to records and disclosure of information. – Protection of public welfare, Consistency with statute, and Clarity.

Information in a protective services record may not be disclosed except as provided in this section. To protect the rights of an older adult in protective services, this section should be amended. It should specify that relevant information may be disclosed to a court-appointed guardian, or to an attorney who is providing legal services to the alleged victim.

The Department proposes to amend language in Paragraph (1) which currently reads: "Information may be disclosed to a court of competent jurisdiction **or** under a court order." (Emphasis added.) We object to the Department's proposed change to delete the word "or" because it is inconsistent with Section 10225.306(a) of the Act.

17. Section 15.121. Protective services staff qualifications. - Clarity.

Subsection (b) requires applicants for protective services positions to submit a CHRI report. Applicants who are not Pennsylvania residents are required to obtain a FBI check. The subsection should include or reference the Act's requirement that residency be at least two years.

18. Section 15.127. In-service training curriculum. - Reasonableness and Clarity.

This section sets forth an annual training requirement for protective services supervisors and caseworkers. It states that the supervisors and caseworkers will "participate in in-service training in protective services as required by the Department each year." Since this is an annual requirement, the regulation should indicate the minimum hours necessary to meet the Department's requirements.

19. Section 15.131. Prospective facility personnel. - Consistency with regulations, Reasonableness, and Clarity.

Subsection (a)

First, the beginning sentence of Subsection (a) states that a facility shall require all applicants to submit "criminal history record information, obtained within the one-year period immediately preceding the date of application, as appropriate." The phrase "as appropriate" at the end of this sentence is unnecessary and should be deleted.

Second, this section cites the federal law establishing procedures for obtaining an FBI check, but does not explain the Department's role in this procedure. We recommend adding a cross-reference to Section 15.134 relating to the procedures for obtaining a FBI check.

Subsection (b)

Subparagraph (b)(6) indicates that "records of contacts with public or private social agencies" will be considered as reasonable proof of residency. The Department should explain what types of documents are being considered and how these records could be used as proof of residency.

20. Section 15.132. Facility personnel requirements. - Consistency with statute, Reasonableness, and Clarity.

This section describes the facility personnel who are required to submit CHRI reports.

Subsection (a)

Several of our concerns involve inconsistencies with the Act. Sections 10225.502(a) and 10225.503(a) of the Act place responsibility for obtaining and using CHRI reports on the facilities. Section 10225.502(a) of the Act states that a facility shall require all applicants,

administrators and operators to submit CHRI reports. Under Section 10225.503(a), a facility cannot hire an applicant or retain an employee if that person's CHRI report indicates that he has been convicted of any offense listed in Section 10225.503(a). Hence, the Act places the responsibility on the facility to implement the CHRI report requirement.

In contrast, Subsection (a) of the regulation lists the facility personnel who are required to submit CHRI reports. How and when will employees be notified of the CHRI report requirement? This section should require that facilities notify current facility personnel verbally in a language understood by the employee, as well as in writing. The notice should include a reference to Sections 15.135 and 15.136 relating to the rights of applicants and employees to review and challenge the accuracy of their CHRI reports.

Second, Subsection 15.132(a)(2) gives facility administrators and operators 90 days after the date of employment to comply with the CHRI report requirement. This provision is inconsistent with the requirements of Section 10225.506 of the Act. Only non-resident employees have 90 days to comply with the requirement. Employees, including operators and administrators, who are Pennsylvania residents have only 30 days to comply with the requirement. We object to this inconsistency. This subsection must be revised to reflect the statute.

In addition, this subsection is directed at administrators and operators "who began serving as administrators and operators after July 1, 1998." The rest of the section relates to **current** facility personnel. Section 15.132(a)(2) should be moved to Section 15.137 (relating to provisional hiring).

Third, Section 15.132(a)(5) addresses facility employees that provide services in other facilities. An example is an employee of a home health care staffing agency who is assigned to care for older adults at a long-term care nursing facility. The regulation should clarify which facility is responsible for notifying these employees of the CHRI report requirement.

Another minor clarity issue is the use of the term "the agency" in this subsection. Is this a reference to the home health care staffing agency or the local provider of protective services as indicated in the definition of "agency" in Section 15.2?

Subsection (b)

Section 15.132(b) states that employees are responsible for determining whether they are required to obtain a CHRI report. This subsection adds that if an employee fails to comply with this section, the facility cannot be held liable for failure to inform the employee of obligations under this section.

In contrast, Section 10225.502(a) of the Act directs facilities to require that applicants and employees submit CHRI reports. Section 10225.503(a) states that facilities cannot hire or retain individuals if their CHRI reports indicate convictions of one or more of the listed offenses.

Subsection (b) is inconsistent with the Act. We object to this inconsistency. This provision should be deleted or replaced with language that requires facilities to implement the CHRI report requirement and to notify applicants and employees of the CHRI report requirement.

In addition, there is a question regarding the application of the CHRI report requirement to certain employees. There are two aspects to this question. First, Section 10225.502(a) of the Act states that it only applies to operators and administrators who have direct contact with clients. Those who do not have direct contact are exempt. Does the exemption apply to other employees who do not come into contact with the older adult clients?

Finally, the Act's definition of "facility" covers certain entities designed to care for older adults or care-dependent individuals. Large hospitals may be licensed as a long-term facility but only a portion of the hospital or one floor provides long-term care (LTC). Many of the facility's employees may not work in the LTC area of the facility. The regulation should clarify that the CHRI report requirement does not apply to employees who work for a facility that has a LTC component if the employees do not work in or do not have access to the LTC component and are not in direct contact with the older adults in that component.

21. Section 15.133. Facility responsibilities. - Consistency with statute, Reasonableness, and Clarity.

Subsection (c)

This subsection addresses situations when a CHRI report indicates records of arrests but no final decision or sentencing by the court, or no offense code or grading of the offense. The subsection contains a time limit of 60 days for the applicant or employee to obtain court documents showing disposition. Failure to provide these documents would result in a prohibition against hiring the applicant or retaining the employee.

Section 10225.503(a) of the Act prohibits employment due to a "conviction" but not an "arrest." We question why employment would be denied when an applicant or employee is unable to obtain the necessary court papers within a certain time period. We recommend that the Department delete the reference to the 60-day period. The same concern also applies to Subsection 15.134(b)(3) (relating to FBI checks).

Subsection (d)

This subsection states that a facility may not hire an applicant or retain an employee when the CHRI report indicates "conviction of a Federal or out-of-state offense similar in nature, as determined by the Department, to those listed in Subsections (a) and (b)." This language is vague. When and how will the Department make determinations concerning the similarity of offenses? The regulation should include the procedures for this determination process and provide for an appeal process.

Subsection (f)

This subsection requires facilities to ensure that the information obtained from the CHRI reports remains confidential and is used solely to determine an **applicant's eligibility** for employment. Facilities must also be required to ensure confidentiality for **current employees**.

Subsection (i)

Subsection (i)(2) allows for the exchange of an employee's CHRI report between two different facilities "when necessary." In what circumstances would this be necessary? Sections 502 and 503 of the Act direct a facility as an employer or prospective employer to review a worker's CHRI report. It does not make one facility responsible for workers employed by another. If any CHRI reports are to be exchanged between facilities, then these facilities should be directed to maintain and protect confidentiality of the information.

A separate issue is the responsibility of facilities for employees who were not required to submit a CHRI report or who, when they were hired, had no criminal record but are later convicted of one of the listed offenses. Section 10225.503(a) of the Act states that an employee cannot be retained once he is convicted of one of the listed offenses. How will a facility become aware of convictions of current employees?

22. Section 15.134. Procedures. - Reasonableness and Clarity.

Subsection (e)

The second sentence of this subsection includes the phrase "within the time limits required for submitting criminal checks." To which time limits is this phrase referring? The same sentence also states that employees will "provide Pennsylvania and FBI checks obtained no longer than one year prior to the their date of submission." The Department should clarify the inconsistencies in this subsection.

Subsection (f)

Subsection (f) states that applicants and facility personnel are responsible for reviewing all CHRI reports for accuracy. There are two concerns. First, are facility personnel responsible for reviewing their own CHRI reports and are they also responsible for reviewing the CHRI reports pertaining to applicants? If facility staff must review applicants' CHRI reports, which facility personnel will be allowed access to applicants' CHRI reports?

The second issue is access to the FBI check. There is no provision in this section for access by applicants to their own FBI check. The regulation should inform applicants on how and when they can review their FBI check for accuracy. For example, federal regulations at 28 CFR Section 50.12 require state officials using FBI records to provide the subject of the records with the opportunity to challenge the accuracy of the information.

Third, Section 9125(c) of the Criminal History Record Information Act (CHRI Act) (18 P.S. § 9125(c)) requires an employer to notify the applicant in writing if the decision not to hire the applicant is based in whole or in part on the CHRI report. This statutory requirement should be referenced in the regulation. In addition, current employees should receive similar notice if and when their termination is based in whole or in part on their CHRI reports.

Subsection (g)

This subsection states that applicants and facility personnel may question the Department's determination. Greater detail is needed in Subsection (g) regarding the process to "question" or appeal the Department's determination.

23. Section 15.135. Applicant rights of review. – Reasonableness and Clarity.

Subsections (b) and (c) appear to be unnecessary. Subsection (a) explains the rights of applicants to review their CHRI reports and challenge their accuracy under state law. It references portions of the CHRI Act. The provisions of Subsections (b) and (c) are addressed in the CHRI Act. Subsections (b) and (c) should be deleted and a reference to Section 9125 of the CHRI Act (18 P.S. § 9125) should be added to the CHRI Act citations already in Subsection (a).

24. Section 15.136. Facility personnel rights of review and appeal. - Consistency with regulations, Reasonableness, and Clarity.

This section references the CHRI Information Act and its procedures for challenging the accuracy of a state CHRI report. It should also reference the federal procedures for challenging the accuracy of FBI checks.

25. Section 15.137. Provisional hiring. - Reasonableness and Clarity.

This section sets forth procedures for the provisional hiring of applicants who have applied for, but not received, their CHRI reports. Subsection (a)(5)(ii) states that a provisionally employed applicant will receive "regular supervisory observation." The regulation should clarify how and when a facility and its staff should observe and supervise a provisionally hired applicant.

26. Section 15.138. Violations. - Clarity.
Section 15.148. Penalties - Clarity

Section 15.138(a)(4) uses the words "Commonwealth agencies" and "these agencies." Is the phrase "these agencies" referring to local providers of protective services as stated in the definition of the term "agency" in Section 15.2? If not, the phrase "these agencies" should be clarified. The same question also applies to Section 15.148(a)(4).

27. Section 15.141. General requirements. - Reasonableness and Clarity.

This section sets forth provisions for reporting suspected abuse. Subsection (a) requires an immediate oral report to the agency as well as a written report. There should be a reference to Section 15.143 that sets forth the content requirements for the written report.

28. Section 15.143. Contents of reports. - Clarity.

Subsection (a) requires that the mandatory written reports be made on forms supplied by the Department. It also states that the Department will provide facilities with initial supplies of the forms. How and when do facilities receive these supplies? The regulation should inform facilities and individuals about how to obtain copies of the forms.

29. Section 15.144. Reports to Department and coroner by agencies. - Clarity.

When employees or administrators have a reasonable cause to suspect that a recipient died as a result of abuse, Subsection (b) requires an agency to forward a copy of the written report to the "appropriate coroner" within 24 hours. Who is the "appropriate coroner"? Is it based on the county where the death occurred or where it was reported? The regulation should use the term "county coroner" and identify which coroner is required to investigate.

30. Section 15.146. Restrictions on employees. – Consistency with statute, Fiscal impact, and Clarity.

Subsections (a) and (b)

Subsection (a) requires facilities to develop and submit their "facility supervision/suspension plans" to the agency and appropriate licensing Commonwealth agency within 90 days of the effective date of this regulation. Subsection (b) provides: "following written approval of plans by the agency and the Commonwealth agency with regulatory authority over the facility, **facilities shall follow these plans in instances involving allegations of abuse by employees.**" (Emphasis added.)

Section 10225.704(a) of the Act requires "upon notification that an employee is alleged to have committed abuse, the facility shall immediately implement a **plan** of supervision." The plan is in connection with each **individual** instance of notification that an employee is alleged to have committed abuse. However, it does not require advance submission of general, master plans by the facilities. What is the need or purpose of requiring facilities to file plans under Section 15.146(a) before any specific allegations are made?

Another concern is the cost for agencies. Depending on the region, there could be a large number of facilities within an agency's service area. These facilities include long-term nursing facilities, personal care homes, home health care agencies and older adult daily living centers. Neither the Preamble nor the Regulatory Analysis Form for this regulation contains any information regarding the potential cost of this requirement for facilities, agencies or the Commonwealth. If the Department retains this requirement in the final-form regulation, it should include an assessment of the costs.

We have several additional concerns. This section provides no specific provisions concerning the required content of these plans or the criteria for approval. Other concerns include the lack of any specific time period for review and approval of the plans by the agencies. Who will provide technical assistance to facilities in the development of these plans? In addition, if the facility is a home health care operation, which agency reviews its plan? Is it the agency in the region where the home health care service is based or the agency in the area where the recipient is located?

Subsection (d)

Upon notification that an employee is alleged to have committed abuse, this subsection requires that a facility "immediately" implement the plan of supervision or suspension. It also requires that the facility "immediately" submit a copy of the plan to the agency and Commonwealth agency. There is no definition of what is meant by "immediately." The regulation should clarify, for example, whether "immediately" means within a certain number of hours or before the employee returns to work on his next scheduled shift.

31. Section 15.147. Confidentiality of and access to confidential reports. - Consistency with statute and Clarity.

This section establishes standards and procedures for protection of confidential information and its release under certain circumstances. There are three concerns.

First, Subsections (b)(8) and (b)(9) allow for the release of confidential information to the Attorney General, and "to law enforcement officials of any jurisdiction as long as the information is relevant in the course of investigating cases of abuse." In addition, Subsection (e) mirrors the statute concerning the release of information identifying reporters of suspected abuse (Section 10225.306(b)(4) of the Act). However, the regulation does not mirror the Act in requiring a report of criminal conduct before law enforcement officials may gain access to these records. We object to the inconsistency.

Under the Act's "confidentiality of records" provisions, law enforcement officials are **only** allowed access to the records **if** there is a report of criminal conduct. This exemption on the release of confidential records for law enforcement officials is in Section 10225.306(b)(1) of the Act. It reads:

> In the event that an investigation by the agency results in a report of criminal conduct, law enforcement officials shall have access to all relevant records maintained by the agency or the Department.

The stipulation requiring "a report of criminal conduct" does not appear in the regulation. This provision is especially important for the protection of the identity of the reporters of abuse. It should be added to Subsections (b) and (e).

Second, a few commentators suggested the regulation provide for sharing of certain information with the ombudsman. Section 10225.303(b) of the Act requires that an ombudsman be notified of an investigation under certain circumstances. In addition, Section 10225.306(b)(2) of the Act provides for limited disclosure of confidential information to service providers. Does the later subsection also provide access for an ombudsman? The Department should explain its position on this issue.

Finally, there appears to be a typographical error in Section 15.147(b)(10). The word "under" in the first sentence in unnecessary and should be deleted.

32. Section 15.148. Penalties. - Clarity.

Subsection (c)

If an agency learns of a person's refusal to complete all reporting requirements, Subsection (c) requires the agency to notify the police. However, there is no indication of how quickly an agency should notify the police. In addition, there is no guidance as to what constitutes a refusal to report. The regulation should clarify how quickly an agency should notify the police and what constitutes willful refusal.

33. Section Headings. - Clarity.

Throughout the regulation, the Department has included section headings for subject areas. Some of the headings are confusing. For instance, "Reporting Suspected Abuse" for Sections 15.141 – 15.149 and "Reporting Suspected Abuse, Neglect, Abandonment or Exploitation" for Sections 15.21 – 15.27 appear to overlap. The Department should reexamine the subheadings for additional clarity.