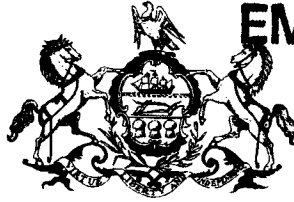


Original: 2077

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,

A handwritten signature in cursive script that reads "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.

JERE W. SCHULER, MEMBER
HOUSE POST OFFICE BOX 202020
MAIN CAPITOL BUILDING
HARRISBURG, PA 17120-2020
PHONE: (717) 783-6422
FAX: (717) 787-5713

MUNICIPAL BUILDING
852 VILLAGE ROAD
POST OFFICE BOX 268
LAMPETER, PA 17537-0268
PHONE: (717) 464-5285
FAX: (717) 295-7817



House of Representatives
COMMONWEALTH OF PENNSYLVANIA
HARRISBURG

COMMITTEES

AGING AND OLDER ADULT SERVICES
MAJORITY CHAIRMAN
EDUCATION
POLICY

BOARD OF GOVERNORS
STATE SYSTEM OF HIGHER EDUCATION

Original: 2077

January 15, 2001

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

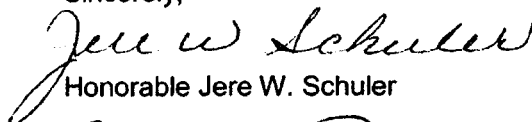
Dear Mr. McGinley:

The House Aging and Older Adult Services Committee has reviewed Final Form Regulations: Protective Services for Older Adults, #001-017, in accordance with the requirements of the Regulatory Review Act, Act 181 of 1982. Upon review, there are no objections to the regulations, as revised.

It is important to note that the committee has been closely monitoring the Commonwealth Court Case of Nixon v. Commonwealth of Pa. and the decision rendered on that case. As such, the committee stands ready to take legislative action, as deemed necessary, in order to ensure that the intent of the legislature is fulfilled through the administrative implementation of the Older Adult Protective Services Act. Committee staff has met satisfactorily with Department of Aging staff regarding clarification of certain issues and has not identified additional concerns at this point in time. As a result of that meeting, the department has committed to providing the committee with the final determination on implementation of the Nixon v. Commonwealth court ruling.

For your information, the committee will be holding two public hearings in February and March regarding the Older Adult Protective Services system and concerns regarding the law. Following those hearings, it is anticipated that legislation will be proposed to update the law and to address certain outstanding technical implementation concerns.

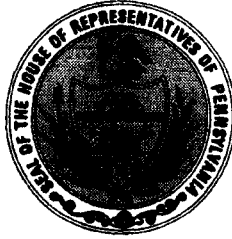
Sincerely,


Honorable Jere W. Schuler


Honorable Frank Pistella

cc: IRRC Commissioners
Secretary Browdie
Secretary Houston
Secretary Zimmerman

KEVIN BLAUM, DEMOCRATIC CHAIRMAN
JUDICIARY COMMITTEE
RULES COMMITTEE



152 SOUTH PENNSYLVANIA AVENUE
WILKES-BARRE, PENNSYLVANIA 18702
PHONE: (570) 825-5934
WEB PAGE - www.pahouse.net/blaum

Original: 2077

MAIN CAPITOL BUILDING
HOUSE BOX 202020
HARRISBURG, PENNSYLVANIA 17120-2020
PHONE: (717) 783-2580

House of Representatives
COMMONWEALTH OF PENNSYLVANIA
HARRISBURG

January 15, 2002

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

Dear Bob:

Thank you for advising me of the commission's receipt of the final-form regulations dealing with the Older Adults Protective Services Act, and specifically with the changes in the act made in 1997 through Act 13 and in 1996 through Act 169.

I am enclosing my correspondence submitted to the Chairman of IRRC, John R. McGinley, regarding these regulations and understand my comments will be shared with Commissioners Bush, Coccodrilli, Harbison, and Mizner for their consideration prior to their meeting on January 24, 2002.

I appreciate your efforts to ensure that all aspects of the Regulatory Review Law are carried out.

Sincerely,

A handwritten signature in black ink, appearing to read "Kevin Blaum".

KEVIN BLAUM, Democratic Chairman
Judiciary Committee

Enclosures