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House of Representatives
COMMONWEALTH OF PENNSYLVANIA
HARRISBURG

January 15, 2002

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

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

Dear Chairman McGinley:

I am writing to urge your disapproval of the final-form regulations pertaining to the Older Adults Protective Services Act that were submitted to the commission on December 27, 2001.

As a cosponsor of Act 13 of 1997 (House Bill 132), which amended the Older Adults Protective Services Act (OAPSA), I am greatly concerned that the final-form regulations violate both the statute and intent of the General Assembly and are not in the public interest. Not only do these regulations fail to implement Section 503 of the statute, which prohibits the hiring and employment of individuals in certain programs and facilities if they have been convicted of criminal offenses enumerated in the law, these regulations jeopardize the safety and welfare hundreds of thousands of frail, disabled, incapacitated and older adults.

These final-form regulations do not carry out the expressed intent of OAPSA, which states as follows:

“It is the intent of the General Assembly to provide for the detection and reduction, correction or elimination of abuse, neglect, exploitation and abandonment, and to establish a program of protective services for older adults in need of them.”
(Section 102, Legislative policy. Act 79 of 1987)

Pursuant to Section 5.1, subsection (h) of the Regulatory Review Act, the commission is required to consider if the final-form regulations are consistent with the statute and intent of the General Assembly. I hope that this letter provides you with ample justification as to why these regulations should not be approved on the basis of these criteria.

The final-form regulations now before you substantially differ from the regulations as proposed on November 27, 1999, in that the Department of Aging has deleted critical provisions previously contained in §15.131 through §15.138 of the regulations that prohibit long-term care facilities and programs providing services to disabled adults from hiring certain criminal offenders. The Department of Aging apparently has interpreted the Commonwealth Court decision in Nixon et al. v. the Commonwealth of Pennsylvania, 359 M. D. 2000, Commonwealth Court Docket, reported December 11, 2001, as meaning that Section 503 of the Older Adults Protective Services Act (OAPSA), Act 79 of 1987 is unconstitutional as it applies to all current and prospective applicants and employees covered by the act, rather than only in respect to the petitioners who filed the lawsuit. However, the department's interpretation of the case and its decision to strike all the pertinent sections in the final-form regulations are premature.

On January 9, 2002, Attorney General Michael Fisher appealed the Nixon case to the Pennsylvania Supreme Court. The appeal resulted in an automatic stay of the Commonwealth Court order. Therefore, the current statute remains in effect, and there is no justification for approving regulations that infer otherwise. A copy of the Attorney General's appeal is included with this correspondence.

I am also sharing with you the House Journal of February 11, 1997 when the House of Representatives considered House Bill 132 to document that changes in restrictions on the criminal background checks were clearly intended by the General Assembly.

It should also be pointed out that prior to the Attorney General's appeal the Department of Aging hastily posted a notice on its website to explain its interpretation of the Commonwealth Court order and its plans to implement the decision. This notice indicated that, as a result of the Commonwealth Court decision, the facilities covered by the law will have "discretion to make their decision as to whether to hire applicants." The department's intent to continue with this interpretation of the court decision is reflected in the final-form regulations.

When I learned of the department's position, I wrote to Governor Mark S. Schweiker. While I am grateful that Attorney General Fisher appealed the case and by doing so ensured that the current law would remain in effect during the appeal process, in response to my letter to Governor Schweiker, Howard A. Burde, Deputy

General Counsel in the Office of General Counsel, lends further support to enforcing current law during the appeal. To quote Mr. Burde, "With respect to your concerns regarding the Department of Aging, to the extent that the OAPSA hiring prohibitions remain the law, Commonwealth agencies will enforce that law." This view reinforces my position that administrative regulations must reflect current law. I have enclosed copies of the correspondence as well as the department's notices posted regarding the Nixon case.

Under the criminal history record sections of the final-form regulations, specifically, §15.131 through §15.138, criminal history reports would be maintained as part of an employee's employment records, but the prohibition on hiring or retaining employees with certain criminal records is completely eliminated.

The crimes enumerated under Section 503 of the Older Adults Protective Services Act and for which conviction precludes certain employment include as follows: criminal homicide, rape, aggravated assault, sexual assault, indecent assault, unlawful restraint, statutory sexual assault, involuntary deviate sexual intercourse, incest, indecent exposure, sexual abuse of children, aggravated indecent assault, felony theft or two or more misdemeanor theft offenses, forgery, securing execution of documents by deception, intimidation of witnesses or victims, retaliation against a witness or victim, a felony offense of prostitution, dealing with obscene and other sexual materials and performances, the corruption of minors, arson, burglary, robbery, kidnapping, concealing the death of a child, dealing in infant children, endangering the welfare of children, a felony drug offense, and a federal or out-of-state crime similar to any of these crimes.

There should be no ambiguity in the final regulations as to current law.

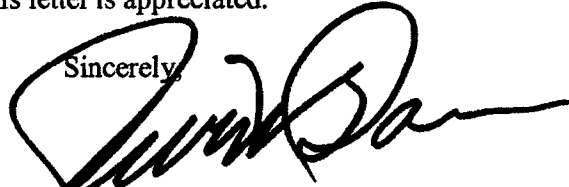
Moreover, there should be no doubt in your mind as to the individuals whose safety and welfare are protected by the current law. The statute covers employees who have direct contact with residents or recipients of services in nursing homes, personal care homes, domiciliary care homes, older adult daily living centers and home health care agencies. In addition, the Department of Public Welfare interprets the law as applying to group homes for adults with mental retardation, community residential programs for adults with a mental illness, intermediate care facilities for adults with mental retardation--including both state centers and private facilities---and state mental hospitals. Based on information available to me at this time, in Pennsylvania there are 776 licensed nursing homes with a capacity to serve 96,000 persons and 1,900 personal care homes approved to serve 71,000 persons. There are about 7,100 individuals in residential homes for individuals with mental illness; 15,464 residents in group homes for persons with mental retardation; 1,516 individuals in state centers for persons with mental retardation; 2,668 individuals in private intermediate care facilities for persons with mental retardation; 2,600 persons in state mental hospitals, and over 6,000 older adults served in about 250

adult day care centers. I do not have statistics as yet on numbers of adults served by home health care agencies or in domiciliary care homes.

I believe that our state will put thousands of severely low-functioning, immobile, disabled and vulnerable citizens in harm's way and jeopardize their health and safety if the final-form regulations are approved. The law has established safeguards to protect these citizens from being victimized by individuals with serious criminal records, and the responsibilities of providers as mandated by the law should be clearly stated.

Your serious consideration of this letter is appreciated.

Sincerely,

A handwritten signature in black ink, appearing to read "Nevin Blaum". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

NEVIN BLAUM, Democratic Chairman
Judiciary Committee

Enclosures