MENTAL RETARDATION BULLETIN

COMMONWEALTH OF PENNSYLVANIA • DEPARTMENT OF PUBLIC WELFARE

DATE OF ISSUE	EFFECTIVE DATE	NUMBER
August 1, 1988	October 1, 1988	6000-88-04

SUBJECT:

Preventing, Managing, and Reporting Unusual Incidents and Deaths

BY:

Steven M. Eidelman
Deputy Secretary for Mental Retardation

SCOPE:

County Mental Health/Mental Retardation Administrators
Community Residential Mental Retardation Facility Directors
Non-State Operated Intermediate Care Facility for the Mentally Retarded (ICF/MR) Directors
Adult Day Care Center Directors
Vocational Facility Directors
Early Intervention Program Directors
Non-Licensed County Mental Retardation Funded Program Directors

PURPOSE:

The purpose of this Bulletin is to establish uniform procedures for preventing, managing, and reporting unusual incidents and deaths in community facilities and programs serving persons with mental retardation. This Bulletin applies to all licensed community facilities, including non-state operated intermediate care facilities for the mentally retarded, and all non-licensed County Mental Retardation funded programs serving persons with mental retardation.

This Bulletin is intended to be a guide for community facilities and programs serving persons with mental retardation and for County Mental Retardation Programs. The Office of Mental Retardation intends to amend the licensing regulations and the County Mental Retardation Services Regulations (55 Pa. Code CH. 6201) in accordance with the procedures specified in this Bulletin.

POLICY:

Applicability

The procedures set forth in this guideline are published to provide a consistent system for preventing, managing, and reporting unusual incidents and deaths in community facilities and programs serving persons with mental retardation. These procedures apply to all licensed community facilities, including non-state operated intermediate care facilities for the mentally retarded, and all non-licensed County Mental Retardation funded programs serving persons with mental retardation.

COMMENTS AND QUESTIONS REGARDING THIS BULLETIN SHOULD BE DIRECTED TO:

APPROPRIATE REGIONAL MENTAL RETARDATION PROGRAM MANAGER

Facilities are obligated to comply with requirements already codified at 55 Pa. Code Chapters 6400 and 2390, and Chapter II, Sections 8A, 8B, 8C, 8D, and 8E of the Department's Social Services Manual. To the extent that this guideline exceeds the requirements of 55 Pa. Code Chapters 6400, 6401, 2380, 2390 and Chapter II, Sections 8A, 8B, 8C, 8D and 8E of the Department's Social Services Manual, the use of this guideline is optional for facilities. Because this guideline meets/exceeds the regulatory requirements in 55 Pa. Code Chapters 6400 and 2390, compliance with the reporting procedures in this guideline will be accepted by the Department as meeting the regulatory requirements of 55 Pa. Code CH. 6400 titled Community Residential Mental Retardation Facilities, section 6400.15 relating to unusual incident reports and 55 Pa. Code CH. 2390 titled Vocational Facilities, section 2390.18 relating to unusual incident reports.

These procedures do not apply to the reporting of incidents as required in 55 Pa. Code CH. 6400, Section 6400.16 (relating to incident report).

Definitions

Non-licensed county mental retardation funded programs - programs or services that are funded through the County Mental Retardation Program that are not licensable under the scope of the Commonwealth's licensing statutes.

Unusual incidents - unusual incidents include:

- abuse or suspected abuse of a client; abuse is any act or omission of an act that willfully deprives a client of the client's rights or human dignity or which may cause or causes actual physical injury or emotional harm to a client such as striking or kicking a client; neglect; alleged rape, sexual molestation, sexual exploitation, or sexual harrassment of a client; restraining a client without following the requirements set forth in the licensing regulations; financial exploitation of a client; humiliating a client; withholding regularly scheduled meals; or forcing a client to eat obnoxious substances

- injury, trauma, or illness of a client requiring inpatient hospitalization

- suicide attempt by a client

- a client who is missing for more than 24 hours or who could be in immediate jeopardy if missing at all

- misuse or alleged misuse of client funds or property

- outbreak of diseases as specified in 28 PA Code CH. 27 - Communicable and Noncommunicable Diseases - Section 27.2 - Reportable Diseases (see attachment A); outbreak means more than one client or staff has the disease

- an incident requiring the services of a fire department
- an incident requiring the services of a law enforcement agency
- any other condition (except for snow/ice conditions) that results in closure of the facility for more than one facility operation day
- violation or alleged violation of client's rights

Prevention of unusual incidents - prevention of unusual incidents involves taking those actions necessary to ensure that conditions under which unusual incidents could occur are eliminated. Those actions include, but are not limited to, staff training, proper supervision of clients, careful scheduling of client activities, and correction of circumstances that constitute a high probability of unusual incidents occurring based on previous experience.

Management of unusual incidents - management of unusual incidents includes, but is not limited to, prompt medical treatment of clients when necessary; timely and accurate notification of family, relatives, advocates, law enforcement agencies, and legal representatives; thorough investigation and documentation of the incidents; corrective action of staff; evaluation, program intervention, and corrective action to preclude the occurrence of similar incidents.

Provider/Agency Responsibilities

Prevention and Management of Unusual Incidents

(a) Each provider/agency shall establish policies and procedures on prevention and management of unusual incidents. These policies and procedures shall include, but are not limited to:

(1) Procedures for pre-service and in-service training for staff in the prevention, detection, investigation, and reporting of unusual incidents;

(2) procedures for the investigation of unusual incidents;

(3) corrective action for staff who are responsible for the occurrence of an unusual incident and for staff who fail to report an unusual incident;

(4) procedures for contacting family, relatives, advocates, law enforcement agencies, and legal representatives, etc.;

(5) proper supervision of clients and scheduling of client activities;

(6) correction of circumstances or conditions at the premises that constitute a high probability of unusual incidents occurring based on previous experience; and,

(7) policies that define who in the facility/agency should be notified of an unusual incident.

(b) When an unusual incident affects the physical or emotional well-being of a client, the staff shall immediately ensure that the client is safe from further possible injury. The client shall receive first aid, medical attention, and programmatic attention as soon as possible, if necessary. Staff shall have concern for and be sensitive to the emotional needs of the client after an unusual incident and arrange for specialized counseling, if necessary.

(c) The chief executive officer shall evaluate semi-annually the unusual incidents that have occurred in relation to policies, procedures, and staffing. If this evaluation identifies an existing problem with the prevention and management of unusual incidents, necessary corrective changes shall be made to reduce or prevent occurrence of similar incidents. Written documentation of the semi-annual evaluation shall be kept.

(d) The chief executive officer shall cooperate with the County Mental Retardation Program of the county in which the facility is located, the funding agency (or County Mental Retardation Program that has the client on its active caseload), the appropriate Regional Office of Mental Retardation and the state office responsible for licensing early intervention programs (Regional Office of Children, Youth, and Families) and non-state operated Intermediate Care Facilities for the Mentally Retarded (Department of Health, Division of Long Term Care) in any investigation of the unusual incident.

Reporting of Unusual Incidents

(a) The provider/agency shall complete and send copies of an unusual incident report on a form specified by the Department (see Attachment B) to the County Mental Retardation Program of the county in which the facility is located, the funding agency (or County Mental Retardation Program that has the client on its active caseload), and the appropriate Regional Office of Mental Retardation within 24 hours (postmark date) after an unusual incident occurs. If the facility is licensed as a child day care center (early intervention program), the facility shall also complete and send a copy of the unusual incident report to the Regional Office of Children, Youth, and Families within 24 hours (postmark date) after an unusual incident occurs. If the facility is licensed as a non-state operated ICF/MR, the facility shall also send a copy of the unusual incident report to the Department of Health, Division of Long Term Care within 24 hours (postmark date) after an unusual incident occurs.

(b) The provider/agency shall also orally notify the County Mental Retardation Program of the county in which the facility is located, the funding agency (or County Mental Retardation Program that has the client on its active caseload), and the appropriate Regional Office of Mental Retardation, within 24 hours after one of the following unusual incidents occur:

(1) Abuse or suspected abuse of a client.
(2) An incident requiring the services of a fire department or law enforcement agency.
(3) Any condition (except for snow/ice conditions) that results in closure of the facility for more than one facility operation day.

(i) If the facility is licensed as a child day care center (early intervention program), the facility shall also verbally notify the Regional Office of Children, Youth, and Families within 24 hours. If the facility is licensed as a non-state operated ICF/MR, the facility shall also verbally notify the Department of Health, Division of Long Term Care within 24 hours.

(c) The client's family shall be immediately notified in the event of an unusual incident relating to a client, if appropriate.

(d) A copy of all unusual incident reports shall be kept in the client's record by the provider/agency.

(e) Attachment B shall be used to complete the unusual incident report. Other forms are acceptable if the form includes all the information included on the attached form.

(f) The provider/agency shall report immediately any cases of suspected child abuse to Child Line at 1-800-932-0313.

(g) The provider/agency shall report any occurrence of an outbreak of diseases to the local health officer of the county in which the facility or program is located. (Refer to Attachment A for the list of diseases to be reported).

Reporting of Deaths

(a) The provider/agency shall complete and send copies of a death report on a form specified by the Department (see Attachment C) to the County Mental Retardation Program of the county in which the facility is located, the funding agency, (or County Mental Retardation Program that has the client on its active caseload), and the appropriate Regional Office of Mental Retardation within 24 hours (postmark date) after a death of a client occurs. If the facility is licensed as a child day care center (early intervention program), the facility shall

also complete and send a copy of the death report to the Regional Office of Children, Youth, and Families within 24 hours (postmark date) after a death occurs. If the facility is licensed as a non-state operated ICF/MR, the facility shall send a copy of the death report to the Department of Health, Division of Long Term Care within 24 hours (postmark date) after a death occurs.

(b) The program/agency shall also orally notify the County Mental Retardation Program of the county in which the facility is located, the funding agency (or the County Mental Retardation Program that has the client on its active caseload), and the appropriate Regional Office of Mental Retardation, within 24 hours after an unexpected death (a death not associated with a known illness) occurs. If the facility is licensed as a child day care center (early intervention program), the facility shall also verbally notify the Regional Office of Children, Youth, and Families within 24 hours. If the facility is licensed as a non-stated operated ICF/MR, the facility shall also verbally notify the Department of Health, Division of Long Term Care within 24 hours.

(c) The client's family shall be immediately notified in the event of a death of a client.

(d) A copy of all death reports shall be kept in the client's record by the provider/agency.

(e) Attachment C shall be used to complete the death report. Other forms are acceptable if the form includes all the information included on the attached form.

County Responsibilities

The County Mental Retardation Program is responsible in accordance with Section 305(7) of the Mental Health and Mental Retardation Act of 1966 to ensure all community facilities and programs serving persons with mental retardation, whether or not the facility or program is funded through the County Mental Retardation Program, prevent, manage, and report the occurrence of all unusual incidents in accordance with the procedures in this Bulletin.

(a) The County Mental Retardation Program shall approve policies and procedures on the prevention and management of unusual incidents for all community facilities and programs serving persons with mental retardation that are located in their county.

(b) The County Mental Retardation Program shall conduct investigations of unusual incidents for clients on their active caseload regardless of the location of the facility. An agreement can be made between the County Mental Retardation Program who has the client on their active caseload and the County Mental Retardation Program where the facility is located as to who will conduct an investigation. The County Mental Retardation Program may seek the assistance of the Office of Mental Retardation to conduct an investigation.

(c) The County Mental Retardation Program shall conduct investigations of unusual incidents for all community facilities and programs serving people with mental retardation that are located within their county. An agreement can be made between the County Mental Retardation Program who has the client on their active caseload and the County Mental Retardation Program where the facility is located as to who will conduct an investigation. The County Mental Retardation Program may seek the assistance of the Office of Mental Retardation to conduct an investigation.

(d) The County Mental Retardation Program shall maintain a record of reported unusual incidents for all clients on their active caseload and all community facilities and programs serving persons with mental retardation that are located in their county which includes a brief summary of the unusual incident including the date, location, follow-up actions, and analysis of trends.

Office of Mental Retardation Responsibilities

(a) The Regional Office of Mental Retardation is responsible for ensuring that the County Mental Health/Mental Retardation Administrator carries out his/her responsibilities for the prevention, management, and reporting of unusual incidents in accordance with these procedures. Follow-up information shall be required from the County Mental Health/Mental Retardation Administrator as necessary to ensure proper investigation, analysis, and corrective changes.

(b) The Regional Office of Mental Retardation shall conduct investigations of unusual incidents when warranted.

ATTACHMENTS:

Attachment A: 28 Pa. Code CH. 27, Section 27.2, Reportable Diseases

Attachment B: MR8 Form - Incident or Unusual Incident Report

Attachment C: MR8A Form - Death Report

OBSOLETE MATERIAL:

- MENTAL RETARDATION BULLETIN NUMBER 9054-82-05 TITLED "PREVENTION AND MANAGEMENT OF UNUSUAL INCIDENTS" ISSUED ON DECEMBER 3, 1982.

- MENTAL RETARDATION BULLETIN NUMBER 9054-82-03 TITLED "PROCEDURES FOR REPORTING UNUSUAL INCIDENTS" ISSUED ON DECEMBER 6, 1982.

- MENTAL RETARDATION BULLETIN NUMBER 99-84-09 TITLED "REPORTING OF UNUSUAL INCIDENTS INVOLVING RESIDENTS OF ICFs/MR" ISSUED ON AUGUST 1, 1984.

H503.033 REV. 5/84

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF HEALTH
DIVISION OF EPIDEMIOLOGY

REPORTABLE DISEASES

The Advisory Health Board declares the following communicable diseases, unusual outbreaks of illness, noncommunicable diseases and conditions to be reportable.(1)

Acquired Immune Deficiency Syndrome (AIDS)
Amebiasis
Animal Bites/Trauma
* Anthrax
* Botulism
Brucellosis
** Cancer
* Cholera
* Diphtheria
Encephalitis
* Food Poisoning
Giardiasis
Gonococcal Infections
Guillain-Barre Syndrome
Hepatitis, Viral, Including Type A and Type B
Malaria
* Measles
Meningitis-All Types
Meningococcal Disease
Mumps
Pertussis
* Plague
* Poliomyelitis
* Psittacosis
* Rabies
Reye's Syndrome
Rickettsial Diseases, Including Rocky Mountain Spotted Fever
Rubella and Congenital Rubella Syndrome
Salmonellosis
Shigellosis
* Smallpox
* Syphilis
Tetanus
Toxoplasmosis
Trichinosis
Typhoid
* Yellow Fever

REPORTABLE ADDITIONAL LABORATORY FINDINGS:
Histoplasmosis
Lead Poisoning
Legionnaires' Disease
Leptospirosis
Lymphogranuloma Venereum
Neonatal Hypothyroidism
Phenylketonuria
Tularemia
Viral Infections
(i) Vaccine-Preventable Diseases
(ii) Arboviruses
(iii) Respiratory Viruses

*For these diseases, telephone your report to the local health authority immediately.

**Reports from hospitals only.

UNUSUAL OR ILL-DEFEND DISEASES, ILLNESSES OR OUTBREAKS — The occurrence of outbreaks or clusters of any illness which may be of public concern whether or not it is known to be communicable in nature shall be reported to the local health officer of the municipality in which it occurs. In areas which have no local health officer, reports shall be made to the representative of the Secretary.

(1) Rules and Regulations — Annex A — Title 28 — Health and Safety — Pennsylvania Department of Health — Chapter 27 — Communicable and Noncommunicable Diseases — Section 27.2 — Reportable Diseases.

UNUSUAL INCIDENT REPORT

DATE OF REPORT: | TIME:

NAME OF CLIENT (Last, First, M.I.)

PROVIDER NAME:

ADDRESS:

ADDRESS:

CITY STATE ZIP CODE

CITY STATE ZIP CODE

PHONE:

PHONE:

BSU NUMBER: ☐☐☐☐

COUNTY WHERE FACILITY IS LOCATED:

DATE OF BIRTH:

SEX: ☐ Male ☐ Female

DATE OF ADMISSION:

LEVEL OF MENTAL RETARDATION:

DATE OF INCIDENT:

TIME: ☐ A.M. ☐ P.M.

LOCATION OF INCIDENT (Bathroom, Hall, Program Area, etc.):

FACILITY/AGENCY LICENSE NUMBER:

DESCRIBE IN DETAIL EXACTLY WHAT HAPPENED AND ANY CIRCUMSTANCES WHICH MAY HAVE PRECIPITATED THE INCIDENT/UNUSUAL INCIDENT: (ATTACH ADDITIONAL SHEETS IF NECESSARY)

DESCRIPTION OF ANY INJURY:

PHYSICIAN'S NAME AND STATEMENT (if applicable) - INCLUDE TREATMENT AND FOLLOW-UP ACTION:

ACTION TAKEN:

OTHER PERTINENT INFORMATION (Seizures, Visual Impairment, Safety Conditions, etc.):

RELATIVE OR GUARDIAN NOTIFIED: | RELATIONSHIP: | ADDRESS: | PHONE:

TYPED/PRINTED NAME AND SIGNATURE OF PERSON REPORTING: | TITLE: | PHONE:

TYPED NAME: | SIGNATURE:

DATE MAILED TO::

_____ REGIONAL OFFICE OF MENTAL RETARDATION

_____ COUNTY MENTAL RETARDATION OFFICE

_____ FUNDING AGENCY (Specify) _____

_____ OFFICE OF CHILDREN, YOUTH & FAMILIES (Early Intervention)

_____ DEPARTMENT OF HEALTH (ICF/MR)

DATE AND TIME NOTIFIED IF ABUSE OR SUSPECTED ABUSE OF A CLIENT; AN INCIDENT REQUIRING THE SERVICES OF A FIRE DEPARTMENT OR A LAW ENFORCEMENT AGENCY; OR CONDITION RESULTING IN CLOSURE FOR MORE THAN ONE DAY OF OPERATION OCCURS:

_____ REGIONAL OFFICE OF MENTAL RETARDATION

_____ COUNTY MENTAL RETARDATION OFFICE

_____ FUNDING AGENCY (Specify) _____

_____ OFFICE OF CHILDREN, YOUTH & FAMILIES (Early Intervention)

_____ DEPARTMENT OF HEALTH (ICF/MR)

MENTAL RETARDATION BULLETIN

COMMONWEALTH OF PENNSYLVANIA • DEPARTMENT OF PUBLIC WELFARE

DATE OF ISSUE	EFFECTIVE DATE	NUMBER
June 24, 1988	June 24, 1988	00-88-07

SUBJECT:

OBTAINING CRIMINAL CLEARANCES ON PROSPECTIVE EMPLOYEES

BY:

Steven M. Eidelman
Deputy Secretary for Mental Retardation

SCOPE:

County Mental Health/Mental Retardation Administrators
Base Service Unit Directors
Adult Day Care Center Directors
Vocational Facility Directors
Community Residential Mental Retardation Facility Directors

PURPOSE:

The purpose of this Bulletin is to recommend procedures to be used by County Mental Health/Mental Retardation Administrators and providers of licensed and funded community mental retardation services regarding the pre-employment screening of prospective employees for history of criminal acts. The purpose of the pre-employment screening is to protect the health, safety and well-being of our vulnerable citizens who receive community mental retardation services.

BACKGROUND:

On July 1, 1985, Act 33 of 1985 was signed into law requiring that prospective employees of child care services obtain child abuse and criminal record clearances prior to employment. Act 33 of 1985 became effective January 1, 1986.

Act 33 of 1985 applies to all facilities serving primarily children that are licensed, approved, certified, or registered by the Department of Public Welfare and all programs serving primarily children that are provided through a contract with the Department of Public Welfare or a county social service agency. Primarily means that more than 50% of the people served in the facility or program are children.

COMMENTS AND QUESTIONS REGARDING THIS BULLETIN SHOULD BE DIRECTED TO:

APPROPRIATE REGIONAL MENTAL RETARDATION PROGRAM MANAGER

The Department wants to insure, that in facilities and programs that serve 50% or fewer children (not under the scope of Act 33 of 1985), our vulnerable citizens are also protected from abuse.

APPLICABILITY:

These recommendations apply to providers of licensed and funded community mental retardation services and County Mental Health/Mental Retardation Program Staff. A criminal history records check is recommended only for prospective employees hired after the effective date of this bulletin.

CRIMINAL HISTORY RECORDS CHECK:

The Department recommends that a criminal history records check be completed for all full, part-time, and temporary employees, including persons who will not be providing direct care to clients. If a prospective employee is hired by an agency on a contract basis, a criminal history records check is not recommended. The Department recommends that a criminal history records check be completed prior to:

(a) the person's first day of employment or start date, or,

(b) within 30 calendar days for Pennsylvania residents, or 90 calendar days for out-of-state residents after the date of employment or start date as long as conditions for provisional hiring as specified in Act 80 of 1987 are met. (Refer to Mental Retardation Bulletin #6000-88-02, titled Mandatory Child Abuse and Criminal History Clearances, dated May 31, 1988.)

A criminal history records check is needed to investigate past criminal convictions.

A request should be made to the Pennsylvania State Police in order to obtain a criminal history records check. A copy of the Pennsylvania State Police form that must be used is attached. The facility or agency may contact the Pennsylvania State Police facility to request additional copies of the criminal records check forms.

The State Police charge $10.00 for the criminal history records check. A personal check, cashier's check or certified check or money order made payable to "The Commonwealth of Pennsylvania" should accompany the request.

The estimated processing time from the date of receipt for the criminal history records check is 21 days.

If the prospective employee resides outside of Pennsylvania, a Federal FBI check is needed in addition to the Pennsylvania criminal records check. A copy of the FBI form that must be used is attached. The charge for an FBI report is $14.00.

The Pennsylvania State Police as the repository of criminal information on persons under 18 years of age. If a prospective employee is hired under 18 years of age, a criminal history records check is not recommended. However, once the employee turns 18, these guidelines recommend that a criminal history records check be conducted.

The criminal history record check should be completed no more than one year prior to the hiring of the new employee. If the date of a clearance exceeds one year prior to hire, a new clearance should be obtained prior to hire.

CONSIDERATION FOR EMPLOYMENT:

If it has been found that a prospective employee has committed any of the following offenses under Title 18 of the Pennsylvania Consolidated Statutes (relating to crimes and offenses) as listed in Act 33 of 1985, due consideration should be given the criminal history in light of all relevant factors, including the seriousness of the crime, recency of the crime, evidence of responsible conduct since the crime, and nature of the position within the agency:

1. Chapter 25 (relating to criminal homicide).
2. Section 2702 (relating to aggravated assault).
3. Section 2901 (relating to kidnapping).
4. Section 2902 (relating to unlawful restraint).
5. Section 3121 (relating to rape).
6. Section 3122 (relating to statutory rape).
7. Section 3123 (relating to involuntary deviate sexual intercourse).
8. Section 3126 (relating to indecent assault).
9. Section 3127 (relating to indecent exposure).
10. Section 4303 (relating to concealing death of child born out of wedlock).
11. Section 4304 (relating to endangering welfare of children).
12. Section 4305 (relating to dealing in infant children).
13. A felong offense under Section 5902 (b) (relating to prostitution and related offenses).
14. Section 5903 (c) or (d) (relating to obscene and other sexual materials).
15. Section 6301 (relating to corruption of minors).
16. Section 6312 (relating to sexual abuse of children).

ATTACHMENTS:

Attachment A - Sample State Police Criminal History Records Check Form

Attachment B - Sample FBI Criminal History Records Check Form

REQUEST FOR CRIMINAL HISTORY RECORD INFORMATION

(SEE REVERSE SIDE FOR INSTRUCTIONS)

TYPE OR PRINT ONLY

PART I TO BE COMPLETED BY REQUESTER

DATE OF REQUEST

NAME (Last) (First) (Middle)

MAIDEN NAME AND/OR ALIASES	SOCIAL SECURITY NO.	DATE OF BIRTH	SEX	RACE

REQUESTER IDENTIFICATION

- ☐ CRIMINAL JUSTICE AGENCY - FEE EXEMPT
- ☐ NONCRIMINAL JUSTICE AGENCY - FEE EXEMPT
- ☐ INDIVIDUAL - NONCRIMINAL JUSTICE AGENCY - $10 FEE ENCLOSED

REASON FOR REQUEST

- ☐ CRIMINAL INVESTIGATION
- ☐ INDIVIDUAL ACCESS AND REVIEW BY SUBJECT OF RECORD OR LEGAL REPRESENTATI
- ☐ CRIMINAL JUSTICE EMPLOYMENT
- ☐ NONCRIMINAL JUSTICE EMPLOYMENT
- ☐ COURT REQUEST ON PRIOR ARD
- ☐ OTHER (Specify) _____

PART II TO BE COMPLETED BY CRIMINAL JUSTICE AGENCIES ONLY

INFORMATION REQUESTED	STD NO. (If available)	OTN OR OCA NO. (If availabl
☐ RAP SHEET ☐ PHOTO ☐ FINGERPRINTS ☐ PRIOR ARD		

PART III FOR CENTRAL REPOSITORY USE ONLY (LEAVE BLANK)

INFORMATION DISSEMINATED

- ☐ NO RECORD OR NO RECORD THAT MEETS DISSEMINATION CRITERIA
- ☐ RAP SHEET ☐ FINGERPRINTS ☐ PHOTO

SID NO.

INQUIRY BY	DISSEMINATION BY

THE INFORMATION FURNISHED BY THE CENTRAL REPOSITORY IS SOLELY BASED ON THE FOLLOWING IDENTIFIERS THAT MATCH THOSE FURNISHED BY THE REQUESTER:

- ☐ SID NO. ☐ DATE OF BIRTH ☐ RACE
- ☐ OTN/OCA NO. ☐ MAIDEN NAME ☐ SEX
- ☐ NAME ☐ SOCIAL SECURITY NO. ☐ ALIAS

Director, Central Repository

Response based on comparison of requester furnished information and/or fingerprints against a name index and/or fingerprints contained in the files of the Pennsylvania State Police Central Repository only, and does not preclude the existence of other criminal records which may be contained in the repositories of other local, state or federal criminal justice agencies.

PART IV TO BE COMPLETED BY REQUESTER

NAME OF INDIVIDUAL MAKING REQUEST _____

REQUEST TO BE MAILED TO:

NAME		
ADDRESS		
CITY	STATE	ZIP CODE

LIST TELEPHONE NO. TO BE USED IN CASE OF PROBLEM.

INCLUDE AREA CODE

APPLICANT

LEAVE BLANK

ATTACHMENT B

TYPE OR PRINT ALL INFORMATION IN BLACK

LAST NAME NAM FIRST NAME MIDDLE NAME

FBI LEAVE BLANK

SIGNATURE OF PERSON FINGERPRINTED

RESIDENCE OF PERSON FINGERPRINTED

DATE | SIGNATURE OF OFFICIAL TAKING FINGERPRINTS

EMPLOYER AND ADDRESS

REASON FINGERPRINTED

ALIASES AKA

ORI PA9209402
DEPT OF PUB WELFARE
HARRISBURG, PA

DATE OF BIRTH DOB Month Day

CITIZENSHIP CTZ | SEX | RACE | HGT. | WGT. | EYES | HAIR | PLACE OF BIRTH POB

YOUR NO. OCA

FBI NO. FBI

ARMED FORCES NO. MNU

SOCIAL SECURITY NO. SOC

MISCELLANEOUS NO. MNU

LEAVE BLANK

CLASS

REF.

1. R. THUMB	2. R. INDEX	3. R. MIDDLE	4. R. RING	5. R. LITTLE
6. L. THUMB	7. L. INDEX	8. L. MIDDLE	9. L. RING	10. L. LITTLE

The Philadelphia Alliance

Representing Community Providers of Services for People with Mental Health, Mental Retardation and Chemical Dependency Needs

January 26, 2000

Independent Regulatory Review Commission
333 Market Street, 14th floor
Harrisburg, PA 17101

Re: Comments on proposed regulations regarding the Older Adult Protective Services Act

Dear Mr.Jewitt:

Mental Health/Mental Retardation professional and advocates representing over 86 agencies and provider associations, and employing over 25,000 social services workers within the County of Philadelphia, are offering these comments regarding the proposed regulations on the Older Adult Protective Services Act (OAPSA). OAPSA calls for denial of employment to persons who have committed any of a list of criminal offenses at any point in their lives. The Act also calls for the termination of any employee with such a criminal record, regardless of their job performance, if the person was hired to work with care dependent individuals, between July 1,1997 and July 1,1998.

This aspect of OAPSA is very problematic from the perspective of human service providers because it does not allow for the possibility of recovery or rehabilitation following the conviction for one of the included offenses. The human service field has consistently and effectively employed recovered and/or rehabilitated individuals, often because their life experiences qualify them to understand and support individuals currently in need of services. While we support the motivation behind OAPSA- that care dependent individuals must be protected against abuse and other types of harm-we believe that, as it stands, the statue is too restrictive and may, in fact, discriminate against individuals who might find appropriate work in the care giving domain.

OAPSA will cause some people to lose their livlihoods because of mistakes made long ago. Many employees affected by OAPSA are being fired or denied employment because of crimes that are more than 10 years old (and sometimes decades old). Many of these valuable employees have specialized training to work in this field, while others have spent years working in care-giving, demonstrating their complete rehabilitation by devoting their lives to helping the elderly, the ill, or those who are dependent for other reasons. These employees are now stuck in their current jobs, since changing employers within the same field would expose them

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Founded 1969

to OAPSA's prohibitions. The law even applies to individuals who are employed in facilities in non-care giving capacities, such as grounds-keeping or kitchen work.

Employers in the human service field believe that a criminal background check is an appropriate mechanism for screening prospective employees. The agencies have always utilized this mechanism along with individual review, as a way of finding quality employees. However, OAPSA has a number of major flaws that must be addressed: (1) it disqualifies people with remote convictions and no subsequent behavior, (2) it is a blanket exclusion that does not look at individualized circumstances, and (3) it disqualifies workers who have had misdemeanor convictions.

We respectfully request that the final regulations reflect these problems and concerns in the following ways:

The act should be interpreted as narrowly as possible. This includes restricting the definition of "facilities" to those strictly required by OAPSA and specifically excluding from this definition institutions that serve the mentally ill/ mentally retarded or substance abusers.

The final regulations should provide for a timely and effective appeals process that would allow case by case review of individual situations for those applicants or employees toward whom OAPSA has been unfairly or incorrectly applied.

The final OAPSA regulation should eliminate the employment restriction on individuals who have had misdemeanor arrests only and no other covered convictions, and are therefore not covered by the Act itself.

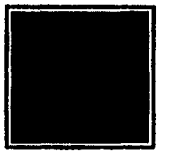
Finally, we endorse the comments submitted by the Employment Unit of Community Legal Services, and ask that you incorporate the restrictions and additions that CLS has requested.

Thank you very much for this opportunity to comment on the proposed regulations. Should you wish to discuss these matters further, please contact me at (215) 238-1376.

Very truly yours

Elizabeth Croxton

Elizabeth Croxton, Executive Director
Philadelphia Alliance



RESOURCES
FOR
HUMAN DEVELOPMENT, INC.

January 18, 2000

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John J. Jewitt
Independent Regulatory Review Commission
333 Market Street, 14th Floor
Harrisburg, Pennsylvania 17101

Re: Comments on proposed regulations regarding
the Older Adults Protective Services Act

Dear Mr. Jewitt:

Resources for Human Development (RHD) joins with many social service providers across the state in expressing our concern regarding the unintended adverse impact of the amendments and regulations of the Older Adults Protective Services Act (OAPSA). While the intent of the regulation and the amendments are praiseworthy (i.e. the protection of older adults), the effect goes well beyond this. The implementation of this Act is the direct cause for the job loss of many qualified employees that performed in exemplary fashion on behalf of many care dependent individuals.

Like most, if not all, responsible social service agencies, RHD concurs that criminal background checks should be part of a thorough employee screening process. Furthermore, we agree that any abuse or suspected abuse should be reported and painstakingly investigated. Finally, RHD agrees that the penalties for failing to safeguard the rights of care dependent individuals should be swift and decisive - giving a clear message that such irresponsible behavior will not be tolerated. Where we "part ways" with the value of this Act is at the point where we are prohibited from employing many qualified men and women because of crimes committed in their past. In one instance, we needed to dismiss an employee for a crime committed twenty-two years ago. Not only are we still "turning away" otherwise qualified and interested prospective employees as a result of the Act, but we have not yet fully recovered from the firing of excellent employees that was required of us as the Act was phased in to effect. At this point, the implementation of the Act begins to undermine its very purpose.

4700 WISSAHICKON AVENUE · SUITE 126 · PHILADELPHIA, PA 19144-4248 · 215-951-0300 · FAX 215-951-0312 · WWW.RHD.ORG

RHD supports the comments submitted by the Employment Unit of Community Legal Services. Any complaint that we might have with them is that they may not go as far as we might like. Nonetheless, we view these recommendations as a vast improvement over the current situation and hope that you will incorporate them into the law.

Thank you very much for the opportunity to comment on the proposed regulations. I hope that you will contact me at 215-951-0300 for further discussion about this matter.

Sincerely,

Dennis H. Roberts
Associate Director

**COMMENT OF DISTRICT 1199C,
NATIONAL UNION OF HOSPITAL AND HEALTH CARE EMPLOYEES,
AFSCME, AFL-CIO ON PROPOSED REGULATIONS REGARDING
PROTECTIVE SERVICES FOR OLDER ADULTS**

The following comments are submitted by District 1199C, National Union of Hospital and Health Care Employees, AFSCME, AFL-CIO (hereinafter referred to as "District 1199C") concerning the proposed regulations on 6 Pa. Code Ch. 15, governing Protective Services for Older Adults. The proposed regulations were published in the Pennsylvania Bulletin on November 27, 1999, Vol. 29, No. 48 at pages 6010-6027.

District 1199C is a labor union which represents approximately 15,000 workers in the health care industry in the Metropolitan Philadelphia area. A large (and growing) percentage of the employees represented by District 1199C are employed in nursing homes and long-term care facilities covered by the Older Adults Protective Services Act (hereinafter referred to as "the Act").

Numerous employees represented by District 1199C have been terminated from employment pursuant to the criminal history provisions of the Act. In many cases, very long-term employees with unblemished records, who would be "grandfathered" under the terms of the Act, have been terminated after a change in the ownership of their facility, based on offenses in the distant past. Because their employers have acted pursuant to their interpretation of the requirements of the Act, District 1199C is unable to assist these employees in obtaining reinstatement to employment. Even more tragically, these employees are then foreclosed from obtaining new employment in the only occupation for which they have training and work experience. In light of the relatively low pay of most of the jobs in this field, these employees may quickly become destitute, with no available avenue of appeal.

For these reasons, District 1199C joins in the comments submitted by Community Legal Services, Inc. and urges the adoption of its recommendations.

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John H. Jewitt, Regulatory Analyst
Independent Regulatory Review Commission
333 Market Street, 14th Floor
Harrisburg, PA 17101

Re: Comments On Proposed Regulations Regarding Protective Services For Older Adults

Dear Mr. Jewitt:

Enclosed please find the comment of District 1199C, National Union of Hospital and Health Care Employees, AFSCME, AFL-CIO on Proposed Regulations Regarding Protective Services for Older Adults.

Very truly yours,

FREEDMAN AND LORRY, P.C.

GAIL LOPEZ-HENRIQUEZ

GLH:lrt
Enclosure

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

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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

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

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

DASPOP

Dear Mr. Nyce,

I am writing to you on behalf of the Drug and Alcohol Service Providers Organization of Pennsylvania to offer our comments and concerns on the proposed regulations regarding the Older Adults Protective Services Act.

Although we applaud and support laws and regulations protecting this particularly vulnerable population, carefully crafted regulations could assist with what presently appears to be an overly broad application of the law.

In this regard, we recommend that the regulations interpret the Act to exclude institutions serving people recovering from alcohol and other drug addictions, the mentally ill or the mentally retarded. (Oddly enough, under present interpretations of the new law, in a field founded by recovering people, people in recovery could be barred from working with people in recovery!)

The regulations also need to be narrowed to avoid being applied where a health care facility has one component dedicated to the care of the elderly but is still barred from hiring – for example a recovering addicted person with an 11 year old offense – in the addiction treatment unit of the facility.

In addition, we agree strongly with the recommendations made by MH/MR professionals and advocates and the Community Legal Services, Inc. on the need to establish a process providing for case by case appeal and review and to limit the prohibitions on hiring to those who have actually been convicted.

Indeed, let's protect the elderly but let's not at the same time, create permanent bars to employment for people in good recovery.

Sincerely,

Deborah Beck, MSW
President/DASPOP

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cc: DASPOP Board
PRO-A
PRO-ACT

Drug and Alcohol Service Providers Organization of Pennsylvania
A subsidiary of the Pennsylvania Chemical Abuse Certification Board
3820 Club Drive Harrisburg, PA 17110 717.652.9128 fax 717.652.3857

COMMUNITY
LEGAL SERVICES, INC.

1424 Chestnut Street, Philadelphia, PA 19102-2505
Phone: 215.981.3700, Fax: 215.981.0434
Web Address: www.clsphila.org

January 18, 2000

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Mary Lou Harris, Regulatory Analyst
Independent Regulatory Review Commission
333 Market Street, 14th Floor
Harrisburg, PA 17101

Re: Final Comments on proposed regulations regarding the Older Adults Protective Services Act

Dear Ms. Harris:

Enclosed please find our final comments on the proposed regulations. We understand that you have previously received our initial draft which was faxed to John Jewitt on January 10th.

We appreciate your setting aside time to meet with us. We look forward to meeting with you on Friday, January 21, 2000 at 11:30 a.m. at your office. Please do not hesitate to contact me (215) 981-3745 if you wish to discuss anything prior to our meeting on Friday.

Very truly yours,

Janet F. Ginzberg, Esquire
Suzanne J. Young, Esquire

- **The definition of "facility" should make clear that it applies only to the nursing home or long-term care facility itself, and not to a larger entity of which that facility may be a unit (such as a hospital).**

The "facilities" that are covered by the OAPSA are limited to domiciliary care homes, home health care agencies, long-term nursing facilities, older adult living centers, and personal care homes. 35 P.S. § 10225.103. However, some health care organizations include such entities as components of more comprehensive health care services that they provide -- a trend that may well increase in the current competitive health care business environment. Faced with fears of possible criminal penalties under the OAPSA, health care administrators have applied the Act over broadly to their own organizations, beyond those parts that are "facilities".

One client's situation provides an example. This client provided housekeeping services through a temp agency at Albert Einstein Medical Center from November of 1998 until July of 1999. When a full-time position at the hospital became available, he applied for it. However, he was informed that Albert Einstein, which runs a long-term care facility on one floor of one of its buildings, could not hire him because of a single drug-related conviction from many years before.

The proposed regulations should add a provision to clarify that the criminal records prohibitions do not cover hospitals, nor are hospitals or other entities that run long-term facilities as a small part of their operations prohibited from hiring or retaining as employees individuals with convictions. Rather, the Act merely prohibits employment of those individuals within the physical confines of the units covered by the definition of "facilities".

Additionally, confusion could arise because the proposed regulations, unlike the statute, include a definition for "state-licensed facilities," which does include hospitals but which pertains only to the narrow determination of whether an adult is in need of protective services. See proposed 6 Pa. Code § 15.2. Any confusion should be avoided by indicating in this definition that it does not apply to the criminal record provisions of the OAPSA.

- **The regulations should provide that an employee of a facility is not required to provide criminal record information (and thus lose his "grandfathered" status) where that facility is bought by another owner.**

The proposed regulations fail to make clear that an employee of a facility is not required to provide criminal record information to a new owner where that employee and the facility had already been in compliance with the law. See 35 P.S. § 10225.508 (1). The consequence is that some workers who otherwise would be grandfathered into their current jobs will lose their ability to work in the industry just because the business in which they have been employed for over a year changes ownership.

One of our clients provides an example of this situation. This client was employed as a

Comments of Employment Unit of Community Legal Services, Inc., On Proposed Regulations About Protective Services for Older Adults

The following are comments concerning the proposed regulations on 6 Pa. Code Ch. 15, governing protective services for older adults.[1] The proposed regulations were published in the Pennsylvania Bulletin on November 27, 1999, Vol. 29, No. 48 at pp. 6010-6027.

The Employment Unit of Community Legal Services, Inc. ("CLS") has received many requests for representation from workers who have lost their jobs, and sometimes their livelihoods, because of the implementation of the amendments to the Older Adult Protective Services Act ("the OAPSA" or "the Act"), which prohibit the employment of persons with certain criminal convictions on their records. A sample of case descriptions of some of our clients is attached.

While the statutory goal of protecting vulnerable adults is of course commendable, the consequences of the amendments to the workers who provide their care can be extreme. Many of our clients were terminated by employers who regretted having to let go valued and trusted employees. Many have worked in the nursing home or home health care industries for years and now face foreclosure from the only occupation for which they are trained because of a crime for which they have served their punishment, sometimes a decade or more ago.

In fact, the legality of the criminal record provisions of the OAPSA is questionable. We believe that these provisions have a disparate impact on employees based on race and/or national origin that violates the civil rights laws. In addition, these provisions appear inconsistent with the Pennsylvania Constitution, which provides that every citizen has an inalienable right to engage in lawful employment. Several courts, including the Pennsylvania Supreme Court, have determined that this clause bars blanket prohibitions on employing individuals with criminal records.

Because the stakes are so high for workers, we urge both the Department and the Independent Regulatory Review Commission to carefully consider their interests when reviewing the proposed regulations. Our comments below about the proposed regulations seek to protect employee interests by: (1) urging an appropriately narrow construction of the Act to limit the circumstances under which workers are precluded from employment; (2) seeking remedies for persons who have been wrongly denied employment as a result of the Act; and (3) requesting appropriate assistance, communication, and confidentiality by facilities. In some cases, we point out that the proposed regulations are overbroad and inconsistent with the Act. In others, we note that additional provisions that would be consistent with the statute are needed, often based on issues we have encountered in cases in which we have provided representation.

---

[1] Some readers may have reviewed an earlier draft of these comments . For these readers' assistance, new subjects presented in this final paper are marked √.

The OAPSA Should Be Construed Narrowly To Limit the Circumstances Under Which Workers Are Precluded from Employment.

Because of the consequences of the criminal records prohibitions to those workers who have made a career in the care-giving industries covered by the OAPSA, regulations concerning the scope of the Act are critically important. In our experience, employers often have construed the employment prohibitions over broadly, because they are concerned about being subject to the civil and criminal penalties provided by the Act. Thus, the regulations should contain provisions clarifying the scope of the Act to provide guidance to employers so that workers are not fired or rejected unnecessarily. Moreover, given the consequences to workers of an overbroad interpretation of the Act, regulations that construe definitions more broadly than permitted by the statute must be strictly avoided.

√ **The proposed regulation defining "home health care agency" is impermissibly broad.**

A "home health care agency" is a "facility" subject to the criminal record prohibitions of the OAPSA. See 35 P.S. §§ 10225.103, 10225.503. The statute clearly defines "home health care agency" as a home health care agency or organization licensed by the Department of Health or a public or private agency or organization (or parts thereof) that provides care to care-dependent individuals in their place of residence. 35 P.S. §10225.103.

In addition to the statutory language defining "home health care agency," however, the proposed regulations add an entire new set of persons and organizations under this definition:

> (ii) 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.

See proposed 6 Pa. Code §15.2.

This additional language has two problems. First, while persons in the listed jobs might work for an organization licensed by the Department of Health or meet the relevant statutory definitions ("care" and "care-dependent individuals") so that they are covered by the Act, they also might perform these jobs in situations that are not covered by the Act. Second, persons in these jobs may not work for an agency at all, but this language suggests that they are covered by the Act. If privately hired care-givers or housekeepers, or friends or relatives who provide care for some remuneration, were deemed to be covered by this language, it would go well beyond the words and intent of the statute. The language should be altered to make clear that this list is merely illustrative of jobs that could be covered in the statutory definition, but that not every person performing the listed jobs is necessarily covered by the Act.

- **The definition of "facility" should make clear that it applies only to the nursing home or long-term care facility itself, and not to a larger entity of which that facility may be a unit (such as a hospital).**

The "facilities" that are covered by the OAPSA are limited to domiciliary care homes, home health care agencies, long-term nursing facilities, older adult living centers, and personal care homes. 35 P.S. § 10225.103. However, some health care organizations include such entities as components of more comprehensive health care services that they provide -- a trend that may well increase in the current competitive health care business environment. Faced with fears of possible criminal penalties under the OAPSA, health care administrators have applied the Act over broadly to their own organizations, beyond those parts that are "facilities".

One client's situation provides an example. This client provided housekeeping services through a temp agency at Albert Einstein Medical Center from November of 1998 until July of 1999. When a full-time position at the hospital became available, he applied for it. However, he was informed that Albert Einstein, which runs a long-term care facility on one floor of one of its buildings, could not hire him because of a single drug-related conviction from many years before.

The proposed regulations should add a provision to clarify that the criminal records prohibitions do not cover hospitals, nor are hospitals or other entities that run long-term facilities as a small part of their operations prohibited from hiring or retaining as employees individuals with convictions. Rather, the Act merely prohibits employment of those individuals within the physical confines of the units covered by the definition of "facilities".

Additionally, confusion could arise because the proposed regulations, unlike the statute, include a definition for "state-licensed facilities," which does include hospitals but which pertains only to the narrow determination of whether an adult is in need of protective services. See proposed 6 Pa. Code § 15.2. Any confusion should be avoided by indicating in this definition that it does not apply to the criminal record provisions of the OAPSA.

- **The regulations should provide that an employee of a facility is not required to provide criminal record information (and thus lose his "grandfathered" status) where that facility is bought by another owner.**

The proposed regulations fail to make clear that an employee of a facility is not required to provide criminal record information to a new owner where that employee and the facility had already been in compliance with the law. See 35 P.S. § 10225.508 (1). The consequence is that some workers who otherwise would be grandfathered into their current jobs will lose their ability to work in the industry just because the business in which they have been employed for over a year changes ownership.

One of our clients provides an example of this situation. This client was employed as a

housekeeper at the Philadelphia Geriatric Center (PGC) for 13 years. When Temple Continuing Care Center (TCCC) bought the facility in July, 1999, it retained all former employees of PGC and rolled over the existing Collective Bargaining Agreement. However, TCCC notified this individual that it would have to terminate his employment under the Older Adult Protective Services Act because of a conviction for forgery dating back to 1980.

This result should not have occurred under the OAPSA, which clearly exempts from the criminal records provisions employees who are continuously employed by a particular "facility" for over one year. 35 P.S. § 10225.508. Notably, the statutory provision does not indicate that the employee must work for the same "employer" or "owner," but the same "facility," indicating that the length of employment at a site rather than the identity of the employer is the key issue under the grandfathering provision. The proposed regulations should avoid job loss by making this point explicit.

- **The proposed regulations impermissibly add requirements about arrests for crimes that might prohibit hiring applicants or retaining employees, even though the statute only prohibits employment of persons with convictions.**

The OAPSA prohibits facilities covered by the statute to hire or retain as employees individuals who have been convicted of certain enumerated criminal offenses. 35 P.S. § 10225.503(a). Arrests short of conviction do not prohibit employment under the OAPSA. Rather than clarifying that distinction, however, the regulations would require rejections or terminations in some cases in which there was an arrest that did not lead to a conviction. See proposed 6 Pa. Code § 15.133(c) and proposed 6 Pa. Code § 15.134(b)(3).

The proposed regulations require that an applicant or employee whose record shows an "open disposition" (which includes arrest information without a final decision or sentence) must "obtain and submit court documents showing disposition within 60 days of receipt of the original report," or there will be "an administrative prohibition against hiring or retention." See proposed 6 Pa. Code § 15.133(c), proposed 6 Pa. Code § 15.134(b)(3) and definition of "open disposition" found in proposed 6 Pa. Code § 15.2. Additional language suggests that if a disposition is open for "court scheduling," the status shall be checked every 30 days until conclusion. See proposed 6 Pa. Code § 15.133(c). However, these proposed regulations suggest that a person must be terminated if the reason the person cannot produce documents showing disposition is that the case is still open (i.e., there is no conviction). The final regulations must clarify that a person is not to be terminated under those circumstances.

Equally important, the proposed regulations should enunciate the principle that the prohibition on employment does not apply to an arrest until it becomes a conviction. In addition to the text of the OAPSA itself, other provisions of federal and state law prohibit the treatment of arrests as convictions. The inferred presumption that an [open] arrest or the incomplete reporting of the disposition of an arrest is equivalent to a finding of guilt would violate due process of law. Moreover, Pennsylvania law prohibits employers from not hiring or from firing employees based

(See attached memorandum from Jeffrey J. Woods, Chief Counsel, Pa. Dept. of Aging, dated April 1, 1999). Guidance of this nature is very helpful to both employers and employees and particularly appropriate for the regulatory process. We recommend that the construction of "direct contact" provided in the opinion be included in a regulation.

√ **The regulations should clarify that summary offenses and some misdemeanors are not disqualifying convictions.**

The offenses which will disqualify a person from employment under the OAPSA are enumerated in 35 P.S. § 10225.503(a). In most cases, the grading of each crime is not discussed.[2] However, there are several exceptions, the consequences of which should be made explicit.

Two types of offenses are disqualifying only if they are felonies: offenses under the Controlled Substance, Drug, Device and Cosmetic Act, and prostitution-related offenses. Thefts under Chapter 39 of the Crimes Code are disqualifying if there was either one felony or at least two misdemeanors. Thus, in order to avoid confusion, the regulations should state that misdemeanors are not disqualifying, unless there are two or more misdemeanors for theft, and that summary offenses are never disqualifying

on arrests alone. 18 P.S. §9125; Cisco v. United Parcel Service, 328 Pa. Super. 300, 476 A.2d 1340 (1984).

CLS represented a client whose employer reluctantly suspended her when her criminal record check revealed an open bench warrant from twelve years ago which the client had not known was still an open case. We were only able to convince the employer to allow the client to work while the bench warrant was being resolved by obtaining statements from the enforcement agency that the OAPSA does not require terminations for mere arrests. Other workers may be less fortunate if their employers cannot be reassured about the consequences of an arrest under the OAPSA.

Additionally, the regulations as proposed place a burden, not envisioned by the statute, on applicants and employees to track and document arrest information within 60 days of receipt of the original report, regardless of whether or not it is in the applicant or employee's power to do so. Often, obtaining criminal records, particularly old ones, is a bureaucratic nightmare for which 60 days may be too short a time frame. It would be unfair for workers to lose jobs or employment opportunities because paperwork over which they have no control cannot be generated in two months. Finally, the regulations inexplicably fail to provide the same exemptions for court scheduling in out-of-state open dispositions that they do for in-state open dispositions. See proposed 6 Pa. Code § 15.133(c) and proposed 6 Pa. Code § 15.134(b)(3).

√ **The scope of "contract" employees within the coverage of the Act should be defined.**

Whether an individual is an "employee" who is within the scope of the Act depends in some cases on whether that person works for the facility directly or for a contractor with the facility. Contract employees are covered only if they have "direct contact with residents or

Whether an individual is an "employee" who is within the scope of the Act depends in some cases on whether that person works for the facility directly or for a contractor with the facility. Contract employees are covered only if they have "direct contact with residents or unsupervised access to their personal living quarters." 35 P.S. § 10255.103 (definition of "employee").

The statute does not define "direct contact with residents," and given the frequency with which institutional functions are contracted out, the parameters of this language are very important. In one case that CLS handled, we asked the Department for an opinion as to whether kitchen or food service personnel have "direct contact." In its response, the Department indicated as follows in part:

> It is presumed that kitchen/food service personnel do not have 'contact' with recipients in their ordinary course of performing their duties; that is, PDA is taking the position that direct contact entails a touching or hands-on of a facility recipient by the contract employee ... say, e.g. a physician, physical therapist, minister or barber is expected to touch or have hands-on a recipient, however an attorney (contract employee), plumber (contract employee), appliance repair (contract employee), painter (contract employee) or kitchen/food service personnel (contract employee) is not expected to touch or have hands-on a recipient ....

(See attached memorandum from Jeffrey J. Woods, Chief Counsel, Pa. Dept. of Aging, dated April 1, 1999). Guidance of this nature is very helpful to both employers and employees and particularly appropriate for the regulatory process. We recommend that the construction of "direct contact" provided in the opinion be included in a regulation.

√ **The regulations should clarify that summary offenses and some misdemeanors are not disqualifying convictions.**

The offenses which will disqualify a person from employment under the OAPSA are enumerated in 35 P.S. § 10225.503(a). In most cases, the grading of each crime is not discussed.[2] However, there are several exceptions, the consequences of which should be made explicit.

Two types of offenses are disqualifying only if they are felonies: offenses under the Controlled Substance, Drug, Device and Cosmetic Act, and prostitution-related offenses. Thefts under Chapter 39 of the Crimes Code are disqualifying if there was either one felony or at least two misdemeanors. Thus, in order to avoid confusion, the regulations should state that misdemeanors are not disqualifying, unless there are two or more misdemeanors for theft, and that summary offenses are never disqualifying.

The need for regulatory clarification is not merely theoretical. We have assisted a client who had a drug misdemeanor and a client with a summary offense for theft, both of whom were threatened with termination under the Act. Our own experiences, then, establish the need for such a regulation, which could be incorporated into proposed 6 Pa. Code § 15.133(a) and (b) (listing the crimes for which employment must be denied).

Additionally, the final regulations should establish a procedure for applicants or employees to appeal determinations of their employability based on the grading or classification of an offense. We have seen clients, for example, who were convicted of felony offenses that were reclassified as misdemeanors when the Pennsylvania Crimes Code was enacted in 1972. The offenses still appear as felonies on their criminal records, however, thereby precluding them from employment for crimes that are not intended to be covered by the OAPSA. These individuals are entitled to the opportunity to assert that the Act was not meant to deny them employment.

Remedies Should Be Provided to Workers Who Are Wrongly Denied Employment or Removed from their Employment.

- **Some provisions must be included in the final regulations to ensure that due process and employment rights are not violated. For example, the proposed regulations do not provide a remedy for employees who are wrongfully terminated or who resign**

---

[2] We have been told that the reason is that most of the listed crimes are only graded as felonies.

The proposed regulations provide that facilities must reinstate employees in situations in which an employee successfully challenges the accuracy of his criminal record. See proposed 6 Pa. Code § 15.136(b). But the proposed regulations do not provide any remedy for employees who are terminated in circumstances in which facilities have misapplied the law, in error or in an excess of caution, or in which crimes have been reclassified as described above. We have already seen several such cases.

- **Facilities should be required to reinstate employees who resign their positions (in which they are exempt from the application of the statute) based on misinformation provided to them by the facility administrators or personnel.**

In one such example, a long-term employee of a nursing home applied for a better-paying job at a different facility (with a different owner). After being assured by the human resources personnel at both facilities that his criminal history would not present a bar to his new employment, he quit his job at the old facility and began work at the new one. One month later, his new job was terminated, with great apologies, when it was determined that he could not, in fact, be hired at the second facility under the OAPSA.

- **The regulations also should require a facility to reconsider an applicant whose criminal record has been successfully challenged.**

The proposed regulations provide that facilities may reconsider the applicant's application for employment in situations in which an applicant successfully challenges the accuracy of his criminal record. See proposed 6 Pa. Code § 15.135(b). The proposed regulations should make clear that, as with all employment determinations, the employer's hiring determination must be made subject to 18 P.S. §9125. Consequently, the regulations should provide that facilities "shall" reconsider the applicant's application for employment in situations in which an applicant successfully challenges the accuracy of his criminal record, and may hire the applicant where the only impediment had been the erroneous application of the Act that had prevented/precluded employment.

- **In order to avoid incorrect and harmful employment decisions by facilities based on misinterpretation of the Act, each applicant or employee whom a facility has discharged or failed to hire pursuant to the Act must have a right of appeal to the Department of Public Welfare, which is charged with implementation of the OAPSA.**

The final regulations should require that each facility provide written notice to each applicant and employee at the time of a decision not to hire or to terminate pursuant to the Act, which notice explains the right and procedure for an appeal. The final regulations should establish the procedure for such an appeal. The substance of what is set forth in proposed 6 Pa. Code

§15.134(g) is grossly inadequate.

Without such an appeal mechanism, there would be no forum to determine the correctness of any facility's individual decision under the Act, and no forum to ensure reinstatement as discussed above. Proposed sections 15.135 and 15.136 purport to set out "rights of review." However, they fail to address the concerns that we have identified.

- **In addition, the final regulations should establish a procedure by which facilities and/or applicants or employees could request advisory opinions from an enforcing agency regarding coverage of the OAPSA in individual circumstances.**

Such a process could avoid needless denials of employment or terminations from employment where not required by the Act, particularly as such opinions may reassure facilities concerned with the possibility of the assessment of civil or criminal penalties if they employ someone in less than certain circumstances. We have sought such advisory opinions in numerous cases, often with good results for our clients. However, we have experienced different levels of cooperation each time, and there is often uncertainty about which of the three enforcing agencies is the proper place to ask for guidance. A well-defined process would help tremendously in resolving such situations.

Workers Should Be Entitled to Appropriate Assistance, Communication and Confidentiality by Facilities.

- **The proposed regulations do not reflect the statute's requirement that facilities are required to pay for the criminal history records of their current employees.**

The statute requires applicants to submit criminal record histories, but clearly places the burden on facility administrators to determine whether current employees must be terminated under the Act. 35 P.S. §10225.502. In one exceptional provision, the proposed regulations recognize this distinction and state that although the burden to obtain criminal records is on the applicant, the facility may decide to "assume financial responsibility for the fees." See proposed 6 Pa. Code §15.134(c). The proposed regulations, however, generally lump together applicants and employees in their mandate to obtain and pay for criminal record history information. See proposed 6 Pa. Code §15.134(a) and (c). The final regulations should make clear that current employees are, under the statute, to be treated differently from applicants and that the burden remains on the facility to pay for the criminal records that are required for their retention determinations.

- **Similarly, employees should not be made responsible for determining whether they are required to obtain criminal history record information, as the Act places that responsibility (both criminal and civil) on the facilities. 35 P.S. §10225.505.**

The proposed regulations contradict the statute by placing the burden on the employees to determine whether they are covered by the OAPSA and by providing them with no remedy should they receive little or incorrect information on how to comply with the statute. See proposed 6 Pa. Code §15.132(b).

Furthermore, the proposed §15.134(b) also improperly places responsibility on employees. We suggest the regulation should more properly read: "The facility shall provide the applicant and facility personnel with the necessary information packet, forms, and FBI fingerprint card in order to obtain the federal criminal history record information from the FBI as required."

- **Written information should be made available to applicants affected by this Act.**

Explanations of the applicant's responsibility to provide criminal records should be provided in writing as well as orally. See proposed 6 Pa. Code §15.133(e). Furthermore, upon receipt of an applicant's criminal record and a decision not to hire that individual because of prohibited offenses, the applicant should be informed of the reason for this decision in writing, pursuant to 18 P.S. §9125, and should be notified of his or her appeal rights under these proposed regulations. Additionally, the facilities should be required to provide copies of criminal record information to the subject individual.

Finally, we recommend that the phrase "if requested" be deleted from proposed 6 Pa. Code §15.134(d) in order to appropriately set forth the facilities' obligation to provide assistance to applicants and employees.

- **Confidentiality of criminal history records should apply to employees as well as applicants.**

Finally, the final regulations should ensure that the confidentiality of criminal history records should be strictly observed, both for employees and applicants. We are concerned that the proposed provision applies only to applicants, see proposed 6 Pa. Code §15.133(f), and believe that the final regulations should add the phrase "or an employee's retention of employment."

Miscellaneous Provisions

There are several other ways in which the final regulations must expand upon or clarify language in the OAPSA in order to protect the rights of those whose employment is at risk.

- **The proposed regulations should define clearly the term "similar in nature," with regard to federal or out-of-state crimes that bar employment of an applicant or employee. See 6 Pa. Code §15.133(d) and §15.133(h).**

The statute enumerates of list of crimes found in the Pennsylvania crimes code that

prohibit facilities from hiring applicants or retaining employees and also bars employment of those convicted of a Federal or out-of-state offense "similar in nature." 35 P.S. §10225.503(a)(3). This language is arguably unconstitutionally vague and the proposed regulations should provide a clear definition that cannot give rise to arbitrary interpretations of that phrase.

Additionally, the final regulations should establish a procedure by which applicants or employees who have been barred from employment because of the "similar in nature" provision could appeal this determination or request advisory opinions from the Department of Public Welfare regarding coverage of the OAPSA in their particular circumstances.

- **Facilities at which care is provided by employees supplied, referred or arranged by other facilities should not be permitted to have criminal history record information made available "when necessary."**

Section 15.133(i)(2) of the proposed regulations states that criminal records shall be made available "when necessary" to facilities at which care is provided by employees supplied, referred or arranged by other facilities. This provision is troublesome for several reasons. First, it is superfluous; the proposed regulations already provide that written assurance of compliance is sufficient to meet the terms of the Act. Second, the term "when necessary" is extremely vague and could open the door to situations in which the statute is read in an overbroad manner. Finally, this provision could be read and used in a manner inconsistent with the confidentiality provisions of the regulations. See 6 Pa. Code §15.133(f).

Selected Stories of Clients of Community Legal Services
Who Have Lost Employment Because of the Older Adult Protective Services Act

B. J.

B.J. was convicted of voluntary manslaughter 15 years ago. After suffering more than 10 years of battering at the hands of her boyfriend, B.J. accidentally stabbed a third party with a knife when he jumped between her and her boyfriend during a violent fight. She was sentenced to three months in jail and five years of probation, but the judge released her from supervision so that she could move away from the continually violent boyfriend. After her ex-boyfriend found her in Erie, B.J. was forced to move to Pittsburgh, where she settled for a number of years.

While she was living in Pittsburgh, B.J. went to school and became a Certified Nurse's Aide. She worked for three years in a nursing home before leaving to raise her grandchildren. Now that she is trying to get back into nursing and caring for the elderly, she finds that Act 169 blocks her from employment because of her 15-year-old conviction.

Marie Martin

Marie Martin was convicted of felony drug delivery in 1988. She describes herself as using drugs because she was "young and dumb" and rebelling against her parents. Ms. Martin is a prime example of the need for an appeals and exemption process under the Older Adult Protective Services Act. In August of 1997, after receiving her Certified Nurse's Aide license, she began to work as a Residential Support Staff at On Our Own, a residential home for adults with mental disabilities and autism which is operated by Resources for Human Development (RHD). Numerous letters from colleagues, supervisors, and families of patients attest to the dedication, compassion, and leadership displayed by Ms. Martin during the two years she worked there, caring for the residents even while fighting her own battle with cancer.

In response to the OAPSA, her employer terminated her with great reluctance, as she was a model employee, well-loved by her patients and colleagues alike. RHD has expressed concern that the quality of care for its patients will go down because of the loss of Ms. Martin and other employees like her. Ms. Martin's story has another tragic twist: she is unable to pay for COBRA to cover her health insurance for her cancer treatments. She is understandably concerned that any other job she gets will be unable to cover her health care because of this pre-existing condition.

Patricia Ashmore

Pat Ashmore is a registered nurse in Delaware County who was terminated from Mercy Home Health Care after her employer learned that she had a misdemeanor theft conviction from 1977. At that time, Ms. Ashcroft was approached by her husband (now ex-husband) came home with a silver plate and asked her if she knew anyone who sold antiques. Ms. Ashcroft sold the plate to a friend for $60, and was arrested when it turned out to be stolen property. Ms. Ashmore had been under the impression that the conviction was erased because of her successful

COMMUNITY LEGAL SERVICES, INC.

1424 Chestnut Street, Philadelphia, PA 19102-2505
Phone: 215.981.3700
Web Address: www.clsphila.org

FAX TRANSMITTAL COVER SHEET

FAX NUMBER: 215.981.0434

DATE: JANUARY 19, 2000

TO: MARY LOU HARRIS, REGULATORY ANALYST

FAX NUMBER: (717) 783-2664

ORGANIZATION: INDEPENDENT REGULATORY REVIEW COMMISSION

FROM: JANET GINZBERG (215-981-3745), SUZANNE J. YOUNG (215-981-3754)
OR SHARON DIETRICH (215-981-3719)

DIRECT DIAL:

TOTAL NUMBER OF PAGES (INCLUDING THIS COVER SHEET): 15

MESSAGE: FINAL COMMENTS OFFERED BY CLS RE: PROPOSED REGULATIONS IMPLEMENTING THE OLDER ADULTS PROTECTIVE SERVICES ACT.

TO BE COMPLETED AFTER FAX HAS BEEN TRANSMITTED:

DATE OF TRANSMISSION: _____ TIME: _____

OPERATOR: _____

DISTRICT 1199P SEIU Leading the Way

Service Employees International Union, AFL-CIO, CLC
THE HEALTH CARE WORKERS UNION

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January 17, 2000

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

Subject: Comments on Proposed Regulations Regarding Protective Services for Older Adults

Dear Msrs. McGinley and Jewitt,

Let this letter serve as an endorsement by District 1199P, Service Employees International Union AFL-CIO, CLC of the comments submitted by Community Legal Services, Inc. of Philadelphia, Sharon M. Dietrich Esquire and by the Pennsylvania AFL-CIO regarding the proposed regulations governing the Protective Services for Older Adults. In addition, we submit the following comments regarding the proposed regulations on 6 Pa. Code Ch. 15, governing protective services for older adults:

District 1199P, Service Employees International Union, AFL-CIO, CLC, represents approximately 14,000 health care workers in Pennsylvania. In June 1999, two of our members at Polyclinic Hospital in Harrisburg – Russell Williams and Gayle Thompson -- were terminated from their jobs as dietary workers. Mr. Williams was hired in January 1998 and Ms. Thompson in March 1998; they had both successfully completed their probationary period and had no performance problems. They were terminated for convictions dating back to the early 1980s. District 1199P/SEIU filed a grievance and proceeded to arbitration on their behalf; we are currently awaiting a decision from the arbitrator.

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State College, PA 16801-6288
(800) 252-3894 & (814) 234-0713
FAX (814) 237-2755

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

On more than one occasion, Hospital administrators admitted that the only reason they terminated Williams and Thompson was because of the amendments to the Older Adult Protective Services Act. They have repeatedly indicated that they did not want to take this action but felt they had no other choice because they run a long-term care facility on two floors of Polyclinic Hospital. As discussed in the comments of the Employment Unit of Community Legal Services, Inc., **"The definition of 'facility' should make clear that it applies only to the nursing home or long-term care facility itself, and not to a larger entity of which that facility may be a unit (such as a hospital)."**

If you have any questions or would like to discuss this matter further, I can be reached at 717-238-3030.

Sincerely,

Fran Campo
Organizer

cc: Honorable Timothy Murphy, Chair Senate Aging & Youth
Honorable Christine Tartaglione, Minority Chair Senate Aging & Youth
Honorable Jere W. Shuler, Chair H. of R. Aging & Youth
Honorable Frank J. Pistella, Minority Chair H. of R. Aging & Youth
Tom DeBruin, President District 1199P/SEIU
Nadia Hewka, Esquire, Community Legal Services
David Wilderman, Legislative Director PA AFL-CIO, CLC
file

January 14, 2000

John R. McGinley, Jr.
Chairman
Independent Regulatory Review Commission
14th Floor, Harristown 2
333 Market Street
Harrisburg, PA 17101

Re: Older Adult Protective Services Act

Dear Chairman McGinley:

I write to you regarding the proposed regulations for the Older Adult Protective Services Act (OAPSA). The National Council of Senior Citizens of Pennsylvania is an affiliate organization that advocates on behalf of senior citizens. Its membership is comprised of the very population that the Act and its regulations seek to protect–the elderly and care-dependent who are particularly vulnerable to abuse and other kinds of harm.

However, although the intent of the Act is a positive one, we feel that the provisions on criminal record history reports and the prohibition on employing individuals who have remote convictions have a detrimental effect on the staffing of nursing homes and other long-term care facilities. From the consumer's point of view, elderly and disabled patients lose care-givers who have provided dedicated and responsible service to them and whom they have come to trust and rely on. Moreover, the drastic reduction in the eligible labor pool for low-wage jobs in the health care industry can only lead to short-staffed facilities and therefore reduce the quality of care given to patients.

In light of these concerns, we feel that the proposed regulations do not interpret the OAPSA as narrowly as they should and that honest and dedicated care-givers will be wrongly and unfairly terminated as a result. We endorse the comments submitted by the Employment Unit of Community Legal Services and urge that the final regulations be drawn as narrowly as possible to ensure that the rights and interests of both the employees and our constituents be protected.

Thank you for the opportunity to comment on these proposed regulations.

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Very truly yours,

Martin Berger
President

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UNION YES

PENNSYLVANIA AFL-CIO

WILLIAM M. GEORGE
President

RICHARD W. BLOOMINGDALE
Secretary-Treasurer

January 13, 2000

Richard Sandusky
Director of Regulatory Analysis
Independent Regulatory Review Commission
14th Floor, Harristown 2
333 Market Street
Harrisburg, PA 17101

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RE: Protective Services for Older Americans, PA Bull. Vol. 29, No. 48

Dear Mr. Sandusky:

We are writing to you concerning proposed regulations implementing the Protective Services for Older Americans Act.

First, you should understand that we support the general thrust of the legislation. Next, we want you to know that our affiliates represent thousands of nursing home workers and others in long-term care facilities.

Generally speaking, these workers - both Union and, even more directly, workers in non-union settings - are doing low-wage work. The working conditions, as described by Auditor General Casey, are extremely difficult, and the patients are suffering as a result. The biggest problem is understaffing which dramatically reduces the quality of care for nursing home workers. Our affiliates' members have the highest accident and injury rate of any industry classification other than agricultural workers. The main reason for the high accident and injury rate is understaffing. Aides seeking to turn patients, bathe patients, etc., alone cause back injuries which are the single, largest problem.

The workers are truly dedicated to serving their clients and their employers. Quality of care is their number one reason for organizing, and staffing levels are a top concern in collective bargaining.

The Protective Services Act has a noble purpose, but will, unless properly implemented, cause even greater staffing problems.

The proposed regulations are overly broad as outlined by the comments submitted by Community Legal Services. We adopt those comments as our own.

For example, the OAPSA regulations should clearly be limited to nursing homes and long-term care facilities. Hospitals are not intended to be included in the definition, and no punitive action should be taken against workers other than in the nursing homes or long-term care facilities.

Similarly, transfers of ownership, which are very prevalent in the nursing home industry, should allow the "grandfathering" of incumbent workers who would otherwise be fired.

Similarly, the regulations go beyond the statutory requirement that applies only to convictions and not "other information" required in making a determination regarding an applicant or employee.

The Courts and the Legislature have been abundantly clear that only convictions - and not charges or other outcomes such as pleas of nolo contendere - apply to this type of situation. Because of the dramatic consequences of a conviction, it is a term of art that deserves narrow interpretation.

Finally, in addition to the other CLS comments that we support, there must be a process for individuals who are threatened with discharge for some criminal behavior, perhaps minor and committed over 20 years ago, for example, to have their situation fully considered. The grievance procedure must be explicitly recognized where there is one in the collective bargaining agreement.

This industry is already in crisis. Many who work in the industry may have had minor criminal records. State law allows for pardons and other processes, including opening the record, to avoid the conviction label. The industry can not afford to lose long-term, reliable employees. This will harm not only the worker, but also fellow employees and their clients in nursing homes and long-term care facilities.

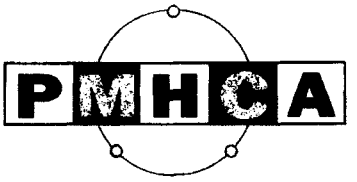
We urge that the regulations be re-drafted to conform to the law.

Sincerely,

WILLIAM M. GEORGE, President
RICHARD W. BLOOMINGDALE, Secretary-Treasurer

jcg

cc: Henry Nicholas, President, 1199C AFSCME
Thomas DeBruin, President, 1199P SEIU
Gail Lopez Henriquez, Esq.
Sharon Dietrich, Esq.
Janet Ginsburg, Esq.



Pennsylvania Mental Health Consumers' Association

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January 13, 2000

Mr. John J. Jewitt
Independent Regulatory Review Commission
333 Market Street, 14th Floor
Harrisburg, PA 17101

RE: Comments on proposed regulations regarding the Older Adult Protective Services Act

Dear Mr. Jewitt:

The Pennsylvania Mental Health Consumers Association (PMHCA) joins with other mental health/mental retardation professionals and advocates in offering these comments regarding the proposed regulations on the Older Adult Protective Service Act (OAPSA). PMHCA is the only statewide membership association representing individuals who have been diagnosed with a mental illness.

OAPSA calls for denial of employment to persons who have committed any of a list of criminal offenses at any point in their lives. The Act also calls for the termination of any employee with such a criminal record, regardless of their job performance, if the person was hired to work with care dependent individuals, between July 1, 1997 and July 1, 1998.

This aspect of OAPSA is very problematic as it does not allow for the possibility of recovery or rehabilitation following the conviction for one of the included offenses. The human service field has consistently and effectively employed recovered and/or rehabilitated individuals, often because their life experiences uniquely qualify them to understand and support individuals currently in need of services. While PMHCA supports the motivation behind OAPSA —that care dependent individuals must be protected from abuse and other types of harm – we believe that, as it stands, the statute is too restrictive and may, in fact, discriminate against individuals who might appropriately work in the care-giving domain.

Because of OAPSA, some people are unfairly losing their livelihoods because of mistakes made long ago. Many employees affected by OAPSA are being fired or denied employment because of crimes that are more than 10 years old (and sometimes decades old). Many of these valuable employees have specialized training to work in this field, while others have spent years working in care-giving, demonstrating their complete rehabilitation by devoting their lives to helping the elderly, the ill, or those who are dependent for other reasons. These employees are now stuck in their current jobs, since changing employers within the same field would expose them to OAPSA's prohibitions. The law even applies to individuals who are employed in facilities in non-care-giving capacities, such as grounds-keeping or kitchen work.

PMHCA believes that a criminal background check is an appropriate mechanism for screening prospective employees. The agencies have always utilized this mechanism along with individual review, as a way of finding quality employees. However, OAPSA has a number of major flaws that

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must be addressed: (1) it disqualifies people with remote convictions and no subsequent criminal behavior; (2) it is a blanket exclusion that does not look at individualized circumstances; and (3) it disqualifies people for misdemeanor convictions. We respectfully request that the final regulations reflect these problems and concerns in the following ways:

- The Act should be interpreted as narrowly as possible. This includes restricting the definition of "facilities" to those strictly required by OAPSA and specifically excluding from this definition institutions that serve the mentally ill/mentally retarded or substance abusers.

- The final regulations should provide for a timely and effective appeals process that would allow case by case review of individual situations for those applicants or employees toward whom OAPSA has been unfairly or incorrectly applied.

- The final OAPSA regulations should eliminate the employment restriction on individuals who have arrests only and no covered convictions, and are therefore not covered by the Act itself.

Finally, we endorse the comments submitted by the Employment Unit of Community Legal Services, and ask that you incorporate the restrictions and additions that CLS has requested.

Thank you very much for this opportunity to comment on the proposed regulations. Should you wish to discuss these matters further, please contact me at717-564-4930.

Sincerely,

Shelley E. Eppley
Executive Director

FREEDMAN AND LORRY, P. C.

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January 14, 2000

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John H. Jewitt, Regulatory Analyst
Independent Regulatory Review Commission
333 Market Street, 14th Floor
Harrisburg, PA 17101

Re: Comments On Proposed Regulations Regarding Protective Services For Older Adults

Dear Mr. Jewitt:

Enclosed please find the comment of District 1199C, National Union of Hospital and Health Care Employees, AFSCME, AFL-CIO on Proposed Regulations Regarding Protective Services for Older Adults.

Very truly yours,

FREEDMAN AND LORRY, P.C.

GAIL LOPEZ-HENRIQUEZ

GLH:lrt
Enclosure

AMERICA WORKS BEST WHEN WE SAY . . .

UNION YES

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January 13, 2000

John R. McGinley, Jr., Chairman
Independent Regulatory Review Commission
14th Floor, Harristown 2
333 Market Street
Harrisburg, PA 17101

RE: Protective Services for Older Americans, PA Bull. Vol. 29, No. 48

Dear Chairman McGinley:

We are writing to you concerning proposed regulations implementing the Protective Services for Older Americans Act.

First, you should understand that we support the general thrust of the legislation. Next, we want you to know that our affiliates represent thousands of nursing home workers and others in long-term care facilities.

Generally speaking, these workers - both Union and, even more directly, workers in non-union settings - are doing low-wage work. The working conditions, as described by Auditor General Casey, are extremely difficult, and the patients are suffering as a result. The biggest problem is understaffing which dramatically reduces the quality of care for nursing home workers. Our affiliates' members have the highest accident and injury rate of any industry classification other than agricultural workers. The main reason for the high accident and injury rate is understaffing. Aides seeking to turn patients, bathe patients, etc., alone cause back injuries which are the single, largest problem.

The workers are truly dedicated to serving their clients and their employers. Quality of care is their number one reason for organizing, and staffing levels are a top concern in collective bargaining.

The Protective Services Act has a noble purpose, but will, unless properly implemented, cause even greater staffing problems.

The proposed regulations are overly broad as outlined by the comments submitted by Community Legal Services. We adopt those comments as our own.

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Similarly, transfers of ownership, which are very prevalent in the nursing home industry, should allow the "grandfathering" of incumbent workers who would otherwise be fired.

Similarly, the regulations go beyond the statutory requirement that applies only to convictions and not "other information" required in making a determination regarding an applicant or employee.

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Finally, in addition to the other CLS comments that we support, there must be a process for individuals who are threatened with discharge for some criminal behavior, perhaps minor and committed over 20 years ago, for example, to have their situation fully considered. The grievance procedure must be explicitly recognized where there is one in the collective bargaining agreement.

This industry is already in crisis. Many who work in the industry may have had minor criminal records. State law allows for pardons and other processes, including opening the record, to avoid the conviction label. The industry can not afford to lose long-term, reliable employees. This will harm not only the worker, but also fellow employees and their clients in nursing homes and long-term care facilities.

We urge that the regulations be re-drafted to conform to the law.

Sincerely,

WILLIAM M. GEORGE, President
RICHARD W. BLOOMINGDALE, Secretary-Treasurer

jcg

cc: Henry Nicholas, President, 1199C AFSCME
Thomas DeBruin, President, 1199P SEIU
Gail Lopez Henriquez, Esq.
Sharon Dietrich, Esq.
Janet Ginsburg, Esq.

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UNION YES

PENNSYLVANIA AFL-CIO

WILLIAM M. GEORGE
President

RICHARD W. BLOOMINGDALE
Secretary-Treasurer

FAX

DATE: **January 13, 2000**

TO: **Robert Nyce, Executive Director**
Independent Regulatory Review Commission

FAX NUMBER: **717-783-2664**

FROM: **DAVID H. WILDERMAN, ASSISTANT TO THE PRESIDENT/DIRECTOR OF LEGISLATION**

DEPARTMENT: **LEGISLATION**

Comments: See Attached

FACSIMILE Transmission

There is/are 2 page(s) following this cover page.

Please call us if you have any questions:
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Improving the Quality of Care

A Plan of Action to Improve Long-Term Care in Pennsylvania

November 17, 1998

Auditor General
Robert P. Casey, Jr.

COMMONWEALTH OF PENNSYLVANIA
OFFICE OF THE AUDITOR GENERAL
HARRISBURG, PA 17120-0018

THE AUDITOR GENERAL

November 17, 1998

The Honorable Thomas J. Ridge
Governor
Commonwealth of Pennsylvania
225 Main Capitol Building
Harrisburg, Pennsylvania 17120

Dear Governor Ridge:

Pennsylvania families are concerned about the quality, cost, and oversight of long-term care delivered in nursing homes and other settings across the Commonwealth. This is not surprising, given that experts estimate that 43 percent of Americans now age 65 or over will spend some time in a nursing home. The depth and breadth of these concerns were vividly driven home by the outpouring of attention which followed the release, earlier this year, of two audits by the Department of the Auditor General. Our audits identified serious deficiencies in the Department of Health's oversight of nursing home care in Pennsylvania, particularly Health's complaint investigation system.

Upon the release of those audits, this department was contacted by nursing home employees, professionals in the field of long-term care, advocates for the elderly and disabled, family members of nursing home residents, and residents themselves. While greatly disconcerted by the results of the audits, people, by and large, expressed neither surprise nor skepticism regarding our findings. Rather, many people recounted episodes that they had experienced or observed which tended to confirm our audit findings. Others sought our assistance in helping them resolve ongoing complaints with nursing home care involving their loved ones. Still others, while acknowledging the problems exposed in the two audits, raised concerns about other broader facets of long-term care which they felt were equally or more seriously in need of examination. Finally, and no doubt in response to this outpouring of public concern, a number of legislators introduced bills intended to remedy one or another of the perceived problems in long-term care highlighted by the audits. We continue to hear from the public on this subject and have received over 200 letters, telephone calls, and e-mails to date.

It is important for everyone involved to recognize that most long-term care facilities in Pennsylvania provide quality care. Yet there are many challenges and significant problems. As a great Commonwealth with a strong tradition of caring for its older citizens, Pennsylvania can and must do better. We must constantly remind ourselves that these facilities are places where older Pennsylvanians should reasonably expect to live in dignity.

In the face of the concerns which have been expressed to us, and in order to contribute to the public discussion, I established a Task Force within the Department of the Auditor General with the following responsibilities:

- tracking long-term care policy issues and developing related legislation;
- establishing audit priorities; and
- reaching out and gathering information and ideas from advocates, experts, providers, residents, and others involved in long-term care.

The Task Force was composed of senior members of the Department of the Auditor General. It was chaired by my Chief of Staff/Chief Counsel Richard D. Spiegelman. I directly participated in various stages of the Task Force's work, including the development of the action plans and recommendations contained in this report. Our ultimate objective was to determine what could be done by this department and others to improve the quality of long-term care in Pennsylvania.

In order to accomplish our objectives, we gathered, reviewed, and analyzed pertinent literature, data, statutes, regulations, and other information bearing on long-term care issues. In addition, we gathered ideas through discussions with a wide range of stakeholders in the long-term care area. Specifically, discussions were held with officials from the three major associations representing, respectively, non-profit, for-profit, and county-affiliated long-term care providers in Pennsylvania. We also met or spoke with, among others: owners and administrators of long-term care facilities; union officials representing nursing home employees; individual nursing home employees; residents and their families; public interest lawyers and advocates representing the interests of the elderly and disabled; academic researchers focusing on long-term care issues; lawyers from the United States Attorney's Office dealing with long-term care issues; and researchers from the United States General Accounting Office currently studying state regulation and oversight of long-term care providers in a number of states, including Pennsylvania. As part of our information-gathering efforts, I have personally visited sixteen nursing homes throughout the Commonwealth.

Our work over the last several months has resulted in the action plans and recommendations contained in this report, covering the following areas:

- a Nursing Home Report Card;
- whistleblower protection for nursing home employees and other individuals;
- the Department of Health's enforcement of laws and imposition of sanctions;
- staffing in nursing homes;
- cost-effective public funding for assisted living; and
- privatization of county-owned nursing homes.

These and other issues regarding long-term care in Pennsylvania must be a top priority of state government in 1999 and beyond. Many of our proposals can and will be implemented by this department; others will require the involvement of other parties, both public and private. I am committed to ensuring that each of our proposals becomes a reality. I hope that you will join me in that effort.

I look forward to working with your administration to improve long-term care in Pennsylvania.

Sincerely,

Robert P. Casey, Jr.

Robert P. Casey, Jr.
Auditor General

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Summary of Actions and Recommendations[1]

I. Nursing Home Report Card

1. The Department of the Auditor General has developed a list of items to be included in a "Nursing Home Report Card" which would provide the public with comparative information about all nursing homes in Pennsylvania, particularly information regarding complaints, deficiencies, and sanctions.

2. The Ridge Administration should move forward as promptly as possible to design and offer to the public a comprehensive, easy-to-access, family-friendly "Nursing Home Report Card" as described in this report.

3. The Department of the Auditor General will establish a link from its website to the federal government's National Nursing Home Database, which will provide basic information on Medicare- and Medicaid-certified nursing homes in Pennsylvania, including the results of the most recent federal survey of those homes.

4. The General Assembly should act on bills currently pending which would require that nursing home information be collected and provided to the public.

II. Whistleblower Protection for Nursing Home Employees and Other Individuals

5. The Department of the Auditor General will increase awareness of whistleblower protections currently available for nursing home employees and other individuals under the Older Adults Protective Services Act ("OAPSA") by providing each nursing home in Pennsylvania with a notice and asking that copies of that notice be posted throughout the facility.[2]

6. The Department of Aging should adopt regulations requiring facilities to publicize the OAPSA protections through posted notices and other appropriate means.

7. Governor Ridge and Secretary of Aging Richard Browdie should appear in television spots to inform nursing home employees and other individuals of the protections available to them under OAPSA and the Whistleblower Law.

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[1] The stakeholders with whom we met or spoke are listed in Appendix A. We are very grateful for their time and input.

[2] Sample copies of the notice and the accompanying cover letter are attached as Appendix B.

8. The General Assembly should enact amendments to OAPSA and the Whistleblower Law to raise awareness of the whistleblower protections currently available under OAPSA and eliminate disparities in the protection and remedies provided by the two laws.

9. The General Assembly should act on bills currently pending which would strengthen and expand the Whistleblower Law.

III. The Department of Health's Enforcement of Laws and Imposition of Sanctions

10. The Department of the Auditor General will conduct a follow-up audit of the Department of Health to examine the imposition, settlement, and enforcement of state sanctions in 1997 and 1998.

11. The Department of the Auditor General and the United States Attorney's Office for the Middle District of Pennsylvania will share information about complaints, deficiencies, and improprieties at Pennsylvania nursing homes in order to prompt further action by each agency.

12. The Department of the Auditor General will consider the results of the United States General Accounting Office's upcoming study of nursing home enforcement in Pennsylvania in developing future audit initiatives.

13. The Department of Health should implement a policy of "focused enforcement" as described in this report to target the facilities with the worst records.

14. The Department of Health should consider and exhaust all other available options, including placing a nursing facility into a receivership, before closing a facility.

IV. Staffing in Nursing Homes

15. The Ridge Administration should implement minimum training requirements, particularly for in-service training, for nurse aides ("NAs") that go beyond the minimal amounts currently required by the federal government.

16. The Department of the Auditor General has begun working with Private Industry Councils to help match federal training funds with the training needs of nursing homes and the "career ladder" needs of NAs.

17. The Ridge Administration, as part of its ongoing Workforce Development Strategy, should engage in a comprehensive review and assessment of existing job training programs to ensure that there is an adequate public investment in NA training and education.

18. The Department of Health should consolidate the minimum standard for the required number of hours of direct patient care for skilled and intermediate care patients at 2.7 rather than at 2.3 as it has proposed.

19. The Department of Health should also reduce the current ratio of 1 nursing staff member on duty for every 20 residents.

20. The nursing home industry and the Commonwealth must consider how to increase the wages of NAs working in nursing homes.

21. Key stakeholders in the area of long-term care should convene a summit to address the recruitment and retention crisis in the NA field.

V. Cost-Effective Public Funding for Assisted Living

22. Pennsylvania should use public funds, including Medicaid dollars, to pay for home- and community (facility)-based assisted living in a fiscally responsible way.

23. The Ridge Administration should conduct a thorough study of the various funding options proposed by the Assisted Living Work Group of the Pennsylvania Intra-Governmental Council on Long-Term Care, including a rigorous examination of the budgetary implications of each and the extent, if any, of the "woodwork effect."

24. The Ridge Administration should seek to amend Pennsylvania's Home and Community-Based Services ("HCBS") Medicaid waiver to include a limited number of "slots" for home- and community (facility)-based assisted living, study the fiscal impact, and then, if feasible, gradually make assisted living available to Pennsylvanians of all income levels.

25. The Ridge Administration and the General Assembly should remove any obstacles in state law to using the HCBS waiver to fund assisted living services provided in assisted living facilities, so that Pennsylvania can take full advantage of the HCBS waiver program.

26. The Departments of Health and Public Welfare should conduct a thorough examination of the current regulatory program for personal care homes in order to determine its effectiveness as applied to assisted living facilities and to evaluate the need for updated regulations for the latter.

27. The Departments of Health and Public Welfare should conduct a similar review with regard to non-institutional assisted living service providers.

28. The Ridge Administration and the General Assembly should close any gap in current regulations which may allow some assisted living facilities to avoid licensing and regulation altogether through the artifice of labeling themselves as assisted living facilities as distinct from personal care homes.

VI. Study the Effect of Privatization on Quality of Care at County-Owned Nursing Homes

29. The Ridge Administration and the General Assembly should include in the Nursing Home Report Card information regarding the privatization history of formerly county-owned nursing homes.

30. The Department of the Auditor General will use the Nursing Home Report Card to identify possible trends in deficiencies at various nursing homes, including those which have been privatized, as a preliminary basis for studying the effect of privatization on quality of care.

I.

Nursing Home Report Card

The Department of the Auditor General's first audit report on long-term care reported that Pennsylvania residents are not provided with sufficient information to select a nursing facility. In particular, the audit report found that, although the most current Department of Health ("Health") inspection report or survey is public information and is required to be on file at the facility, the inspection report is not useful for the selection of a facility because it does not include comparative information from other surveys or other facilities or an explanation of the seriousness of the instances of noncompliance. Furthermore, the inspection reports examined by our auditors were difficult to read because the deficiencies were presented in very small type. Information provided by private groups was also found to be insufficient.[3]

Consequently, we recommended last March that Governor Ridge designate a council, agency, or board to provide Pennsylvania residents with information necessary for them to make decisions regarding the placement of their loved ones in nursing facilities. We recommended that the information be distributed as a guide to consumers in an easily readable and understandable format containing comparative information about the results of each facility's surveys and inspections, including staffing ratios and turnover rates if possible.[4] Since the release of our audit, we have continued to call for a "Nursing Home Report Card." We are not alone in making this proposal.[5] **Thus far, the Ridge Administration has not responded to our calls for a "Nursing Home Report Card," although it has announced plans to produce a report card on state highways and recently operated a toll-free fall foliage hotline.**

At least three states (Florida, Massachusetts, and California) currently produce nursing home report cards for their citizens. The Florida and Massachusetts report cards are published by their respective state health agencies. California's report card is produced by a private non-profit advocacy group based on information gathered by the California Department of Health. All three are available on the Internet; Massachusetts and Florida also make theirs available in hard copy.

There are currently four bills pending in the Pennsylvania General Assembly that require the dissemination of nursing home information to the public: House Bill 1802,[6] introduced by State Representative Anthony DeLuca (D-32nd District) on December 9, 1997; House Bill 2740,[7]

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[3] Department of the Auditor General, *The Oversight of Nursing Home Care in Pennsylvania: Residents in Jeopardy*, March 1998, at V-5 ("*Residents in Jeopardy*").

[4] *Id.* at V-6.

[5] *See, e.g.*, Steven H. Lopez. *Nursing Home Privatization: What is the Human Cost?*, Keystone Research Center, May 1998, at 35-36. *See also* notes 6, 8-9 and accompanying text, *infra*.

[6] H.R. 1802, 181st Leg. (Pa. 1997).

[7] H.R. 2740, 182nd Leg. (Pa. 1998).

introduced by Rep. DeLuca on June 22, 1998; Senate Bill 1216,[8] introduced by State Senator Edwin Holl (R-24th District) on December 9, 1997; and Senate Bill 1420,[9] introduced by State Senators Richard Kasunic (D-32nd District) and Robert Mellow (D-22nd District) on June 8, 1998. There are differences among the bills in terms of the types of information required to be collected and the means by which such information would be publicized. Yet all share the common objective of giving Pennsylvanians the information that they need to select and evaluate nursing facilities. It is our hope that the release of such information will also lead to improvements in quality of care by placing competitive, public relations, and other pressures on providers.[10]

Actions and Recommendations

The General Assembly should act on the bills discussed above. However, it is very unlikely that any of the bills will become law in the waning days of the current legislative session. The bills would then need to be reintroduced in January 1999, thus further postponing any possibility of legislative action in the near future. Therefore, Governor Ridge should direct the Department of Health and/or the Department of Aging to begin collecting and providing such information to the public immediately. This is an achievable goal that does not require the enacting or implementation of new legislation, simply the desire of the Ridge Administration to do it.

There is some debate over the items to be included in a Nursing Home Report Card. A report card which includes staffing ratios and length of service of employees is supported by the Service Employees International Union, which represents the greatest number of nursing home employees. Studies by the Keystone Research Center also support the inclusion of staffing information.[11] However, not all stakeholders agree on the need for staffing information. The Pennsylvania Health Care Association, which represents for-profit homes, believes that "outcomes," or how residents are being treated, are far more important than how many people are employed by a nursing home and their length of service. We agree that reports of outcomes should be developed to supplement information which appears in a report card. Furthermore, the Pennsylvania Association of County Affiliated Homes emphasized its general concern that any report card which compares deficiencies make fair comparisons by comparing deficiencies of the same category, severity, and frequency.

Based on our discussions and research, we believe that a Nursing Home Report Card must include information on *at least* the following items:

- name, address, and telephone number of facility

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[8] S. 1216, 181st Leg. (Pa. 1997).

[9] S. 1420, 182nd Leg. (Pa. 1998).

[10] This has reportedly been the result of hospital report cards in Pennsylvania and elsewhere. *See* Ron Winslow, "Making the Grade: Improvements in quality of care suggest hospitals are taking report cards to heart," *Wall Street Journal*, Oct. 19, 1998, at R16.

[11] *See* Lopez, *supra* note 5, at 36; Susan C. Eaton, *Pennsylvania's Nursing Homes: Promoting Quality of Care and Quality Jobs*. Keystone Research Center, April 1997, at 45.

- sponsorship and/or affiliation (government, for-profit, non-profit, religious)
- name, address, and telephone number(s) of owner, administrator, and management company
- name, address, and telephone number of Department of Health licensing personnel
- name, address, and telephone number of local ombudsman
- number of licensed beds
- occupancy rate
- physical description of facility, including room size and number of residents per room
- current license status
- resident demographic information
- visiting hours
- cost and methods of payment accepted
- list of services provided
- nursing hours worked per patient per day by nursing staff
- ratio of nursing staff to residents
- ratio of licensed to unlicensed personnel
- annual turnover rate of nursing staff
- average length of service, licensure, and/or certification of nursing staff
- average number of hours of training received by nurses aides
- existence of a residents' council and the frequency of meetings
- existence of written policies on restraint, resuscitation, sedation, and re-admission

- name, address, and telephone number of nearest hospital and its distance in miles from facility

- existence of written description of residents' rights and responsibilities

- local, state, and national professional affiliations

- total number and descriptions of substantiated complaints against the facility in each of the last three years

- total number of deficiencies in each of last three years (state and federal)

- list of deficiencies according to their scope and severity in each of last three years (state and federal)

- sanctions or remedies imposed on facility in each of last three years, and their effective dates (state and federal)

- privatization history of formerly county-owned nursing homes[12]

The Department of Health should be capable of assembling this information, most of which is currently available to Health, in a user-friendly format. It should then be made available to the public in a variety of ways, including on Health's Internet website and in a hard copy format that could be ordered through a toll-free telephone number. The Ridge Administration should then widely publicize the availability of the report card. In addition, the Department of Aging should add to its website information on contacting local ombudsmen regarding complaints about abuse of older Pennsylvanians.

In the meantime, we will establish a link from the Department of the Auditor General's website (http:\\www.auditorgen.state.pa.us) to the Health Care Financing Administration ("HCFA") National Nursing Home Database (http:\\www.medicare.gov\nursing\home.asp). The HCFA database, which is still under construction, includes basic information about every Medicare- and Medicaid-certified nursing home in the country, including the results of the most recent federal survey. Visitors to our website will then be able to obtain that information with regard to Pennsylvania nursing homes. However, reliance on the HCFA database is not completely satisfactory, as the HCFA database does not include information about those facilities which are not Medicare- or Medicaid-certified, state survey and sanction information about any facilities, or complaints against facilities. Again, it is essential that a comprehensive, Pennsylvania-specific report card be developed and publicized as soon as possible.

[12] *See* discussion regarding privatization of county-owned nursing homes in Part VI, *infra* .

II.

Whistleblower Protection for Nursing Home Employees and Other Individuals

We have researched the extent to which Pennsylvania law currently provides whistleblower protection for nursing home employees and other individuals.[13] As discussed below, such protections are provided by the Whistleblower Law and the Older Adults Protective Services Act. However, the former law generally applies only to public employees; the latter, despite broader applicability, still does not provide complete protection and has failed to gain widespread attention. Amendments currently under consideration in the General Assembly and those proposed in this report address and remedy the deficiencies of both laws.

Whistleblower Law

A. Individuals Protected

The Whistleblower Law, enacted in 1986, is found at 43 P.S. § 1421 *et seq.* (1991). It prohibits an "employer" from discharging, threatening, or otherwise discriminating or retaliating against an "employee" regarding the employee's compensation, terms, conditions, location, or privileges of employment because: (i) "the employee or a person acting on behalf of the employee makes a good faith report or is about to report, verbally or in writing, to the employer or appropriate authority an instance of wrongdoing or waste"; or (ii) "the employee is requested by an appropriate authority to participate in an investigation, hearing or inquiry held by an appropriate authority or in a court action."[14] "Employers" must "post notices and use other appropriate means" to inform "employees" about the protections and obligations contained in the Whistleblower Law.[15]

The definitions of terms used in the Whistleblower Law evidence the narrow scope of the protection provided by the Whistleblower Law.[16] "Employee" is defined as "[a] person who

[13] We also researched the extent to which such protection currently exists under federal law, but did not find anything relevant to the current discussion.

[14] 43 P.S. § 1423(a). (b) (1991).

[15] 43 P.S. § 1428 (1991).

[16] It is useful to understand the meanings of other relevant terms as well. The Whistleblower Law defines a "good faith report" as a report of "wrongdoing" or "waste" which is "made without malice or consideration of personal benefit and which the person making the report has reasonable cause to believe is true." 43 P.S. § 1422 (1991). "Wrongdoing" is "[a] violation which is not of a merely technical or minimal nature of a Federal or State statute or regulation, of a political subdivision ordinance or regulation or of a code of conduct or ethics designed to protect the interest of the public or the employer." *Id.* "Waste" is "[a]n employer's conduct or omissions which result in substantial abuse, misuse, destruction or loss of funds or resources belonging to or derived from

performs a service for wages or other remuneration under a contract for hire, written or oral, expressed or implied, for a *public body*."[17] An "employer" is "[a] person supervising one or more employees, including the employee in question; a superior of that supervisor; or an agent of a public body."[18] A "public body" includes the following:

> (1) A State officer, agency, department, division, bureau, board, commission, council, authority or other body in the executive branch of State government.
>
> (2) A county, city, township, regional governing body, council, school district, special district or municipal corporation, or a board, department, commission, council or agency.
>
> (3) Any other body which is created by Commonwealth or political subdivision authority or which is funded in any amount by or through Commonwealth or political subdivision authority or a member or employee of that body.[19]

B. Whistleblower Protection

An "employee" who alleges a violation of the Whistleblower Law may bring a civil action for injunctive relief or damages, or both.[20] The action must be brought within 180 days after the occurrence of the alleged violation.[21] In order to prevail, the employee must show by a preponderance of the evidence that, prior to the alleged reprisal, he or someone acting on his behalf had reported or was about to report an instance of "wrongdoing" or "waste" to the employer or an appropriate authority.[22] The employer can defend himself by proving by a preponderance of the evidence that his action occurred for separate and legitimate reasons which are not merely pretextual.[23] A civil service employee who contests a civil service action believing it to be motivated by his whistleblowing may submit as admissible evidence material relating to the whistleblowing and the resulting alleged reprisal.[24]

If an employee succeeds in proving his case, the court may order his reinstatement, payment of back wages, full reinstatement of fringe benefits and seniority rights, actual damages, or any combination of these remedies.[25] The court may also award all or a portion of the costs of

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Commonwealth or political subdivision sources." *Id.* The term "appropriate authority" includes the Department of the Auditor General. *See id.*

[17] 43 P.S. § 1422 (1991) (emphasis added).

[18] *Id.*

[19] *Id.*

[20] 43 P.S. § 1424(a) (1991).

[21] *Id.*

[22] *Id.* § 1424(b). *See* definitions of "wrongdoing" and "waste," *supra* note 16.

[23] *Id.* § 1424(c).

[24] *Id.* § 1424(d).

[25] 43 P.S. § 1425 (1991).

litigation, including reasonable attorney's fees and witness fees.[26] In addition, anyone who, "under color of an employer's authority," violates the Whistleblower Law is liable for a civil fine of up to $500.[27] If that person is a non-elected employee of the Commonwealth or a political subdivision and violated the Whistleblower Law with the intent to discourage the disclosure of criminal activity, he may also be suspended from public service for up to six months.[28]

C. Protection of Nursing Home Employees and Other Individuals

The Whistleblower Law generally only protects public employees.[29] However, the United States District Court for the Eastern District of Pennsylvania has recently held that an employee of a private company which operated a city's nursing home pursuant to a contract with the city was an "employee" for purposes of the Whistleblower Law.[30] The same court has held that an employee of a private health care facility which receives Medicaid reimbursements is not an "employee" for purposes of the Whistleblower Law.[31]

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[26] *Id.*

[27] 43 P.S. § 1426 (1991).

[28] *Id.*

[29] *See Holewinski v. Children's Hospital of Pittsburgh*, 437 Pa. Super. 174, 179, 649 A.2d 712, 715 (1994) (dismissing at-will hospital employee's wrongful discharge action against private hospital because hospital was not a governmental entity and therefore the Whistleblower Law did not apply); *Krajsa v. Keypunch, Inc.*, 424 Pa. Super. 230, 240, 622 A.2d 355, 360 (1993) (dismissing at-will employee's wrongful discharge action against private company because company was not created or funded by a political body and therefore the Whistleblower Law did not apply).

[30] *See Rankin v. City of Philadelphia*, 963 F. Supp. 463, 471 (E.D. Pa. 1997). The *Rankin* court reasoned that the definition of "employee" as a person who works under a contract "*for* a public body" and the definition of "employer" as "an *agent* of a public body" extended whistleblower protection to employees of private agents of public bodies who are working under a contract between their private employer and the public body. *See id.* at 469-71. At first glance, this case appears to contradict the holding of *Krajsa v. Keypunch, Inc.*, 424 Pa. Super. 230, 622 A.2d 355 (1993), *supra* note 29, in which the Superior Court of Pennsylvania held that an employee of a private company which performed governmental contracts was not an "employee" for purposes of the Whistleblower Law. *Id.*, 424 Pa. Super. at 240-41, 622 A.2d at 360. However, the cases can be reconciled if one assumes that the private company in *Krajsa* merely performed individual contracts for the government (*i.e.*, the government was a customer) and was not an "agent" of the government.

[31] *See Cohen v. Salick Health Care, Inc.*, 772 F. Supp. 1521, 1527 (E.D. Pa. 1991). The *Cohen* court reasoned that the definition of "public body" as including bodies "funded . . . by or through" the Commonwealth was not intended to include health care providers that receive state funds for services rendered to Medicaid patients. *Id.* at 1527. The Court explained:

> Such an interpretation would extend the reach of the Whistleblower Law to every hospital, nursing home, institution for the mentally retarded, institution for the mentally ill, home health care provider, physician, chiropractor, podiatrist, ambulance company, dentist, and optometrist that treats patients whose medical expenses are reimbursed by Medicaid. Doctors, nursing homes, and other health care providers are not the intended beneficiaries of the Medicaid program . . . . "Instead, the purpose underlying the [Medicaid] funding program is to extend financial benefits to the patients eligible to receive their medical care at government expense." . . . Through Medicaid, health care providers merely receive payment for services rendered to Medicaid eligible patients.

Id. at 1526-27 (citations omitted). The Court emphasized that it was predicting how the Supreme Court of Pennsylvania would interpret the "funded" language. *See id.* at 1526.

The Superior Court of Pennsylvania recently stated that the Whistleblower Law protects employees of private organizations receiving Commonwealth funds – *i.e.*, that the third alternate definition of "public body" in 43 P.S. § 1422 means exactly what it says.[32] However, the Court's statement may not be binding as legal precedent, as it did not affect the Court's ultimate decision in the case, affirming summary judgment in favor of the employer.[33] Nevertheless, the Court's statement and a fair reading of the definition of "public body" support the view that the Whistleblower Law might also protect employees of private organizations receiving Commonwealth funds. Future cases may provide guidance as to the type and level of funding required in order to trigger whistleblower protection.

State Representative Michael Veon (D-14th District) has recently introduced House Bills 2726,[34] 2727,[35] and 2728,[36] which seek to extend whistleblower protections to employees of: (i) private organizations; (ii) private businesses or organizations that receive Commonwealth funds;[37] and (iii) private medical facilities such as hospitals and nursing homes. He seeks to accomplish that primarily by amending the definition of "employee" in the Whistleblower Law. The bills are currently in the House Committee on Labor Relations, which we understand has no plans to consider the bills in the near future. State Representative Anthony DeLuca (D-32nd District) has introduced House Bill 2741[38] to extend whistleblower protection to employees of private nursing homes. Rep. DeLuca's bill is also in the House Committee on Labor Relations.

Therefore, although the Whistleblower Law currently protects only employees of public nursing homes, employees of private companies operating public nursing homes and employees of private companies receiving Commonwealth funds may also receive some protection.[39] The Whistleblower Law does not currently protect employees of all private nursing homes. Victims of abuse, their family and friends, and other interested individuals (*i.e.*, non-employees) are also unprotected, even under the expanded versions of the Whistleblower Law proposed by Representatives Veon and DeLuca. However, the Older Adults Protective Services Act, discussed below, supplements the Whistleblower Law by providing whistleblower protections to all private nursing home employees and certain other individuals.

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[32] *See Riggio v. Burns*, 711 A.2d 497, 500 (1998) (*en banc*) (stating that private medical institution which received appropriations from the Commonwealth was a "public body" under the Whistleblower Law).

[33] *See id.* at 501 (holding that plaintiff had not presented a viable claim under the Whistleblower Law because she had not reported "wrongdoing" as defined thereunder).

[34] H.R. 2726, 182nd Leg. (Pa. 1998).

[35] H.R. 2727, 182nd Leg. (Pa. 1998).

[36] H.R. 2728, 182nd Leg. (Pa. 1998).

[37] This extension may be unnecessary in light of *Riggio v. Burns*, 711 A.2d 497 (1998) (*en banc*), discussed *supra* notes 32 and 33 and accompanying text.

[38] H.R. 2741, 182nd Leg. (Pa. 1998).

[39] Private sector employees are not completely without protection under Pennsylvania law: "In Pennsylvania, the public policy exception to employment at-will recognizes a cause of action for wrongful discharge if the employee has been retaliated against for conduct actually required by law or refusing to participate in conduct actually prohibited by law; the employee's reasonable belief of illegality is not enough." *Perry v. Tioga County*, 168 Pa. Commw. 126, 133 n. 8, 649 A.2d 186, 189 n. 8 (1994). *See also Krajsa v. Keypunch, Inc.*, 424 Pa. Super. 230, 239, 622 A.2d 355, 359 (1993).

Older Adults Protective Services Act

The Older Adults Protective Services Act ("OAPSA") is found at 35 P.S. § 10225.101 *et seq.* (West Supp. 1998). OAPSA was originally enacted in 1987 in order "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."[40] The focus of the law is the reporting and investigation of harm to older adults and the provision of services to address such harm. An "older adult" as defined in OAPSA is "[a] person within the jurisdiction of the Commonwealth who is 60 years of age or older."[41]

A. Individuals Protected

1. General Public

OAPSA provides that "[a]ny person having reasonable cause to believe that an older adult is in need of protective services may report such information to the agency which is the local provider of protective services."[42] The information contained in the report is shared with law enforcement officials, staff of the local agency, the Pennsylvania Department of Aging, and the subject of the report.[43] The release of information that would identify the reporter or a person who cooperated in a subsequent investigation is prohibited, unless the Secretary of Aging determines that the release of such information would not be detrimental to the reporter's safety.[44]

2. Mandated Reporters

There are mandatory reporting requirements for "employees" and "administrators" of "facilities." The term "facility" generally includes domiciliary care homes, home health care agencies, long-term care nursing facilities, older adult daily living centers, and personal care homes.[45] An "employee" is someone employed by a "facility," and includes "contract employees who have direct contact with residents or unsupervised access to their personal living quarters" and "any person who is employed or who enters into a contractual relationship to provide care to a care-dependent individual for monetary consideration in the individual's place of residence."[46] An "administrator" is the person responsible for the administration of a facility, and includes "a person responsible for employment decisions or an independent contractor."[47]

An employee or administrator of a facility who has reasonable cause to suspect that an older adult is a victim of abuse must immediately report that fact to the local area agency on

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[40] 35 P.S. § 10225.102 (West Supp. 1998).

[41] 35 P.S. § 10225.103 (West Supp. 1998).

[42] 35 P.S. § 10225.302(a) (West Supp. 1998). *See also* 6 Pa. Code § 15.21 (1997).

[43] 35 P.S. § 10225.306(a), (b) (West Supp. 1998).

[44] *Id.* § 10225.306(b)(4).

[45] *See* 35 P.S. § 10225.103 (West Supp. 1998). This definition would seem to include those assisted living facilities which are licensed as personal care homes. *See* footnote 134 and accompanying text, *infra*.

[46] 35 P.S. § 10225.103 (West Supp. 1998).

[47] *Id.*

aging.[48] If the abuse is sexual abuse, serious physical injury, serious bodily injury, or a suspicious death, the employee or administrator must also immediately report that fact to law enforcement officials.[49] The report is generally kept confidential, although copies are made available to certain agency, government, medical, and law enforcement personnel.[50] The release of information that would identify the mandated reporter or a person who cooperated in a subsequent investigation is prohibited, except to the extent that such information is contained in reports to law enforcement officials, who must treat it as confidential information.[51]

A mandated reporter who willingly fails to report a case of suspected abuse commits a summary offense for the first violation and a misdemeanor of the third degree for a second or subsequent violation.[52] However, an administrator or facility owner who intentionally or willfully fails to report or obstructs reporting commits a misdemeanor of the third degree and is subject to a sentence of a $2,500 fine or up to one year's imprisonment, or both.[53] In addition, an administrator or facility owner who intentionally or willfully fails to report or obstructs reporting or who intimidates or commits a retaliatory act against an employee who reports in good faith is subject to an administrative penalty of up to $2,500.[54]

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[48] 35 P.S. § 10225.701(a) (West Supp. 1998). An oral report of abuse must be made immediately. *See id.* A written report must be made within 48 hours of making the oral report. *Id.* § 10225.701(a)(2). OAPSA appears to require employees to make such reports directly to the agency. *See id.* § 10225.701(a)(1) ("An employee shall notify the administrator immediately following the report to the agency."). OAPSA defines "abuse" as the occurrence of one or more of the following:

> (1) The infliction of injury, unreasonable confinement, intimidation or punishment with resulting physical harm, pain or mental anguish.
>
> (2) The willful deprivation by a caretaker of goods or services which are necessary to maintain physical or mental health.
>
> (3) Sexual harassment, rape or abuse, as defined in the act of October 7, 1996 (P.L. 1090, No. 218), known as the Protection From Abuse Act.

35 P.S. § 10225.103 (West Supp. 1998). OAPSA also states that "[n]o older adult shall be found to be abused 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." *Id.*

[49] 35 P.S. § 10225.701(b) (West Supp. 1998). An oral report of sexual abuse, serious physical injury, serious bodily injury, or a suspicious death must be made immediately. *See id.* § 10225.701(b)(1). A written report must be made within 48 hours of making the oral report. *Id.* § 10225.701(b)(2). OAPSA appears to require employees to make such reports directly to law enforcement officials. *See id.* § 10225.701(b)(1) ("An employee shall notify the administrator immediately following the report to law enforcement officials.").

[50] 35 P.S. § 10225.705(a),(b) (West Supp. 1998).

[51] *Id.* § 10225.705(e).

[52] 35 P.S. § 10225.706(c) (West Supp. 1998).

[53] *Id.* § 10225.706(b).

[54] *Id.* § 10225.706(a).

B. Whistleblower Protection

OAPSA provides the following whistleblower protection for reporters (mandated or otherwise) and victims of abuse:

> Any person making a report or cooperating with the agency, including providing testimony in an administrative or judicial proceeding, and the victim shall be free from any discriminatory, retaliatory or disciplinary action by an employer or by any other person or entity. Any person who violates this subsection is subject to a civil lawsuit by the reporter or the victim wherein the reporter or victim shall recover treble compensatory damages, compensatory and punitive damages or $5,000, whichever is greater.[55]

The same protection and remedy are provided to "[a]ny person, including the victim, with knowledge sufficient to justify making a report or cooperating with the agency, including possibly providing testimony in any administrative or judicial proceeding."[56] Moreover, "[a]ny person participating in the making of a report, or who provides testimony in any administrative or judicial proceeding arising out of a report shall be immune from any civil or criminal liability on account of their report or testimony unless the person acted in bad faith or with malicious purpose."[57] Such immunity does not extend to liability for acts of abuse, neglect, exploitation, or abandonment.[58] Finally, an administrator or facility subject to mandatory reporting "shall not be held civilly liable for any action directly related to good faith compliance" with the mandatory reporting requirements.[59]

C. Protection of Nursing Home Employees and Other Individuals.

OAPSA not only protects private nursing home employees from the consequences of their reporting about abuse, but also requires them to report such abuse in the first place and penalizes them if they fail to report. Victims, their friends and family, and other interested individuals are also protected. **The existence of OAPSA begs the question: *Why are there calls for whistleblower protection for private nursing home employees, when current law provides such protection?*** The answer, based on both legal and anecdotal research, is two-fold.

First, people may not be aware of OAPSA. Unlike the Whistleblower Law, OAPSA does not require employers to post notices informing employees of their rights and obligations under the law.[60] This is surprising, especially considering OAPSA's mandatory reporting requirements

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[55] 35 P.S. § 10225.302(c) (West Supp. 1998). *See also* 6 Pa. Code § 15.22(a) (1997).

[56] 35 P.S. § 10225.302(c.1) (West Supp. 1998).

[57] *Id.* § 10225.302(d). *See also* 6 Pa. Code § 15.22(b) (1997).

[58] 35 P.S. § 10225.302(d) (West Supp. 1998). *See also* 6 Pa. Code § 15.22(b) (1997).

[59] 35 P.S. § 10225.707 (West Supp. 1998).

[60] The Department of Aging's OAPSA regulations merely require the report intake personnel at area agencies on aging to inform anonymous reporters of whistleblower protections *after* the report is made if providing such information becomes needed in order to obtain the reporter's name. *See* 6 Pa. Code § 15.24(b) (1997).

for nursing home employees and administrators. The high turnover rate among nursing home staff may also explain the lack of awareness.

Second, also unlike the Whistleblower Law, OAPSA does not provide complete protection to whistleblowers covered by it. OAPSA only protects individuals who report abuse to the local area agency on aging or who testify in an administrative or judicial proceeding. It does not provide protection when the recipient of the whistleblower's report is some other entity, such as the Department of Health, the Health Care Financing Administration, or even the Department of the Auditor General. In addition, OAPSA only provides for monetary damages, not injunctive relief (*i.e.*, reinstatement, etc.).[61]

Actions and Recommendations[62]

The deficiencies of OAPSA should be solved by making the following statutory and regulatory changes:

Proposed Department of Aging regulation

The following section should be added to 6 Pa. Code Chapter 15: "Notice.—The administrator of a facility shall post notices and use other appropriate means to notify employees and keep them informed of protections and obligations under this act."

Proposed amendments to OAPSA

The following amendments should be made to the last sentence of 35 P.S. § 10225.302(c) and (c.1): "Any person who violates this subsection is subject to a civil ~~lawsuit~~ action by the reporter or the victim for appropriate injunctive relief, or damages wherein the reporter or victim shall recover treble compensatory damages, compensatory and punitive damages or $5,000, whichever is greater or both."

The following subsection (e) should be added to 35 P.S. § 10225.302: "Reporting to other appropriate authorities.—The protections and remedies contained in this section shall also apply to any person who makes a report under this act to any "appropriate authority" as defined in the Whistleblower Law."

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[61] The monetary damages that OAPSA does provide, however, may be more generous than those provided under the Whistleblower Law. OAPSA allows for the recovery of the greater of treble compensatory damages, compensatory and punitive damages, or $5,000, while the Whistleblower Law allows for the recovery of actual damages and litigation costs. *Compare* 35 P.S. § 10225.302(c) (West Supp. 1998); 43 P.S. § 1425 (1991).

[62] The Department of Aging is apparently in the process of proposing new OAPSA regulations. The proposed regulations were supposed to have been published in the *Pennsylvania Bulletin* for public comment in July 1998. They received initial review by certain stakeholders in May and were being amended before publication to incorporate those stakeholders' comments. *See* 28 *Pa. Bulletin* 3128 (July 4, 1998). However, as of the date of this report, the proposed regulations have not yet been published in the *Pennsylvania Bulletin*. Thus, we have not been able to assess their impact on the proposals contained in this report.

Proposed amendment to Whistleblower Law

The following section should be added to the Whistleblower Law: "Older adults in need of protective services. This act shall not be construed to diminish the rights or obligations of any person or entity subject to the Older Adults Protective Services Act."

The most important of these proposals is the notice requirement. Because it can most likely be implemented by regulation as opposed to statute,[63] it is also the easiest to accomplish. The Department of Aging should promulgate such a regulation immediately. Governor Ridge and Secretary of Aging Richard Browdie should also appear in television spots to inform nursing home employees and others of the protections available to them. **In the meantime, the Department of the Auditor General has developed a notice which we will be mailing to every nursing home in Pennsylvania covered by OAPSA with a request that copies be voluntarily posted throughout the facility.**[64]

The proposed amendment to the Whistleblower Law is also a type of "notice" requirement. Although it may appear meaningless, it would perform a very important function by serving as a cross-reference to OAPSA. Individuals (or, more likely, their attorneys) who check the Whistleblower Law for protection would be directed to OAPSA and learn about additional whistleblower protections that may be applicable to their situation. Finally, the two proposed amendments to OAPSA serve to eliminate important differences between OAPSA and the Whistleblower Law, covering remedies and the recipient of the report.

It seems easier (and more realistic) to increase the effectiveness of OAPSA than to expand the scope of the Whistleblower Law. However, we do support the bills introduced by Representatives Veon and DeLuca, as they expand the scope of wasted funds which could be the subject of a whistleblower's report.[65] Thus, they would protect private nursing home employees who report about the waste of money in nursing homes, a type of whistleblowing not covered by OAPSA. In addition, they should help re-enforce awareness of whistleblower protections already available.

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[63] Ideally, this provision would be added as subsection (c) to 35 P.S. § 10225.701. However, the Department of Aging should have the authority to implement the suggested notice requirement via regulation. The chapter of OAPSA dealing with mandatory reporting by employees and administrators provides: "The Department of Aging, the Department of Health and the Department of Public Welfare shall promulgate the regulations necessary to carry out this chapter." 35 P.S. § 10225.708 (West Supp. 1998). The Department of Aging promulgated the current OAPSA regulations, so it would be the appropriate department to promulgate the proposed regulation.

[64] Sample copies of the notice and the accompanying cover letter are included in Appendix B.

[65] *See* House Bills 2726-2728, *supra* notes 34-36 and accompanying text (amending the definition of "waste" in the Whistleblower Law to include waste of money in the accounts of (i) private organizations, (ii) business that receive state funds, and (iii) private medical facilities); House Bill 2741, *supra* note 38 and accompanying text (amending the definition of "waste" in the Whistleblower Law to include waste of money in the account of a nursing home).

III.

The Department of Health's Enforcement of Laws and Imposition of Sanctions

The Department of the Auditor General's first audit report on long-term care discussed the enforcement of relevant laws, regulations, and rules and the imposition of state sanctions by the Pennsylvania Department of Health ("Health").[66] The audit found that the number of facilities which received sanctions *decreased* each year between 1994 and 1996, even as the number of licensed nursing facilities in Pennsylvania *increased* during that same three-year period.[67] The decline in sanctions is demonstrated by the following chart:[68]

	Number of facilities receiving state sanctions		
Type of sanction	**1994**	**1995**	**1996**
Issuance of a provisional license	59	38	26
Ban on new admissions	34	21	13
Assessment of civil monetary penalties	10	9	6

The audit report noted that Health Department officials were unable to explain the reasons for the decline in sanctions or provide evidence that the decline was due to improved compliance or fewer deficiencies in nursing homes.[69] Consequently, we recommended that the Department of Health be more aggressive in imposing sanctions and determine the reasons for the decline.[70] Our concern was, and remains, that the perception that Health may have relaxed sanctions on nursing facilities could result in a reduction of the quality of care at those facilities.[71]

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[66] *See Residents in Jeopardy, supra* note 3, at III-3-III-4.

[67] *Id.* at III-3. A similar trend has been noted nationwide. A study of the regulation and enforcement of federal nursing home standards between 1991 and 1996 found that the average number of citations for deficiencies per Medicare- and Medicaid-certified nursing facilities *decreased* by 42.1% nationwide and by 56.3% in Pennsylvania. During the same period, the number of facilities receiving no citations *increased* by 92.6% nationwide and by 133.6% in Pennsylvania. These trends occurred even as the total number of nursing facilities, beds, and residents in the United States all *increased* significantly. *See* Charlene Harrington and Helen Carrillo, *The Regulation and Enforcement of Federal Nursing Home Standards, 1991-1996*, University of California, March 1998, at Tables 1, 3. The study offered several possible explanations for the decline in citations: reduced enforcement efforts by states and the federal government, political interference with regulatory reform, and improved quality of care by nursing homes. The study seemed unconvinced by the possibility that nursing homes have improved. The study listed several explanations for possible reduced enforcement efforts by states: governors holding an anti-regulatory political philosophy, increased work load burdens caused by federal requirements that detract from the actual detection of inferior care, and insufficient resources of state regulators. *See id.* at 12-15.

[68] *Residents in Jeopardy, supra* note 3, at III-3.

[69] *Id.* at III-4.

[70] *Id.*

[71] *Id.*

In response to our findings, the Ridge Administration announced that the Department of Health was undertaking a review of the sanction process and would prepare an analysis identifying improvements to be made in this area.[72] **Seven months later, Health has neither explained the decline in sanctions nor described the improvements, if any, to be made to the process.** More troubling is the fact that the downward trend noted in our audit report appears to have continued through 1997. The Department of Health's own website provides data regarding the number of facilities which received sanctions in 1997. **Health's data show that the number of facilities which received provisional licenses and admissions bans continued to decline in 1997, to 14 and 8 respectively.**[73] The decline may have been even more dramatic, as the data reflect actions taken by both the state and federal government.[74]

Interestingly, Health's data indicate an increase in the number of facilities which received an assessment of civil monetary penalties ("CMPs") in 1997, to 20.[75] Again, the presentation of the data by Health makes it impossible to determine how many of those CMPs were actually assessed by Health as opposed to the federal government. If all 20 CMPs were assessed by Health, that would represent a marked increase from 1996 and perhaps a step in the direction of more vigorous state enforcement. Regardless, it is important to recognize that an increase in the number of CMPs *assessed* by Health is absolutely meaningless if the moneys are never ultimately *collected* by Health. Indeed, the evidence from our initial audit and our discussions with stakeholders suggests that Health "negotiates away" CMPs and other sanctions as a matter of course, because "making them stick" is a resource-intensive process, consuming money, personnel, and time. **Between 1994 and 1996, Health settled every sanction order that was appealed to the Health Facility Hearing Board and some sanction orders even before an appeal was filed.**[76] Health settles CMPs both by reducing the amount of the fine and by waiving the fine entirely. Thus, it is questionable whether Health's self-reported increase in imposing CMPs in 1997 represents a real change in Health's sanction process.

Actions and Recommendations

The Department of the Auditor General will conduct a follow-up audit of the Department of Health to examine the imposition and enforcement of state sanctions in 1997 and 1998. This audit is made necessary in large part by Health's failure to release its own review of the sanction process. Our audit objectives will include confirming or refuting the apparent continuing decline in the number of facilities receiving sanctions by Health and, if possible, determining the reasons for the downward trend. We will pay particular attention to the number and dollar amount of CMPs imposed by Health relative to the number settled and the amount of

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[72] *See* Office of the Budget, *Report on the Pennsylvania Department of Health's Complaint Response Process During the Period January 1, 1997 to February 28, 1998*, April 16, 1998, at 19 ("*Report on Health's Complaint Response Process*").

[73] Pennsylvania Department of Health, *Nursing Home Inspection Information* (last updated on Oct. 20, 1998) <http:\\www.health.state.pa.us\>.

[74] *Id.*

[75] *Id.*

[76] *Residents in Jeopardy*, *supra* note 3, at III-6.

money actually collected, as we are concerned that Health may be falsely presenting itself as being more aggressive than is really the case simply by (i) combining, for reporting purposes, the number of state and federal fines imposed, and/or (ii) imposing a greater number of fines that it has no intention or ability to ultimately collect.

We will also focus on the settlement and enforcement of the sanctions which Health does impose. Our initial audit found that Health lacked policies and procedures governing the settlement of sanctions, and recommended that Health establish, follow, and document such policies and procedures.[77] Our follow-up audit will assess Health's progress on this issue.

In addition, we will examine the resources used by Health in settling sanctions relative to the resources needed to enforce them. The preliminary evidence suggests that Health needs to shift or add resources to the enforcement side of the oversight process (for example, by hiring additional attorneys to defend appeals of sanction orders) so that sanctions become permanent, meaningful, and therefore effective as a tool to improve quality of care. After our initial audits last spring, Health indicated that it would give higher priority to the complaint investigation side of the oversight process by shifting certain personnel within its Division of Nursing Care Facilities ("Division").[78] The Division is responsible for responding to and investigating complaints, conducting annual and follow-up inspections, and initiating and enforcing sanctions. Health also requested and received an additional $1.4 million for the 1998-99 fiscal year in order to improve its complaint intake and investigation capabilities by adding new technology and 14 new staff members to the Division.[79] It is our understanding that over half of the additional amount was used to purchase computer equipment, but that since the additional funds were appropriated by the General Assembly more than six months ago the number of employees in the Division, while fluctuating slightly both up and down, has not increased at all as of October 23, 1998.

While we are pleased that the Ridge Administration requested and received additional funding to support the Division of Nursing Care Facilities, we are concerned about Health's slowness in hiring staff to carry out the Division's important functions. Moreover, given the diversion of existing Division personnel to give higher priority to complaint investigations, we are particularly concerned about Health's ability to vigorously enforce sanctions.

Through our research, and particularly in our discussions with representatives of the United States General Accounting Office ("GAO"), we have learned that other states have implemented policies of "focused enforcement" to target the facilities with the worst records.[80] It is unclear whether or not the Pennsylvania Department of Health has an effective policy of increased attention to those facilities. Health should implement a "focused enforcement" policy which includes the following elements:

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[77] *Id.* at III-7.

[78] *Report on Health's Complaint Response Process*, *supra* note 72, at 18 & Appendix A.

[79] *See id.*; Rep. Dwight Evans (D-203rd District), Pennsylvania House of Representatives Appropriations Committee, *1998/99 General Fund Budget in Perspective*, April 1998, at 18.

[80] *See, e.g.*, U.S. General Accounting Office Report to the Special Committee on Aging, U.S. Senate, *California Nursing Homes: Care Problems Persist Despite Federal and State Oversight*, July 1998, at 28-29 (discussing California's "focused enforcement" program).

- inspections conducted more frequently than the federal requirement of every nine to fifteen months;

- *real* surprise inspections;

- more complete on-site reviews for all complaints received about those facilities;

- follow-up visits to verify compliance;

- immediate, severe, and non-negotiable sanctions; and

- refusal to grant licenses for new facilities to owners whose current facilities are not in substantial compliance.

If Health is constrained by federal requirements and budgetary issues, Governor Ridge and the General Assembly should provide Health with sufficient resources to supplement its current activities with a "focused enforcement" program. To put it simply, if Health cannot shift resources to "get the bad guys," it should add the resources necessary to do it. In the meantime, Health should explain its current policy with regard to the worst offenders.

As the Department of Health does impose and enforce sanctions, it should consider and exhaust all other available options before closing a facility. The recent closing of Cobbs Creek Nursing Center in Philadelphia and the transfer of its residents to other facilities beg the question: *Who is Health punishing?* Such action is the epitome of the cliché "throwing out the baby with the bathwater." Health should consider and exhaust all other available options, including placing the facility into a receivership,[81] before choosing to close a facility, and the end result must be the improvement of quality of care. Health should interrupt the residents' "aging in place" only as an absolute last resort.

The nursing home community and the public should be aware that the Department of the Auditor General has reached an agreement with David M. Barasch, the United States Attorney for the Middle District of Pennsylvania, to share information about complaints, deficiencies, and improprieties at Pennsylvania nursing homes. Under this arrangement, the Department will notify the U.S. Attorney's Office ("USAO") of complaints received from the public and problems uncovered in the course of audits which may provide a basis for federal investigation and possible civil or criminal prosecution.

The Department has already provided information to the USAO on over 200 potential complaints which the Auditor General has received. These matters are currently being reviewed for possible further investigation. Specifically, the USAO is exploring ways of using the federal False Claims Act ("FCA") as an enforcement mechanism to ensure the quality of care in long-term

[81] *See* 35 P.S. § 448.814(b) (West Supp. 1998 Rev.) (appointment of temporary management).

care facilities.[82] The FCA would allow the federal government to bring a claim against a health care provider or facility that billed the government under Medicaid or Medicare for services that were inadequate or undelivered. Also under the agreement, the USAO will notify the Department of the Auditor General of the misuse of public funds by nursing homes and their personnel as a basis for further auditing and other action by this Department.

We have also commenced communications with the GAO, which is currently studying nursing home enforcement in Pennsylvania, Texas, Michigan, and California. The GAO's report is scheduled to be issued in January 1999 and will be considered by the Department of the Auditor General in developing future initiatives in this area.

[82] *See* 31 U.S.C. §§ 3729-3733 (1995). *See also* David R. Hoffman, "The Role of the Federal Government in Ensuring Quality of Care in Long-Term Care Facilities," 6 *Annals of Health Law* 485 (1997) (discussing how the False Claims Act could be used as discussed above).

IV.

Staffing in Nursing Homes

Approximately 100,000 elderly and chronically ill individuals are currently cared for in Pennsylvania nursing homes.[83] The well-being of these individuals depends critically on the employees who staff these facilities. Unfortunately, a lack of qualified applicants, low wages and benefits, and extremely high rates of employee turnover often characterize employment in the nursing home industry.[84] These problems are particularly acute with respect to nurse aides (also referred to as nursing assistants) ("NAs"), who provide as much as 90% of the direct care of nursing home residents.[85]

When nursing homes are unable to recruit *and* retain qualified and committed "front line" staff, the quality of care and the well-being of residents suffer. This fact is overwhelmingly supported by the research literature[86] and was reinforced in our discussions with nursing home employees and long-term care professionals. In light of the critical responsibilities given to NAs, it is more than obvious that inadequate training and staffing prevents a nursing home from meeting the needs of its residents. As one expert has stated, "nursing assistants are the key to quality care."[87]

High turnover among NAs is particularly detrimental to residents because it results in the loss of resident-specific information. NAs acquire specific knowledge concerning the unique, individualized needs of each resident. This can only be acquired over time as a relationship develops between the NA and the resident. When that knowledge is lost, the day-to-day quality of care and safety of residents is adversely affected.[88] Nursing homes also pay a price for high turnover in the form of training and personnel processing costs and lost productivity.[89]

This recruitment/retention crisis is caused by a variety of factors. Low wages and poor working conditions are frequently cited.[90] The day-to-day tasks of NAs can be physically and

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[83] Eaton, *supra* note 11, at 4.

[84] *Id.* at 6.

[85] G. Wunderlich *et al.*, *Nursing Staff in Hospitals and Nursing Homes*, Institute of Medicine, National Academy of Science, 1996, at 156.

[86] *See generally* Steven L. Dawson, *Confronting the Decline of Paraprofessional Care*, presentation at AARP National Conference, "Paraprofessionals on the Front Lines: Improving their Jobs – Improving the Quality of Long Term Care." Sept. 11, 1998. *See also* Wunderlich, *supra* note 85, at 387; Eaton, *supra* note 11, at 29.

[87] Michael Vitez, "Labor of Strength and Empathy," *Phila. Inquirer*, March 17, 1998, at A1, A8 (quoting Prof. Karl Pillemer of Cornell University).

[88] Eaton, *supra* note 11, at 29.

[89] One study estimates that each new hire costs nursing homes on average $4,000. Eaton, *supra* note 11, at 4. *See also* Wunderlich, *supra* note 85, at 159.

[90] *See* Eaton, *supra* note 11, at 9; Wunderlich, *supra* note 85, at 156.

emotionally grueling, particularly as nursing homes become more understaffed and find themselves caring for more chronically ill and cognitively impaired residents. Injury and illness rates among nursing home staff are high.[91] Furthermore, the NA position is perceived to be a "dead-end" job with no opportunity for advancement. Some NAs complain that they receive little recognition or rewards from management, and that there is a general lack of respect and dignity associated with the essential services they perform.

These negative factors are dramatically inconsistent with the indispensable role that NAs play in today's long-term care delivery system. There are no simple solutions to these problems. However, our research and outreach efforts clearly point towards education and training as key steps towards alleviating this recruitment/retention crisis. Left unaddressed, this crisis will only worsen; the U.S. Labor Department estimates that 600,000 more NAs will be needed in the United States within the next seven years.[92]

Actions and Recommendations

The initial and ongoing training for NAs should be increased and expanded to ensure that NAs have all of the requisite skills to meet the day-to-day demands of their jobs. Currently, federal law requires only 75 hours of training and testing for competency for NAs within four months of employment and 12 hours of in-service training each year.[93] This is the ***minimal*** amount of training required by law. In contrast, barbers and cosmetologists in Pennsylvania must have 1250 hours of training approved by their respective licensing boards.[94] The increasing acuity levels of residents, complexity of care, and use of sophisticated medical technology require increased competency and skill levels among nursing home staff.[95]

For example, we have learned that NAs do not receive adequate training to deal with residents who are using ventilators or who are on dialysis. Additional training is also needed in the areas of cognitive impairment and mental health. Sensitivity training, learning how to deal with some residents who are more difficult and sometimes abusive, is also lacking. Enhancements in NA training will make NAs more valuable and more readily able to overcome the industry's critical shortage of qualified NAs. This added value could also lead to higher wages, as nursing homes compete to attract these more qualified front line caregivers. **Therefore, the Ridge Administration should implement minimum training requirements, particularly for in-service training, for NAs that go beyond the minimal amounts required by the federal government.**

However, training in the NA field is not enough. It should be supplemented with the establishment of "career ladders" for NAs. Individuals would then be encouraged to pursue entry-level NA positions, knowing that those positions could lead to other opportunities in the

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[91] Service Employees International Union, *Caring Till It Hurts*, 1997, at 1.
[92] Vitez, *supra* note 87, at A8.
[93] 42 C.F.R. § 483.28 (1997).
[94] *See* 62 P.S. § 553(a) (1996) (barbers); 63 P.S. § 512(a) (1996) (cosmetologists).
[95] Wunderlich, *supra* note 85, at 14.

health care field. Examples of such training include training NAs to become licensed practical nurses, medical record clerks, or respiratory therapists.[96]

Not all NAs, for a variety of reasons, can take advantage of these opportunities. In some cases, the amount of time and effort necessary to become certified or licensed in other health care fields is significant. Also, while building career ladders may help to recruit more NAs into the field initially, it could also perpetuate the high turnover rates. Other states and localities provide training as part of an incremental approach that simultaneously expands an NA's existing portfolio of skills while at the same time opens doors to other fields. This has led to an increase in wages and growth within the NA classification itself. For example, Dane County, Wisconsin's Health Care Partnership, a joint public/private venture, recently announced a program of career ladders that will give NAs the opportunity to become phlebotomists, with a goal towards increased wages and reduced turnover.[97] Elsewhere, nursing homes are training NAs to become NA supervisors, and paying them more in that position.[98] These are just a few examples of emerging strategies that are being used across the country to dispel the notion that the NA position is a "dead end" job.

Of course, the nursing home industry cannot be expected to absorb all of the cost of expanded entry-level and career ladder training for NAs. With that in mind, the Department of the Auditor General has entered into discussions with the Private Industry Council ("PIC") of Scranton and Lackawanna County. The PIC, which is comprised of primarily private sector businesses (including health care providers), works with the Scranton-Lackawanna Human Development Agency, Inc. to determine how federal Job Training Partnership Act ("JTPA") funds should be spent locally. We have learned that some nursing homes in Northeastern Pennsylvania may not be taking full advantage of the JTPA funds to train program-eligible entry-level workers. Some nursing homes who choose not to hire untrained NAs have had difficulty finding qualified applicants, while others are using their own resources to provide training themselves. Our discussions have led to an increased effort to match JTPA training funds with current training needs and an exploration of the use of JTPA and other available training dollars to fund some of the career ladder-type training discussed above. The Department of the Auditor General will explore similar strategies with other PICs located throughout the Commonwealth.

The Department of the Auditor General's PIC initiative is a prime example of how more can be done *with existing resources* to alleviate the recruitment/retention crisis in the NA field. Taxpayers with loved ones in nursing homes deserve to know whether the more than $700 million in existing federal and state appropriations (administered through no less than 36 training programs within 5 different executive departments)[99] are being fully utilized to address

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[96] For example, AFSCME District 1199C in Philadelphia has been providing training and career advancement through its Training and Upgrading Fund, established by AFSCME, the AFL-CIO, and major hospitals and health care employers in the region in 1974.

[97] *See generally* Laura Dresser and Peggi Koenecke, "Training and Skills in the Dane County Health Care Industry: Challenges and Opportunities," University of Wisconsin, Madison, April, 1997.

[98] Eaton, *supra* note 11, at 50.

[99] *See* House of Representatives Subcommittee on Workforce Development Report, Oct. 1, 1997, at 5; Exec. Order No. 1997-7 (Dec. 19, 1997) (establishing the Pennsylvania Human Investment Council).

NA training needs. The Ridge Administration, as part of its ongoing Workforce Development Strategy, should engage in a comprehensive review and assessment of existing job training programs to ensure that there is an adequate public investment in NA training and education.

Another approach to encourage training yet still ensure retention of the trained worker is through the use of service requirements. Workers make a commitment to continue their employment for a pre-determined period of time in return for the employer's training and/or education investment. This is being used with success in the T.E.A.C.H. Early Childhood Project, a scholarship program administered by the Pennsylvania Association of Child Care Agencies to assist child care workers in obtaining degrees in childhood education or child development.

While these training recommendations will go a long way towards improving the quality of care in nursing homes, there is widespread disagreement as to how to solve the one problem consistently raised as the primary cause of NA shortages and high turnover -- poor working conditions. Minimum staffing levels and ratios are routinely raised as a way to ease the burdens on NAs, although there are diverging views on this subject. Currently, Pennsylvania regulations require at least 1 nursing staff member on duty for every 20 residents and at least 2 nursing personnel on duty at all times.[100] Nursing homes are also required to provide a minimum of 2.7 hours of direct patient care for each skilled care patient each day and a minimum of 2.3 hours for each intermediate care patient each day.[101] Last year, the Department of Health published a proposed regulation which would consolidate this minimum standard at 2.3 hours for all patients, thus *reducing* the minimum for skilled patients from 2.7 to 2.3.[102]

While we acknowledge that rigid staffing ratios may not lead in every case to higher quality of care, the current 1:20 ratio and Health's proposed 2.3 hour requirement appear fundamentally inadequate. Approximately 70% of the complaints received by this Department about nursing homes are about understaffing. Therefore, Health should adopt the view of various commenters to its proposal that the minimum hours be set at 2.7 for all patients. Health should also examine staffing issues more closely and, in particular, reduce the 1:20 ratio.

Wages for NAs working in nursing homes are generally lower than those paid to NAs working in hospitals and are more comparable with those offered in the fast food and retail industries.[103] Thus, the industry must consider how to increase wages for NAs working in nursing homes. The Commonwealth must consider how incentives and other state action can be used to facilitate higher wages. The average NA wage is simply not commensurate with the crucial role the NA plays in providing direct care to the elderly and infirm.

There are emerging models and "best practices" across the country pursuant to which the NA is regarded as a valued member of the care team and provided with job stability, adequate training and supervision, mentoring and support, career development and promotion, and competitive wages and benefits. Nursing homes that have instituted practices such as these have

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[100] 28 Pa. Code § 211.12(1)(m).

[101] *Id.* § 211.12(n).

[102] *See* 27 *Pa. Bulletin* 3645-3646 (July 19, 1997).

[103] Eaton, *supra* note 11, at 48.

successfully reduced staff turnover while maintaining a positive bottom line and high quality resident care.[104]

Key stakeholders in the area of long-term care should convene a stakeholder summit to address the recruitment and retention crisis in the NA field. State government cannot provide all of the answers to these complex issues. Thus, the summit would bring together industry representatives, advocates for both NAs and residents, as well as the foremost experts in the field of long-term care to share ideas and offer solutions on best practices for staffing, pay, training, and working conditions. Particular attention should be given to the professional and career development of NAs, as well as the development of recognition and reward systems to acknowledge the critical role these front line health care workers play in our nursing homes. The current lack of any formal certification or licensing program for NAs in Pennsylvania is another issue that should be addressed.

The Department of the Auditor General will continue to monitor the progress of the industry and the Commonwealth in addressing the staffing issues raised in this report.

[104] *Id.* at 36-37.

V.

Cost-Effective Public Funding for Assisted Living

Traditional long-term care has meant primarily *nursing home care.* Moreover, quality issues aside, it has also meant institutionalization that is provider-driven and expensive. One area for improving long-term care in Pennsylvania involves providing and funding care for Pennsylvanians who do not need nursing home care but who do need some assistance with activities of daily living. This type of care can generally be called "assisted living."

There is not a uniform definition of "assisted living" in Pennsylvania.[105] The term is not even defined in any Pennsylvania statute or regulation. However, the Assisted Living Work Group of the Pennsylvania Intra-Governmental Council on Long-Term Care ("ALWG")[106] has developed the following relevant definitions:

An assisted living residence:

- is a residential setting that offers, provides and/or coordinates a combination of personal care services, 24-hour supervision and assistance (scheduled and unscheduled) activities, and/or health-related services;

- has a service program and physical environment designed to minimize the need for tenants to move within or from the setting to accommodate changing needs and preferences;

- has an organizational mission, service programs, and a physical environment designed to maximize residents' dignity, autonomy, privacy, and independence;

[105] In fact, the U.S. General Accounting Office has found that there is no uniform model of assisted living nationwide. *See* U.S. General Accounting Office Report to the Honorable Ron Wyden, U.S. Senate, *Long-Term Care: Consumer Protection and Quality-of-Care Issues in Assisted Living*, May 1997, at 3.

[106] The Pennsylvania Intra-Governmental Council on Long-Term Care ("Council") was created by an Executive Order of the Governor in March 1988 and codified into law in December 1988. *See* Exec. Order No. 1988-3 (March 28, 1988); 62 P.S. § 212 (1996). It is currently chaired by Secretary of Aging Richard Browdie. The Council's Assisted Living Work Group, chaired by Ann G. Torregrossa, Esquire of the Pennsylvania Health Law Project (Philadelphia), was convened in December 1996. It has been charged with defining "assisted living" and developing recommendations regarding regulating, funding, and assuring the quality of assisted living in Pennsylvania. The Assisted Living Work Group has submitted its report to the Council, *see generally Assisted Living Work Group Report to the Pennsylvania Intra-Governmental Council on Long-Term Care*, June 10, 1998 ("*ALWG Report*"), and has established task groups to work on the recommendations presented in the report.

- encourages family and community involvement; and

- will disclose services offered, provided, and/or coordinated and the costs thereof.[107]

Assisted living services [not necessarily provided in an assisted living *residence*]:

are a combination of supportive services, and personalized assistance services designed to respond to individual needs of those who need assistance with activities of daily living and instrumental activities of daily living.[108]

Assisted living, in short, is just what its name implies: it provides *assistance* to people who need it in their activities of daily living. That assistance can be provided in a person's own home or in a residential setting of his or her choice, and it can range from help with dressing, bathing, and eating to arranging temporary medical care when it is needed. One of the most important aspects of assisted living is that it allows older persons to *age in place — i.e.,* to stay where they are as they age, rather than to move from facility to facility as their needs change and/or increase. Furthermore, assisted living can be *less costly* than nursing home care.

It should be apparent that assisted living has a philosophy far different from that of traditional nursing home care. The ALWG has defined the assisted living philosophy as follows:

- Assisted Living starts with a philosophy that encourages and supports individuals to live independently.

- Assisted Living provides individuals privacy and dignity.

- Assisted Living maximizes consumer choice to promote and support an individual's changing needs and preferences. Consumer choice includes individuals' rights to make decisions about their own care and to take responsibility for certain risks that may result from their decision, consistent with the individual's capacity to make decisions and the provider's exercise of prudent risk management through negotiated risk agreements.

- Assisted Living supports living in the residential environment of the consumer's choice.

- Assisted Living promotes integration and mainstreaming.[109]

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[107] *ALWG Report, supra* note 106, at 8-9.
[108] *Id.* at 9.
[109] *Id.* at 8.

Assisted living today is primarily a private-pay industry.[110] The Assisted Living Work Group has concluded that assisted living will not be available to Pennsylvanians of all income levels until public funds can be used to develop or purchase assisted living.[111] To that end, the ALWG recommended the funding of assisted living from a variety of sources:

- expansion of Pennsylvania's Home and Community-Based Services Medicaid waiver
- state supplement to the federal Supplemental Security Income ("SSI") program
- new coverage options under the Medicaid state plan service
- Low Income Housing Tax Credit
- Community Development Block Grants
- Optional County Affordable Housing funds
- Neighborhood Assistance Programs
- Penn Homes Program
- Home Investment Partnership Program
- Federal Home Loan Bank Affordable Housing Program
- federal mortgage insurance programs[112]

Of these proposals, the one with the most immediate promise may be the expansion of one of the Commonwealth's Medicaid waivers to cover assisted living services statewide.[113] Under Section 1915(c) of the Social Security Act,[114] states may request Home and Community-Based Services ("HCBS") waivers in order to offer Medicaid-eligible individuals alternatives to institutionalization in a medical facility. According to the Health Care Financing Administration ("HCFA"), which administers Medicaid, the HCBS waiver program "recognizes that many individuals at risk of being placed in a medical facility can be cared for in their homes and communities, preserving their independence and ties to family and friends *at a cost no higher than*

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[110] Harris Meyer, "The Bottom Line on Assisted Living," *Hospitals & Health Networks*, July 20, 1998, at 22.

[111] *ALWG Report*, *supra* note 106, at 21.

[112] *See generally id.* at 25-28.

[113] *Id.* at 26-27. The Assisted Living Work Group advocates the expansion of the waiver only to those long-term care facilities which have adopted the assisted living philosophy. *See id.* at 26. Furthermore, according to the ALWG, such services should be provided not by the assisted living facility itself, but rather by one of several assisted living service providers offered as choices to the residents. *See id.* at 26.

[114] 42 U.S.C.A. § 1396n(c) (West Supp. 1998).

that of institutional care."[115] The waiver requested is of certain federal requirements which would otherwise impede the development of such alternatives to institutionalization.[116] The waiver is initially approved for three years and may be renewed at five-year intervals.[117]

As of June 1998, twenty-three states use HCBS waivers to fund assisted living, and eight more plan to do so.[118] Pennsylvania currently utilizes HCBS waivers to offer a variety of groups, including the elderly, alternatives to institutionalization.[119] However, Pennsylvania has been ranked as 43rd in the nation (or "below average" as compared to other states) in its progress towards an HCBS system,[120] and as 49th in the nation (or "very low") in its commitment to using the HCBS waiver for persons age 65 and older.[121] **More importantly, Pennsylvania does not use the HCBS waiver to fund any type of or home- or community (facility)-based assisted living. Pennsylvania is one of only fourteen states that do not use any Medicaid funds to pay for assisted living.**[122] This is despite the fact that Pennsylvania is ranked *third* in the number of beds in licensed facilities providing services of a type which may place them under the heading of assisted living.[123]

The HCBS waiver program attempts to keep costs under control by requiring that waiver-seeking states assure HCFA that: (i) participating individuals are in need of institutional-level services[124] and are otherwise Medicaid-eligible,[125] and (ii) the average annual cost of using Medicaid funds to provide such services will not exceed the average annual cost of institutional care to the identical population served by the waiver.[126] In addition, states can set limits on the

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[115] Health Care Financing Administration. *Medicaid Waivers* (last updated on July 22, 1997) <http://www.hcfa.gov/medicaid/obs7.htm> (emphasis added).

[116] *See* 42 U.S.C.A. § 1396n(c)(3) (West Supp. 1998) (explaining that the HCBS waiver may waive requirements relating to statewideness, comparability, and income and resource rules applicable in the community, as listed in 42 U.S.C.A. § 1396a(a) (West Supp. 1998)).

[117] 42 C.F.R. § 441.304(a), (b) (1997).

[118] Robert L. Mollica, *State Assisted Living Policy: 1998*, National Academy for State Health Policy, June 1998, at 44. Five additional states use Medicaid state plan services to fund assisted living. *Id.*

[119] *See ALWG Report*, *supra* note106, at 22, 23.

[120] Richard C. Ladd et al., *State LTC Profiles Report*, National LTC Mentoring Program, University of Minnesota School of Public Health, November 1995, at 34, 85, 139. The report defined progress in terms of how much money has been invested in HCBS and how effectively nursing home utilization and expenditures have been controlled. *Id.* at 1.

[121] *Id.* at 33, 85, 139. Such commitment was measured by Pennsylvania's total HCBS expenditures per person age 65 and older and total HCBS expenditures as a percentage of total long-term care expenditures. *See id.* at 33.

[122] Mollica, *supra* note 118, at 44.

[123] *Id.* at i. As of June 1998, Pennsylvania had 62,241 beds in licensed personal care homes. Only California (123,328) – also with no state funding – and Florida (66,293) have more beds. *Id.* at i, vii. As discussed below, facilities licensed as personal care homes in Pennsylvania provide services which in many instances fit under the heading of assisted living. Conversely, as further explained, facilities presenting themselves as providing assisted living generally are, or should be, licensed as personal care homes under current Pennsylvania law.

[124] 42 U.S.C.A. § 1396n(c)(2)(B)(C) (West Supp. 1998); 42 C.F.R. §§ 441.302(c)(1) (1997).

[125] 42 U.S.C.A. § 1396n(c)(1), (2)(B) (West Supp. 1998); 42 C.F.R. §§ 441.301(b)(1)(iii) (1997); 42 C.F.R. § 441.302(g) (1997).

[126] 42 U.S.C.A. § 1396n(c)(2)(D) (West Supp. 1998).

number of participants in the waiver program.[127] Note that what are being funded through the HCBS waiver are *services*, as Medicaid will not fund room and board.[128] However, Oregon has developed a payment model which combines HCBS waiver dollars (which pays for services) with SSI payments (which pays for food and residential costs) to pay for low-income residents to live in assisted living facilities.[129]

Actions and Recommendations

Pennsylvania should use public funds, including Medicaid dollars, to pay for home- and community (facility)-based assisted living in a fiscally responsible way. The cost controls which are built into the HCBS waiver program attempt to ensure fiscal responsibility. The experiences of the states which use the HCBS waiver to fund assisted living also demonstrate the success of the program.[130] It is important to remember that assisted living as covered by the HCBS waiver will be less costly than nursing home care. This and other evidence suggests that creative use of the HCBS waiver may actually *save* the Commonwealth money over the long-term, even accounting for what some stakeholders refer to as the "woodwork effect" (as in hordes of people "coming out of the woodwork" to take advantage of the program), while at the same time making assisted living available to Pennsylvanians of different income levels.

Ultimately, however, the only way to really study the fiscal impact of expanding the HCBS waiver to cover assisted living is to do it. **Therefore, we recommend that the Ridge Administration apply to HCFA to amend Pennsylvania's current HCBS waiver to include a limited number of "slots" for home- and community (facility)-based assisted living, study the fiscal impact, and then, if feasible, gradually make assisted living available to more and more interested citizens.** Aside from the evidence suggesting such a program will prove to be cost-effective in the long run, this experiment can be conducted in a controlled fashion so as to not cause any material detrimental effect on Commonwealth resources in the short-term.

The Ridge Administration should conduct a thorough study of this and the other funding options proposed by the Assisted Living Work Group, including a rigorous examination of the budgetary implications of each and the extent, if any, of the "woodwork effect." Pennsylvania must not adopt any specific funding proposal without first evaluating whether or not it would create a new entitlement that would unduly drain Commonwealth resources and taxpayer dollars.[131] As indicated above, based on what we know so far, there seems to be less reason for such concern with regard to the HCBS waiver.

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[127] *See id.* § 1396n(c)(9).

[128] 42 C.F.R. § 441.310(a)(2) (1997). However, room and board may be funded in certain very specific situations. *See id.*

[129] Barbara Coleman, *New Directions for State Long-Term Care Systems*, AARP Public Policy Institute, February 1996, at 15.

[130] *See generally* Mollica, *supra* note 118, at 41-62.

[131] We do not mean to suggest that the Assisted Living Work Group was itself insensitive to this concern. To the contrary, the ALWG Report emphasizes its mandate "to not simply develop a new level of care to be funded by state government." *ALWG Report*, *supra* note 106, at 21.

Unfortunately, current Pennsylvania law creates an obstacle to using an amended HCBS waiver to cover assisted living services provided in those assisted living facilities that are licensed as personal care homes. That gap would be caused by the definition of "personal care home" in Pennsylvania law as a facility for four or more adults "who do not require the services in or of a licensed long-term care facility . . . ."[132] In other words, the intersection of state and federal law creates an unfortunate Catch-22: federal law requires individuals to be nursing-home eligible to benefit from the HCBS waiver, but state law declares that residents of personal care homes are inherently *not* nursing-home eligible. The ALWG has proposed solving this problem by making the necessary changes in the law, which would apply to those personal care homes which adopt the assisted living philosophy and which are capable of providing adequate care to higher acuity residents.[133] **The Ridge Administration and the General Assembly should remove any**

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[132] *See* 62 P.S. § 1001 (1996).

[133] *See ALWG Report, supra* note 106, at 26, 31-32. *See also Report from Act 185 Barriers Subcommittee*, undated, at 3. In order to solve the problem noted above, the ALWG has proposed several changes in the law. First, the definition of "long-term care nursing facility" in 35 P.S. § 448.802a should be amended as follows:

> "Long-term care nursing facility." A facility that provides either skilled or intermediate nursing care or both levels of care to two or more patients, who are unrelated to the licensee, for a period exceeding 24 hours. Intermediate care facilities exclusively for the mentally retarded, commonly called ICF/MR, personal care homes, domiciliary care homes, and/or assisted living facilities as defined by statute, shall not be considered long-term care nursing facilities for the purpose of this act ~~and shall be licensed by the Department of Public Welfare~~.

Second, the Department of Health's proposed definition of "skilled or intermediate nursing care" in 27 *Pa. Bulletin* 3620 (July 19, 1997) should be amended as follows:

> *Skilled or intermediate nursing care.*-Professionally supervised nursing care and related medical and other health services provided directly or indirectly by the licensed entity for a period exceeding 24 hours to an individual not in need of hospitalization, but whose needs ~~are above the level of room and board and~~ can only be met in a long term care nursing facility on an inpatient basis because of ~~age,~~ illness, disease, injury, convalescence or physical or mental infirmity. The term includes the provision of inpatient services that are needed on a daily basis by the resident, ordered by and provided under the direction of a physician, and which require the skills of professional personnel, such as registered nurses, licensed practical nurses, physical therapists, occupational therapists, speech pathologists or audiologists.

Finally, the definition of "personal care home" in 62 P.S. § 1001 should be amended as follows:

> "Personal care home" means any premises in which food, shelter and personal assistance or supervision are provided for a period exceeding twenty-four hours for four or more adults who are not relatives of the operator, who do not require the services in ~~or of~~ a licensed long-term care nursing facility but who do require assistance or supervision in such matters as dressing, bathing, diet, financial management, evacuation of a residence in the event of any emergency or medication prescribed for self administration.

obstacles in state law to using the HCBS waiver to fund assisted living services provided in assisted living facilities, so that Pennsylvania can take full advantage of the waiver program.

Finally, as we enable more Pennsylvanians to choose assisted living, we must make an even greater effort to ensure the quality of those facilities. Currently, most assisted living facilities ("ALFs") in Pennsylvania are licensed and regulated as personal care homes ("PCHs").[134] Yet current regulations applicable to PCHs may be inapplicable in the era of assisted living. Therefore, we recommend that the Departments of Health and Public Welfare conduct a thorough examination of the current regulatory program for PCHs in order to determine its effectiveness as applied to ALFs and to evaluate the need for updated regulations dealing with ALFs. A similar review should occur with regard to non-institutional assisted living service providers.

Moreover, some ALFs may be avoiding licensing and regulation altogether through the artifice of labeling themselves as ALFs as distinct from PCHs. Any gap in the current law which facilitates such avoidance should be closed immediately. This could be accomplished by including the term "assisted living facility" in the list of facilities licensed and regulated by the Departments of Health and Public Welfare[135] and in the definition of "personal care home."[136] Such changes in the law are necessary in order to foreclose the possibility, however remote, that a provider might attempt to evade oversight simply by calling a particular facility an "assisted living facility."

The same changes should be made to the definition of "personal care home" in 55 Pa. Code § 2620.3.

[134] *See ALWG Report, supra* note 106, at 38 (majority, not consensus view); 62 P.S. § 1001 (1996) (defining "personal care home"); 55 Pa. Code § 20.1 *et seq.* (1996) (regulating personal care homes); 55 Pa. Code § 2620.1 *et seq.* (1998) (regulating personal care homes).

[135] This would require an amendment to the definition of "facility" in 62 P.S. § 1001 as follows:

> an adult day care center, child day care center, family day care home, boarding home for children, mental health establishment, personal care home, assisted living facility, nursing home, hospital or maternity home, as defined herein, and shall not include those operated by the State or Federal governments or those supervised by the department.

It would also require an amendment to the definition of "private institution" in 71 P.S. § 775.5(3) as follows:

> . . . Mental hospital, institution for the mentally defective, day care center, family day care home, nursing home, nursing home, hospital boarding home, personal care home, assisted living facility, and other similar institution which is operated for profit and which requires a license issued by the department.

[136] This would require the addition of the following sentence to the definition of "personal care home" in 62 P.S. § 1001 and 55 Pa. Code § 2620.3: "The term 'personal care home' shall include all facilities satisfying this definition, regardless of whether or not the facility chooses to call itself an 'assisted living facility.'"

VI.

Study the Effect of Privatization on Quality of Care at County-Owned Nursing Homes[137]

During recent years, a number of Pennsylvania counties have privatized or considered privatizing county-owned nursing homes. This trend has generated concerns in some quarters regarding the effect of privatization on quality of care.[138] Yet it appears that there may be very considerable variation among the privatization models which county nursing homes have followed or considered. Such variations may make it difficult or less than meaningful to attempt to identify a relationship between quality of care and some simple measure of privatization. The relevant variable may be not privatization *per se*, but rather the quality of the implementation of privatization.

For example, we were told by industry representatives that some privatization efforts have involved only the contracting out of certain management positions or functions such as nursing home administrator, director of nursing, and/or fiscal officer. Under these arrangements, all other employees have remained on the counties' payroll and counties have maintained ownership and control of all physical facilities. At the other extreme are counties which have fully divested themselves of all nursing home buildings and assets and no longer employ any nursing home personnel. Moreover, we were advised that even among homes which had more fully privatized with respect to formal ownership of physical assets and employment of personnel, there can still be significant variations. Some of those homes, we were told, were transformed into locally-based, non-profit entities whose policies and operations continued to be governed or influenced, formally or informally, by county officials and other community leaders, and whose staffing did not significantly change following privatization. On the other hand, some of those homes have been taken over by large nursing home chains with no previous local presence, and have then been run without any significant community involvement.

Actions and Recommendations

Because of these variations, it appears that any attempt to identify the effect of privatization on quality of care by means of an audit by the Department of the Auditor General

[137] In the first printing of this report, released on November 17, 1998, Part VI was titled, "Privatization of County-Owned Nursing Homes." We have changed that title for the purpose of the second printing and thereafter in order to preclude any misperception that we are recommending that county-owned nursing homes be privatized. To the contrary, we are recommending that the effect of such privatization on quality of care be *studied*. The corresponding headings in the Table of Contents and Summary of Actions and Recommendations were changed to reflect the revision. No text in the body of the report was changed.

[138] *See, e.g.*, Lopez, *supra* note 5.

may be methodologically complex and ultimately inconclusive. While we do not think that the idea of such an audit should be abandoned altogether, higher priority should be accorded to the development of a Nursing Home Report Card, as discussed in Part I of this report. The primary purpose of such a report card would, of course, be to provide consumers with an easily understandable guide that they could use to compare nursing homes. However, a report card could also be valuable as a preliminary basis for identifying possible trends in quality of care at various nursing homes, including those which have been privatized, and evaluating whether more in-depth research on the issue of privatization is warranted. **Therefore, the Nursing Home Report Card which we are urging the Ridge Administration to develop and publicize should include an item regarding whether a particular facility has privatized and the date and extent of such privatization.** Moreover, privatization history should be included as an item in any report card legislation. This approach will provide a sound basis for further study by the Department of the Auditor General on this issue.

APPENDIX A

Auditor General Robert P. Casey, Jr. and/or members of his Task Force and Working Group on Long-Term Care have met and/or spoke with the following stakeholders:[138]

- Abilities in Motion: William Ross, Advocacy Specialist
- Action Alliance of Senior Citizens of Philadelphia: representatives of Board of Directors and member agencies
- AFSCME, AFL-CIO District 1199C Training and Upgrading Fund: James T. Ryan, Ph.D., Director; Cheryl Feldman, Learning Center Coordinator; Adele Butler, Registered Nurse
- Beechview Senior Community Center forum on long-term care
- Center on the Park in Philadelphia (senior citizen center)
- Genesis ElderCare, Non-Profit Section: Michael Wylie, Vice President
- Heinz Harrisburg Senior Center luncheon
- Keystone Research Center: Stephen Herzenberg, Executive Director
- Keystone Research Center Stakeholders' Forum
- Laurel Hills Nursing Center, Scranton: Ann St. Ledger, Administrator
- Former Governor George Leader
- Brian McDonell, advocate for the disabled and former Director of Special Programs, Office of Vocational Rehabilitation
- Professor Kathryn Pearson of Dickinson College, who conducts research in elder law
- Pennsylvania Association of County Affiliated Homes: Kathy Otto, President; Michael J. Wilt, Executive Director
- Pennsylvania Association of Non-Profit Homes for the Aging: Ronald L. Barth, Executive Director; Veronica Varga, Director of Governmental Affairs
- Pennsylvania Coalition for Citizens with Disabilities: Linda Anthony, Executive Director

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[138] In addition, individual Task Force and Working Group members met and/or spoke informally with many others interested in long-term care issues. We appreciate their time and input as well.

- Pennsylvania Health Care Association: Richard W. Bricker, President; Robert Moran, Executive Vice President; Veronica M. Thompson, Director of Quality Care; Brenda Penyak, Director of Government Relations; Janet Wall, Liaison, Foundation for Excellence in Long-Term Care

- Pennsylvania Health Law Project representatives

- Pennsylvania Protection and Advocacy Group

- Philadelphia Community Legal Services representatives

- Philadelphia Long-Term Care Ombudsman Program representatives

- Former Secretary of Aging Dr. Linda M. Rhodes

- Scranton-Lackawanna Human Development Agency, Inc.: Fred Lettieri, Executive Director; members of Private Industry Council

- Service Employees International Union: David McCann, member of State Council; Thomas DeBreux, President of Local 1199; Tammy Miller, Organizer

- Service Employees International Union Nursing Home Workers Summit

- Southwestern Pennsylvania Partnership for Aging: Carolyn C. Rizza, President; Mary Anne Kelly, Executive Director

- Statewide Independent Living Council: Sandra Weber, Executive Director

- United Church of Christ Homes: Executive Director, Catherine R. Price; Steven Horvath, Director of Operations

- United States Attorney's Office for the Middle District of Pennsylvania: David M. Barasch, U.S. Attorney; Lawrence Selkowitz and Mary Catherine Frye, Assistant U.S. Attorneys

- United States General Accounting Office representatives, including Peter E. Schmidt, Ph.D., Senior Evaluator of Health Services Quality and Public Health Issues; Margaret R. Buddeke

- Representatives from the following organizations attending an advocacy meeting in Erie:

    - Diocese of Erie Catholic Charities

    - Diversified Health Services

- Erie Area Agency on Aging
- Greater Erie Community Action Committee
- John F. Kennedy Community Center
- Lake Erie College of Osteopathic Medicine
- Life Services Management Corporation
- Pleasant Ridge Manor West
- Sisters of St. Joseph
- St. Mary's Home
- Pleasant Ridge Manor

Auditor General Casey has also met with residents, family members, administrators, and staff at the following nursing homes:

- Dauphin Manor, Dauphin County
- Ellen Memorial Health Care Center, Wayne County
- Heartland Health Care Center, Allegheny County
- Highland Manor Nursing Facility, Luzerne County
- Laurel Hill Nursing Home, Lackawanna County
- Laurel Manor, Monroe County
- ManorCare Valley Forge, Montgomery County
- Memorial Hospital, Bradford County
- Naamans Creek Country Manor, Delaware County
- Presbyterian Home, Cambria County
- St. Francis Nursing Home North, Butler County

- Sunnyview Nursing Home, Butler County
- Susquehanna Lutheran Village, Dauphin County
- Valley View Home, Blair County
- Valley View Nursing Center, Lycoming County
- York County Nursing Home, York County

COMMONWEALTH OF PENNSYLVANIA
OFFICE OF THE AUDITOR GENERAL
HARRISBURG, PA 17120-0018

THE AUDITOR GENERAL

APPENDIX B

[DATE]

Mr. John Q. Smith, Administrator
Pennsylvania Nursing Home
100 Keystone Street
Qualityville, Pennsylvania 99999

Dear Mr. Smith:

As a Commonwealth, we must always be concerned about the quality of long-term care. Earlier this year, the Department of the Auditor General released two audits which identified serious deficiencies in the Department of Health's oversight of nursing home care in Pennsylvania. Since the release of those audits, I created an internal Task Force to look more closely at several issues, including whistleblower protections for nursing home employees and other individuals.

Two laws currently provide such protections, the Whistleblower Law, 43 P.S. § 1421 *et seq.* (1991), and the Older Adults Protective Services Act (OAPSA), 35 P.S. § 10225.101 *et seq.* (West Supp. 1998). While the Whistleblower Law focuses on public employees, OAPSA provides whistleblower protection for any individual who reports to the local Area Agency on Aging about abuse of an older adult. OAPSA also protects the victim of the abuse.

We have found that there is a profound lack of awareness about the OAPSA protections by the people whom the law is supposed to protect. This is due in part to the fact that, unlike the Whistleblower Law, OAPSA does not require employers to post notices informing employees of their rights and obligations under the law. Consequently, I have urged the Department of Aging to immediately adopt a regulation requiring such notice.

In the meantime, the Department of the Auditor General has developed the enclosed notice which we are mailing to every long-term care nursing facility in Pennsylvania subject to OAPSA. I ask that you voluntarily post copies of the notice and use other appropriate means to inform your employees, residents, and others of their OAPSA protections and obligations.

Thank you in advance for helping to improve the quality of long-term care in Pennsylvania. If you have any questions about the enclosed notice, please do not hesitate to call our Office of Chief Counsel at (717) 787-4546.

Sincerely,

SAMPLE

Robert P. Casey, Jr.
Auditor General

Department of the Auditor General

NOTICE TO EMPLOYEES, RESIDENTS, VISITORS, AND FAMILY MEMBERS

If you report abuse of an older adult, you may be protected.

There is a law called the Older Adults Protective Services Act that may protect you if you report abuse of an "older adult" to the local Area Agency on Aging. (An "older adult" is defined as a person within the jurisdiction of the Commonwealth of Pennsylvania who is 60 years of age or older.) This law also protects the *victim* of the abuse.

The law basically means that if certain individuals or facilities cause trouble for you or the victim because you know about or have reported such abuse or mistreatment, you can sue that individual or facility. For example, you can't be fired from your job, and nobody can intimidate you or the victim.

Here are the words actually used in the part of the law that talks about how you may be protected:

> **Retaliatory action; penalty.**—Any person making a report or cooperating with the agency, including providing testimony in any administrative or judicial proceeding, and the victim shall be free from any discriminatory, retaliatory or disciplinary action by an employer or by any other person or entity. Any person who violates this subsection is subject to a civil lawsuit by the reporter or the victim wherein the reporter or victim shall recover treble compensatory damages, compensatory and punitive damages or $5,000, whichever is greater.
>
> **Intimidation; penalty.**—Any person, including the victim, with knowledge sufficient to justify making a report or cooperating with the agency, including possibly providing testimony in any administrative or judicial proceeding, shall be free from any intimidation by an employer or by any other person or entity. Any person who violates this subsection is subject to civil lawsuit by the person intimidated or the victim wherein the person intimidated or the victim shall recover treble compensatory damages, compensatory and punitive damages or $5,000, whichever is greater.

Additional notice to employees and administrators: You may be *required* to report to the local Area Agency on Aging (and in some instances, law enforcement officials) about abuse which you have a reasonable cause to suspect. In addition to your protections under the Older Adults Protective Services Act, you may also be subject to protections under a law called the Whistleblower Law.

If you have questions about whether you are protected by this law,
you should contact an attorney.

Mental Health Associations in Pennsylvania

c/o 116 Pine Street, Harrisburg, PA 17101 (717) 236-8110, fax (717) 236-0192

Original: 2077
Mizner
Copies: Harris
Jewett
Markham
Nanorta
Sandusky
Wyatte

Coordinator:
Sue Walther

Participating Associations:

Adams County Mental Health Association

Mental Health Association of Allegheny County

Berks County Mental Health Association

Mental Health Association of Columbia/Montour Counties

Mental Health Association in Cumberland, Dauphin, and Perry Counties, Inc.

Fayette County Mental Health Association

Franklin/Fulton County Mental Health Association

Mental Health Association in Lancaster County

Mental Health Association in Lebanon

Mental Health Association of Mercer County

Mifflin/Juniata Mental Health Association

Mental Health Association in Northeastern Pennsylvania

Mental Health Association of Southeastern Pennsylvania

Mental Health Association in Westmoreland County

Mental Health Association of York County

January 12, 2000

John J. Jewitt
Independent Regulatory Review Commission
333 Market Street, 14th Floor
Harrisburg, PA 17101

Re: Comments on the Older Adult Protective Services Act proposed regulations

Dear Mr. Jewitt:

Because of amendments to the Older Protective Services Act, many highly qualified and caring workers are being fired from their jobs in the human services field and being prohibited from finding similar employment. This has serious consequences not only for them but also for human service providers and for the vulnerable individuals they serve.

We are offering comments in the hope that the Independent Regulatory Review Commission (IRRC) will interpret the Act in a manner consistent with what we believe is the intent of the General Assembly -- to affect vulnerable elderly citizens only.

In 1996, the Older Adults Protective Services Act was amended to require adult care facilities to do a criminal background check on prospective employees and deny employment to persons who have committed any of the listed criminal offenses. It provided an exemption for crimes committed more than 10 years earlier.

But before that law took effect, the General Assembly passed an additional amendment that eliminated the exemption and applied the ban to a job applicant's lifetime. The list of offenses ranges from murder to nonviolent crimes such as retail theft, and includes misdemeanors. The law also calls for the termination of any employee with such a criminal record, regardless of job performance, if the person was hired after June 30, 1997. The law does not allow for the possibility of recovery or rehabilitation following a conviction for one of the included offenses.

In reviewing the legislative history, we find that members of the General Assembly seemed to believe that they were passing legislation that would protect vulnerable elderly citizens who are care-dependent — certainly a laudable goal. However, as it is currently being interpreted, the law has a much broader impact, with serious and apparently unintended consequences for the human services agencies that provide care to people with mental illness, people with mental retardation, people with physical disabilities, and people in substance abuse and recovery programs, as well as to the elderly.

The human services field has consistently and effectively employed recovered and/or rehabilitated individuals, often because their life experiences uniquely qualify them to

understand and support individuals currently in need of services. But in the course of applying this law as it now stands, many human service agencies have lost and will continue to lose many exemplary employees, who are unfairly losing their livelihoods because of mistakes made long ago. Furthermore, many "care-dependent individuals" who have been served well over the years are losing critical connections and support. The amendments also make it difficult to find qualified direct-care workers in an already tight job market.

Many affected employees are being fired or denied employment because of crimes that are more than 10 years old (and sometimes decades old). Many of these valuable employees have specialized training as well as life experiences (in the case of Drug & Alcohol and mental health workers) that qualify them to work in this field. Others have spent years working in care giving, demonstrating their complete rehabilitation by devoting their lives to helping others.

These employees are now restricted to their current jobs, since changing employers within the same field would expose them to the amendment's prohibitions. The law apparently also applies to individuals who are employed in facilities in non-care-giving capacities, such as grounds keeping or kitchen work.

It should be noted that employers in the human services field believe that a criminal background check is an appropriate mechanism for screening prospective employees. The agencies have always utilized this mechanism, along with individual review, as a way of finding quality employees.

The regulatory process is now the only means available to protect individuals who have paid their debt to society, are truly rehabilitated, and have a great deal to offer in the service of people who need care, as well as the hundreds of provider agencies who would like to be able to hire them. It is also the only way to protect the many, many people with disabilities who have and would continue to benefit from their care.

Therefore, we respectfully request that the final regulations reflect the following:

- The Act should be interpreted as narrowly as possible. Specifically, the provisions of this Act should be restricted to programs for persons 60 years and older. Institutions that serve the mentally ill/mentally retarded or substance abusers should be excluded from the definition of "facilities".
- The final regulations should provide for a timely and effective appeals process that would allow case by case review of individual situations for those applicants or employees toward whom OAPSA has been unfairly or incorrectly applied.
- The final OAPSA regulations should eliminate the employment restriction on individuals who have arrests only and no convictions, and are therefore not covered by the Act itself.

Finally, we endorse the comments submitted by the Employment Unit of Community Legal Services (CLS), and ask that you incorporate the restrictions and additions that CLS has requested.

Thank you for this opportunity to comment on the proposed regulations.

Sincerely,

Sue Walther
Policy Coordinator

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF AGING

DATE: December 4, 1997

TO: Area Agency on Aging Directors

Original: 2077
Mizner
Copies: Harris
Jewett
Markham
Nanorta
Sandusky
Wyatte

FROM: Richard Browdie
Secretary

SUBJECT: INTERIM AGING PROGRAM DIRECTIVE TO IMPLEMENT ACT 13-97 MANDATORY REPORTS

The purpose of this interim program directive is to provide guidance to AAAs regarding the implementation of Act 13-97. This act, effective December 5, 1997, requires employees and administrators of nursing homes, personal care homes, domiciliary care homes, home health and adult daily living centers to report abuse of care recipients to AAAs.

The failure of Act 13-97 to define the term "recipients," as used in chapter 7, has created confusion as to the role of the AAA's in responding to reports received for persons under age 60.

The Department is engaged in on-going discussions with representatives of the affected parties in the process of fully implementing the new law and promulgating the necessary policies, procedures and regulations. Since it is not possible to complete all of these tasks prior to the effective date (12/5/97) of the mandatory reporting law, this directive will provide short-term guidance. Revisions to this directive may be made periodically as stakeholder agreements are achieved. When stakeholder agreement has been achieved on all elements, this interim directive will be replaced by program regulations.

Victims Aged 60 or Older

The role of AAAs receiving mandated abuse reports from the noted facilities is clear when the abuse victim is aged sixty or older. The AAA should complete a report of need, assign an investigative priority and conduct an investigation to substantiate or unsubstantiate the individual's need for protective services exactly as set forth in current PS regulations. If the need for protective

services is substantiated, the AAA should follow the current PS regulations concerning the Provision of Services.

Victims Under Age 60

When the mandatory abuse report concerns an individual recipient under the age of sixty, the role of the AAA established by Act 13 is less clear. Until final regulations are promulgated, AAA's shall receive all reports from mandated reporters under the Act and complete the standard report of need form.

As the General Assembly failed to set forth their intent regarding the resolution of cases for persons under age 60, it is necessary to resolve this issue with all affected parties. The Department's position, for purposes of this directive, is that Act 13-97 gives the aging network neither the authority nor responsibility to investigate reports on victims under the age of 60. Therefore our interim guidance is that such reports shall not be categorized for PS due to the fact that the victim is less than sixty years of age. AAAs should note that the report was received in a separate list for persons under 60. The information in the completed report of need shall be forwarded to the state agency, if any, responsible for licensing the facility wherein the abuse report emanated, and transmit a copy of the report to PDA to the attention of James Bubb.

The AAA will not conduct the investigation into allegations of abuse of individuals under age sixty. Such investigations will be conducted by the state agency, if any, which licensed the facility.

An exception to this rule occurs if the under age sixty abuse victim is currently being served by the AAA (e.g. a fifty year old consumer receiving home health services purchased by the AAA and the provider reports suspected abuse to the AAA). Since the AAA is serving this under 60 person, the AAA should make every reasonable effort to resolve the crisis, in spite of the fact that the formal authorities and responsibilities relating to protective services investigations do not apply.

Additional AAA Responsibilities

To Reporters/Administrators

The AAA receiving a mandated abuse report shall advise the reporting employee or administrator that Act 13 contains additional reporting requirements. Those requirements are:

1. Within 48 hours of making the oral report to the AAA, the facility employee or administrator shall make a written report to the AAA. The AAA shall notify the administrator of the reporting facility that a report of abuse has been made with the AAA.

2. An employee or administrator who has reasonable cause to suspect that a recipient is the victim of sexual abuse, serious physical injury or serious bodily injury or that a death is suspicious shall also make an immediate oral report to local law enforcement officials followed by a written report within 48 hours; make an oral report to the Pennsylvania Department of Aging during the current business day or, if the incident occurs after normal business hours, at the opening of the next business day. An employee who makes a report shall immediately notify the administrator following a report to law enforcement officials.

3. The law enforcement officials receiving a mandated report shall notify the administrator that the report has been made with the law enforcement officials.

4. The employee may request the administrator to make, or to assist the employee to make, the oral and written reports to law enforcement required by Act 13-97.

Contents of Report - The written report referenced above shall include, at a minimum, the following information: Name, age and address of the recipient; name and address of the recipient's guardian or next of kin; name and address of the facility; Nature of the alleged offense; any specific comments or observations that are directly related to the alleged incident and the individual involved.

The AAA receiving a mandated abuse report from a facility must notify the administrator of that facility that an abuse report has been received by the AAA.

To PA Department of Aging and Coroner

- Department

1. Within 48 hours of receipt of a written report involving sexual abuse, serious physical injury, serious bodily injury or suspicious death, the agency shall transmit a written report to the Department.

2. The report shall include, at a minimum, the following information: The name and address of the alleged victim; Where the suspected abuse occurred; The age and sex of the alleged perpetra-

tor and victim; The nature and extent of the suspected abuse, including any evidence of prior abuse; The name and relationship of the individual responsible for causing the alleged abuse to the victim, if known, and any evidence of prior abuse by that individual; The source of the report; The individual making the report and where that individual can be reached; The actions taken by the reporting source, including taking of photographs and x-rays, removal of recipient and notification of the coroner; Any other information which the Department may require by regulation.

- Coroner - For a report which concerns the death of a recipient, if there is reasonable cause to suspect that the recipient died as a result of abuse, the agency shall give the oral report and forward a copy of the written report to the appropriate coroner within 24 hours.

Questions concerning this directive and/or implementation of Act 13-97 should be directed to the appropriate Pennsylvania Department of Aging Program Consultant.

RB/JLB/tjn

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF AGING

DATE: January 27, 1999

SUBJECT: Act-13 Mandatory Reporting Procedures

TO: Area Agency on Aging Directors

FROM: R. Dan Ainscough, Director
Bureau of Contracts and Management

The purpose of this memorandum is to provide additional guidance to Area Agencies on Aging (AAAs) and to reinforce the responsibility of facility employees and/or administrators regarding the provisions of the mandatory reporting requirement of Act-13 of 1997. Please forward this memorandum to your Protective Services staff.

Act-13 requires an employee or an administrator of a facility who has reasonable cause to believe that a recipient is a victim of abuse to immediately report the abuse to the AAA. Act-13 also states if an employee or an administrator of a facility has reasonable cause to believe that a recipient is a victim of sexual abuse, serious bodily injury, serious physical injury or that a death is suspicious shall, in addition to contacting the AAA, make an oral report to the Pennsylvania Department of Aging (PDA) and immediately contact local law enforcement officials. Additionally, the Act also requires that within 48 hours of making the oral report, the employee and an administrator shall make a written report to the AAA.

The AAA is also mandated to make a written report to PDA within 48 hours if the abuse is of a sexual, serious physical injury, serious bodily injury or a suspicious death. *The only reports the AAA is to send PDA are those involving sexual abuse, serious bodily injury, serious physical injury or suspicious death.*

In order to clarify the AAAs reporting requirements to PDA and to reinforce the responsibility of the facility to contact PDA, it is requested that the following guidelines be followed.

1) At the time of the initial contact between the facility and the AAA, it is to be determined if the abuse being reported rises to the level of:

a) sexual abuse;

b) serious bodily injury, which is defined as an injury which creates a substantial risk of death or which causes serious permanent disfigurement or protracted loss or impairment of the function of a body member or organ;

c) serious physical injury, which is defined as an injury that causes a person severe pain or significantly impairs a person's physical functioning, either temporarily or permanently; or,

d) suspicious death.

Note: If during the course of the initial oral report, there is cause to suspect or if the report is questionable in regards to sexual abuse, serious bodily, serious physical or suspicious death, it is advised that the report be treated as one of the four above-mentioned abuses.

2) Once the abuse is determined to be sexual, serious bodily injury, serious physical injury or suspicious death, the AAA shall remind the facility of the requirement to contact PDA and local law enforcement. The contact person at PDA is Laura Hemperly and the telephone number is 717-783-6207. Note: The oral report to PDA shall be made during the current business day or, if the incident occurs after normal business hours, at the opening of the next business day.

3) Within 48 hours of the AAA's receipt of the facility's written report involving sexual abuse, serious bodily injury, serious physical injury or suspicious death, the AAA shall transmit a written report to PDA. The report can be mailed or faxed (717-783-6842) to the attention of Laura Hemperly. For more information on the contents of the AAA's report to PDA, please reference Secretary Browdie's program directive dated December 4, 1997, relative to the implementation of Act 13-97.

Questions regarding this memorandum can be directed to my staff member, Debbie Carroll, at 717-783-6207, or your PDA Program Consultant.

Commonwealth of Pennsylvania
Department of Aging

DATE: February 3, 1999

SUBJECT: Act-13 Mandatory Reporting Procedures

TO: Area Agency on Aging Directors

FROM: R. Dan Ainscough, Director
Bureau of Contracts and Management

The purpose of this memorandum is to issue clarification on my previous memorandum dated January 27, 1999. The previous memo dealt solely on the reporting requirements for Act 13 reports on victims age 60 and older.

The reporting requirements for victims under age 60 have not changed, with the exception on who to send the reports of need (RON) to at the Department of Aging. In Secretary Browdie's program directive dated December 4, 1997, the RON's were to be forwarded to James Bubb. The RON's are now to be forwarded to Laura Hemperly. For more information on the reporting requirements for victims under age 60, please reference the previously mentioned program directive.

If you would have any questions regarding this memorandum, please contact Debbie Carroll, at 717-783-6207, or your Program Consultant.

RDA/GD

cc: A. Turowski
C. Boyne
D. McGuire
[redacted]
G. Diamond
L. Hemperly