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

September 28, 2005

Honorable Estelle B. Richman, Secretary
Department of Public Welfare
333 Health and Welfare Building
Harrisburg, PA 17105

Re: Regulation #14-493 (IRRC #2488)
Department of Public Welfare
Nursing Facility Services; Preadmission Requirements and Civil Rights Compliance for
Nursing Facilities

Dear Secretary Richman:

Enclosed are the Commission's comments for consideration when you prepare the final version of this regulation. These comments are not a formal approval or disapproval of the regulation. However, they specify the regulatory review criteria that have not been met.

The comments will be available on our website at www.irc.state.pa.us. If you would like to discuss them, please contact me.

Sincerely,

Kim Kaufman
Executive Director

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Enclosure

cc: Honorable Jake Corman, Chairman, Senate Public Health and Welfare Committee
Honorable Vincent J. Hughes, Minority Chairman, Senate Public Health and Welfare Committee
Honorable George T. Kenney, Jr., Majority Chairman, House Health and Human Services Committee
Honorable Frank L. Oliver, Democratic Chairman, House Health and Human Services Committee

Comments of the Independent Regulatory Review Commission

on

Department of Public Welfare Regulation #14-493 (IRRC #2488)

Nursing Facility Services; Preadmission Requirements and Civil Rights Compliance for Nursing Facilities

September 28, 2005

We submit for your consideration the following comments on the proposed rulemaking published in the July 30, 2005 *Pennsylvania Bulletin*. Our comments are based on criteria in Section 5.2 of the Regulatory Review Act (71 P.S. § 745.5b). Section 5.1(a) of the Regulatory Review Act (71 P.S. § 745.5a(a)) directs the Department of Public Welfare (Department) to respond to all comments received from us or any other source.

1. Section 1187.2. Definitions. – Statutory Authority; Reasonableness; Clarity.

Clinical evaluation

This term refers to the assessment that is required to be conducted before a patient can be admitted to a nursing facility. Commentators have expressed confusion regarding whether this assessment is the same as the OPTIONS assessment that is currently used for Medical Assistance (MA) applicants, or if the Department is establishing a new assessment process. Based on discussions with Department staff, it is our understanding that the existing OPTIONS assessment process will be used. The clarity of the term would be improved if it were defined as the existing OPTIONS assessment process that is currently used to conduct the clinical evaluation.

MA applicant

The definition of this term includes an individual who “Based upon information provided by the individual or person making a nursing facility application on behalf of the individual, is likely to be an MA conversion resident within 12 months from the date of admission.” The regulation provides no direction on the type of information on which this determination must be based. Additionally, as noted in our discussion of Section 1187.31, we question the Department’s statutory authority to impose requirements on nursing homes related to patients who are not MA recipients at the time of admission.

If the Department is able to demonstrate its authority for this approach, the final-form regulation should specify the information that is to be provided by the applicant and the criteria the nursing facilities must use to determine if the applicant is likely to become an MA conversion resident within 12 months from the date of admission.

The Department should also specify whether the facility is responsible for verifying this information, and if so, how that will be accomplished given that an applicant who is not an MA recipient is under no obligation to provide the information to the facility. Finally, the Department should explain how it intends to enforce this provision.

2. Section 1187.22. Ongoing Responsibilities of Nursing Facilities. – Reasonableness; Need; Clarity.

Data collection

Subsection (18)(i) states that the “nursing facility shall **collect** the following data” (Emphasis added.) However, even though the nursing facility requests this information, some of it might not be disclosed by the applicant. Therefore, the word “collect” should be replaced with “request.”

Social security number

Subsection (18)(i)(G) requires the nursing facility to collect the applicant’s Social Security number as part of the civil rights data collection and reporting requirements. The Department has indicated the Social Security number is used to track the individuals as the information is reported to the Department. Given the risk of identity theft related to recording an individual’s Social Security number, the Department should consider eliminating this requirement in favor of another method of tracking individuals.

Additional information

Subsection (18)(iii) provides that if a nursing facility requests additional information from applicants beyond the required information in Paragraphs (A) through (M), the facility is required to maintain a written record of the additional information for four years. Since requests for additional information are at the discretion of the nursing facility, the facility should determine if and for how long it will maintain records of this information. Therefore, this provision is not needed and should be deleted.

Data reporting

Subsection (18)(iv) requires facilities to submit data reports to the Department “in a format and at intervals specified by the Department.” For clarity, the final-form regulation should specify intervals for reporting. It should also identify how and where the facilities can access the report forms.

3. Section 1187.31. Admission or MA Conversion Requirements. – Statutory Authority; Protection of the Public Health, Safety and Welfare; Reasonableness; Economic Impact; Need; Clarity.

This section requires a clinical evaluation to be completed prior to an individual’s admission to a nursing facility, unless certain exceptions apply. This requirement applies to MA recipients and MA applicants, including an individual who may become an MA conversion resident within 12 months from the date of admission. We have four areas of concern.

Pre-admission assessments for future MA recipients

We request the Department provide its statutory authority for requiring clinical assessments of individuals who are not MA recipients at the time of admission. While we understand the Department's desire to plan for future MA recipients, we do not believe it has the authority to require nursing homes to comply with MA assessment requirements for patients who are not currently receiving MA benefits, have not applied for MA benefits and for whom there is no reliable way of ascertaining their future eligibility.

Pre-admission assessments

The Pennsylvania Health Care Association, Pennsylvania Association of County Affiliated Homes, Pennsylvania Association of Nonprofit Homes for the Aging, Colliton Law Associates, Genesis Health Care, Beverly Healthcare and Wellington at Hershey's Mill all noted that the requirement for completion of assessments prior to admission is impractical and will result in substantial delays for individuals awaiting admission to nursing facilities. Department staff has explained that as long as the facility contacts the local area agency on aging (AAA) to advise them that an assessment is needed, the facility can admit the patient without penalty. While this is a reasonable approach, it is not consistent with the preamble or the text of the regulation.

The "Purpose" section of the preamble states that the regulation "requires a nursing facility to have applicants evaluated by the Department or its independent assessor for the need for nursing facility services prior to admission to the facility." Subsection (2)(i) of the regulation states that "The nursing facility shall ensure that the MA applicant and MA recipient who has submitted a nursing facility application to the facility receives a clinical evaluation prior to admission" unless certain exceptions apply. Furthermore, under Subsection (2)(iii), the nursing facility may be subject to civil penalties if the Department "determines that a nursing facility admitted an MA applicant or MA recipient who did not receive a clinical evaluation prior to admission"

If it is the Department's intent to allow admissions without completion of a clinical evaluation as long as the AAA has been notified that a clinical evaluation is necessary, then the preamble and text of the regulation should be revised accordingly. If it is the Department's intent to allow admissions prior to completion of the clinical evaluation only in the limited instances identified in the exceptions in Subsection (2)(ii)(A) through (B), then we request the Department further explain the justification for this approach, including how the resulting delays will impact the health of the individuals involved, hospital costs and access to care.

Referral for clinical evaluation

Subsection (2)(ii)(B) lists the conditions that must be met for a nursing facility to admit an MA applicant prior to receiving a clinical evaluation. Subsection (2)(ii)(B)(I) states that one of those conditions is "the **nursing facility** refers the applicant for a clinical evaluation prior to admission." (Emphasis added.) In its comments, Community Legal Services Elderly Law Project points out that frequently hospitals make the referral for evaluation. Therefore, the language in this subsection should be amended to state that "the facility verifies that the applicant has been referred for a clinical evaluation prior to admission." This language would allow for referral by a party other than the nursing facility.

Civil penalties

As noted above, Subsection (2)(iii) provides that a facility which does not comply with the preadmission clinical evaluation requirements may be subject to civil money penalties, in addition to penalties and sanctions imposed under 55 Pa. Code Chapter 1101. The amount of these penalties may range from \$150 to \$3,000 per day but may not be less than the facility's total charges to the individual for services during the noncompliance period.

We question the Department's statutory authority for imposing these civil penalties. Additionally, we request the Department explain the need for these penalties. Since MA payment would not be made to a provider who failed to comply with the requirements in this regulation, it appears that the additional penalties contained in this subsection are unnecessary.



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Facsimile Cover Sheet

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Date: September 28, 2005
Pages: 6

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Comments: We are submitting the Independent Regulatory Review Commission's comments on the Department of Public Welfare's regulation #14-493 (IRRC #2488). Upon receipt, please sign below and return to me immediately at our fax number 783-2664. We have sent the original through Interdepartmental mail. You should expect delivery in a few days. Thank you.

Accepted by:

Ruth O'Brien

Date:

9/28/05

Pax5