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KIM KAUFMAN, EXECUTIVE DIRECTOR
MARY S. WYATTE, CHIEF COUNSEL
LESLIE A. LEWIS JOHNSON, DEPUTY CHIEF COUNSEL



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

INDEPENDENT REGULATORY REVIEW COMMISSION

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

February 5, 2007

Honorable Ted Erickson, Chairman
Senate Public Health and Welfare Committee
281 Main Capitol
Harrisburg, PA 17120

Re: Regulation #10-182 (IRRC #2577)
Department of Health
Sexual Assault Victim Emergency Services

Dear Senator Erickson:

On December 20, 2006, we delivered our comments on the above-captioned regulation to the Honorable Calvin B. Johnson, M.D., M.P.H., Secretary, Department of Health. Because the General Assembly had adjourned *sine die*, we were precluded from providing you with a copy at that time.

Enclosed is a copy of our comments. If you have any questions, please contact me.

Sincerely,

Kim Kaufman
Executive Director
wbg
Enclosure

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February 5, 2007

Honorable Vincent J. Hughes, Minority Chairman
Senate Public Health and Welfare Committee
543-E Main Capitol
Harrisburg, PA 17120

Re: Regulation #10-182 (IRRC #2577)
Department of Health
Sexual Assault Victim Emergency Services

Dear Senator

On December 20, 2006, we issued comments on the above-captioned regulation and delivered our comments to the Honorable Calvin B. Johnson, M.D., M.P.H., Secretary, Department of Health. Because the General Assembly had adjourned *sine die*, we were precluded from providing you with a copy at that time.

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

February 5, 2007

Honorable Frank Oliver, Majority Chairman
House Health and Human Services Committee
34 East Wing
Harrisburg, PA 17120

Re: Regulation #10-182 (IRRC #2577)
Department of Health
Sexual Assault Victim Emergency Services

Dear Representative Oliver:

On December 20, 2006, we issued comments on the above-captioned regulation and delivered our comments to the Honorable Calvin B. Johnson, M.D., M.P.H., Secretary, Department of Health. Because the General Assembly had adjourned *sine die*, we were precluded from providing you with a copy at that time.

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INDEPENDENT REGULATORY REVIEW COMMISSION

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

February 5, 2007

Honorable George Kenney, Jr., Minority Chairman
House Health and Human Services Committee
108 Ryan Office Building
Harrisburg, PA 17120

Re: Regulation #10-182 (IRRC #2577)
Department of Health
Sexual Assault Victim Emergency Services

Dear Representative Kenney:

On December 20, 2006, we issued comments on the above-captioned regulation and delivered our comments to the Honorable Calvin B. Johnson, M.D., M.P.H., Secretary, Department of Health. Because the General Assembly had adjourned *sine die*, we were precluded from providing you with a copy at that time.

Enclosed is a copy of our comments. If you have any questions, please contact me.

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Comments of the Independent Regulatory Review Commission

on

Department of Health Regulation #10-182 (IRRC #2577)

Sexual Assault Victim Emergency Services

December 20, 2006

We submit for your consideration the following comments on the proposed rulemaking published in the October 21, 2006 *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 Health (Department) to respond to all comments received from us or any other source.

1. Information provided by a hospital to a sexual assault victim. - Protection of the public health, safety and welfare; Reasonableness; Implementation procedures; Clarity.

Several different subsections of the regulation require a hospital to provide information to sexual assault victims. Commentators suggested that the Department either provide or approve the information that is disseminated to victims. The commentators note that this would ensure that the information provides accurate and consistent information to all sexual assault victims. We believe this suggestion would further protect the health, safety and welfare of sexual assault victims and recommend that the Department incorporate it in the final-form regulation. In addition, the informational provisions should be unified into one or two sections of the regulation. Subsections that require hospitals to provide information to sexual assault victims and hospital personnel are:

§ 117.52(a)(2),	§ 117.52 (a)(7),	§ 117.55,
§ 117.52(a)(3),	§ 117.53(a)(1),	§ 117.58(b)(1),
§ 117.52(a)(6), and	§ 117.53(a)(2).	

2. Section 101.4. Definitions. - Consistency with other statutes; Reasonableness; Clarity.

Sexual assault

The intent of this definition is unclear. As set forth in this proposed regulation, the definition of this term reads: "An offense specified in 18 Pa.C.S. Chapter 31, Subchapter B (relating to definition of offenses)." The term "sexual assault" is defined in Section 3124.1 of Subchapter B (18 Pa.C.S.A. §§ 3121-3129). However, Subchapter B includes definitions for several other related terms including "rape, aggravated indecent assault, statutory sexual assault, involuntary deviate sexual intercourse, indecent assault, and indecent exposure." Since the definition of "sexual assault" in this section refers to all of Subchapter B in Title 18, it is not clear whether it is referencing just the definition of "sexual assault" at 18 Pa.C.S.A. § 3124.1, or if the intent is to

include all the other terms defined in Subchapter B. The Department needs to explain its intent and identify the types of crime that will be covered by this proposed regulation.

Sexual assault counselor

This definition identifies a "sexual assault counselor" as someone "who has undergone at least 40 hours of sexual assault training." Should this be described as "training in counseling sexual assault victims"? What is the basis for the minimum of 40 hours of training? How is completion of this training to be certified or documented? In addition, the Pennsylvania State Nurses Association suggested changing the last word of this definition from "assault" to "crimes." Depending on how the Department responds to questions concerning its definition of "sexual assault," it may want to consider adopting this suggestion.

Sexual assault victim or victim

This definition raises a similar question concerning the Department's definition of "sexual assault." Depending on its response to questions on the definition of "sexual assault," the Department may want to consider revising this definition to include a victim of sex crimes rather than "a person who has been sexually assaulted."

3. Section 117.52. Minimum requirements for sexual assault emergency services. - Fiscal impact; Protection of the public health, safety and welfare; Reasonableness; Implementation procedures; Clarity.

Subsection (a) Medical exams, tests and information

This subsection includes a list of things that hospitals are to "promptly" provide to a sexual assault victim. This list of items is primarily tests, examinations, information, and medications related to sexually transmitted diseases (STDs). One commentator, the Ambulance Association of Pennsylvania (AAP), expressed concerns over victims who may also have severe physical injuries. This subsection appears to focus on issues related to STDs and unwanted pregnancies. How are these requirements to be balanced with a need for acute care when a hospital is treating a victim who exhibits severe, perhaps life-threatening, injuries and trauma resulting from a violent physical attack?

Subsection (a)(1) Evidence in a criminal proceeding

Commentators from the Sexual Assault Response Team of Allegheny County and Forensic Graduate Program in the School of Nursing at Duquesne University expressed concerns with staffing in emergency departments in hospitals or medical centers. They recommended that hospitals hire certified Sexual Assault Nurse Examiners (SANE). In addition, one of the commentators indicated that the regulation should set forth specific standards and procedures for the collection of evidence or include the requirement that hospitals supply sexual assault evidence collection kits to emergency rooms. We agree.

Subsection (b) Maintenance of records

This subsection requires hospitals to maintain records pertaining to the results of examinations, tests and services provided to a sexual assault victim. It also requires the hospital to make those

records available to law enforcement officials upon the request and with the consent of the victim. We have several questions.

First, Pennsylvania National Organization for Women, Inc., (PA NOW) noted that victims and SANEs may be reluctant to perform a full risk assessment for fear that the results could be used against the victim in a court of law. PA NOW also commented that the information pertaining to a victim's past sexual history gathered by hospital staff when they provide sexual assault emergency services is confidential under the "Rape Shield Law" (18 Pa.C.S.A. § 3104(a)). Would the information gathered via the risk assessment required by Section 117.54, relating to the prevention of STDs, be included in the records kept by the hospital? Who would have access? Would consent of the victim be required before assessments were released to law enforcement agencies? The policy and procedures for protecting confidentiality and controlling release of this information should be clearly stated in the final-form regulation.

Second, how long will a hospital have to maintain the records? The final-form regulation should include a time frame for keeping the records.

4. Section 117.53. Emergency contraception. - Need; Clarity.

Subsection (b) allows hospitals to require a sexual assault victim to submit to a pregnancy test before providing emergency contraception. PA NOW and the Pennsylvania American Civil Liberties Union (PA ACLU) questioned the reason for this provision. They noted that because emergency contraception has no effect on eliminating an existing pregnancy, the test is not needed. In the Preamble to this proposed rulemaking, the Department confirms that "emergency contraception will not have an effect on eliminating an already existing pregnancy." The Department should explain whether emergency contraception is contraindicated in cases where there is an existing pregnancy.

5. Section 117.54. Prevention of sexually transmitted diseases. - Fiscal impact; Protection of public health; Reasonableness.

Subsections (b)(1) and (d) reference risk assessment standards of the United States Department of Health and Human Services Center for Disease Control and Prevention. The final-form regulation should include a more specific citation to these standards.

Subsection (d) requires a hospital to provide a victim with postexposure prophylactic treatment when requested by that victim. PA NOW has noted that hospitals typically provide a victim with a three to five day supply of the medication, but the entire course of treatment may include a month's worth of medication. Is a hospital required to supply a victim with the necessary medication for the entire postexposure prophylactic treatment? This issue should be addressed in the final-form regulation.

6. Section 117.56. Information regarding payment for sexual assault emergency services. - Fiscal impact; Need; Reasonableness.

PA NOW noted that Pennsylvania law at 42 Pa.C.S.A. § 1726.1 states that a victim may not be charged for medications prescribed during an examination related to any crime under 18 Pa.C.S.A. Chapter 31 (relating to sexual offenses). In addition, the Hospital and Healthsystem Association of Pennsylvania (HAP) noted that this section is not necessary because

hospitals already provide this information and suggested that financial resources information should be included in the informational materials developed and provided by the Department.

The Department should strive to insure that victims and health care facilities are not unduly burdened by the financial costs that result from these crimes. The Department should explain how costs for emergency services and medications are covered. The regulation should require that victims receive comprehensive information on their financial responsibility and all resources available to them for covering the costs of their treatment.

7. Section 117.57. Religious and moral exemptions. - Fiscal impact; Protection of public health, safety and welfare; Consistency with other statutes; Reasonableness; Implementation procedures; Clarity.

This section gives an exemption to a hospital that does not provide emergency contraception because this service is contrary to its stated religious and moral beliefs. Under Paragraph (1), if a hospital does not provide emergency contraception, it must provide notice to the victim that the service is not provided because it is contrary to its stated beliefs. Paragraph (2) requires the hospital to arrange, upon the request of the victim, "for the immediate transfer of the victim, at no cost, to a hospital in this Commonwealth in close proximity that does provide those services." We have eight concerns and questions

First, this section presents two distinct legal issues. The Pennsylvania Catholic Conference and Pennsylvania Catholic Health Association (PCC/PCHA) believe that the transportation requirement violates Pennsylvania's Religious Freedom Protection Act (71 P.S. §2407), the Abortion Control Act (18 Pa.C.S.A § 3213) and the Health Care Facilities Act (35 P.S. § 448.902(a)) because it imposes requirements that would violate its beliefs. In contrast, PA NOW believes this section violates Pennsylvania's Human Relations Act (43 P.S. §§ 951-963) because it discriminates against women. In the Preamble to the final-form regulation, the Department should explain how this section is consistent with Pennsylvania law.

Second, as we noted above, Section 117.52 does not address the prompt assessment of other physical injuries that may be associated with a sexual assault. This assessment is even more critical when the victim may be transferred to another facility. For example, the AAP and PA ACLU question what will be done with a victim that requests or is in need of sexual assault emergency services but has other injuries that require immediate attention. The Department should explain how a victim's request for sexual assault emergency services will be met by a hospital that does not provide those services if the victim has other injuries that require immediate attention.

Third, the phrase "religious or moral beliefs" is not defined. What criteria will the Department use to determine if a particular religious or moral belief qualifies a hospital for the exemption?

Fourth, what sort of documentation must a hospital provide to prove that it qualifies for the exemption? Must the stated beliefs make reference to a hospital's views on providing sexual assault emergency services and emergency contraception? This should be specified in the final-form regulation.

Fifth, under Paragraph (2), the AAP questioned if it is the Department's intent to mandate transfer by ambulance to another hospital and if so, what is the Department's statutory authority for this provision. This should also be explained in the Preamble to the final-form regulation.

Sixth, commentators representing ambulances and hospitals question who is ultimately responsible for paying for the transfer of the victim. We share this concern and ask the Department to quantify the actual costs of transferring the victims to a hospital that provides the necessary services. We have a similar concern with Section 117.58(b)(1), which also relates to the transfer of victims.

Seventh, we question the phrase "close proximity." Both the Department of Aging and PA ACLU believe it would benefit the victim more if that person was transferred to the "closest" hospital that provides the necessary services. We agree and note that the "closest" hospital should also have the availability to serve the victim. We have a similar concern with Section 117.58 (b)(2).

Eighth, we agree with the Department of Aging that hospitals be required to prominently display public notices to inform the public of the type of emergency services provided to sexual assault victims.

8. Section 117.58. Hospitals not providing sexual assault emergency services. - Reasonableness; Clarity.

This section imposes notification requirements on hospitals that elect not to provide sexual assault emergency services to victims.

The delineation of different types of emergency services is unclear. The final-form regulation should clarify that this section pertains to two types of hospitals. First, it applies to hospitals that do not provide *any* sexual assault emergency services. Second, it applies to hospitals that provide sexual assault emergency services but do not provide emergency contraception.

Subsection (a) pertains to notification to the Department. It states that the Department will compile a list of hospitals that have chosen not to provide sexual assault emergency services and publish this list in the *Pennsylvania Bulletin*. However, this subsection does not state when or how often the Department will publish this list. We recommend that the list be published annually and updated whenever a hospital decides to not provide sexual assault emergency services. This would provide the regulated community with necessary information to make informed decisions.

Under Subsection (a)(3), hospitals are required to notify ambulance and emergency care services that the hospital will not provide sexual assault emergency services. When a victim is being transported to a hospital by an ambulance or emergency medical services (EMS) vehicle for initial treatment after the assault, should the regulation require the ambulance or EMS personnel to inform the victim of their hospital choices and whether emergency contraception is available at the hospitals? This provision could allow the victim to avoid another ride to a different hospital if they want access to emergency contraception.

9. General - Consistency with other existing regulations; Implementation procedures; Need; Clarity; Duplication.

Sexual assault, rape and other similar crimes

This proposed regulation introduces the term "sexual assault" into 28 Pa. Code Chapters 101 and 117. However, the existing regulations in Chapter 117 already contain the related term "rape" which is included in the definitions set forth in 18 Pa.C.S.A. Chapter 31, Subchapter B (18 Pa.C.S.A. §§ 3121-3129). The term "rape" is used in the Department's existing regulations at 28 Pa. Code §§ 117.15 and 117.41. It also appears in 28 Pa. Code §§ 29.38, 51.3, 709.43 and 711.42.

The Department should review its use of the terms "rape" and "sexual assault" in this proposed regulation and its existing regulations to be sure that these terms are used consistently and do not cause confusion. For example, Section 117.41(b)(9) requires that hospitals do the following:

Plan for communication with police, local or State health or welfare authorities as appropriate, regarding accident victims and patients whose condition or its cause is reportable, for example, persons having contagious diseases or victims of suspected criminal acts such as rape or gunshot wounds, see 18 Pa.C.S.A. § 5106 (relating to failure to report injuries by firearm or criminal act), and child abuse, see 11 P. S. §§ 2201-2224. (Emphasis added.)

At a minimum, the Department needs to explain how the implementation of the proposed regulation will interface with its existing regulations. In addition, the Department should consider revising its regulations to bring greater consistency to the use of the terms "rape" and "sexual-assault." Revisions for consistency in Chapter 117 could be accomplished via this rulemaking. Provisions in other chapters could be updated in a separate rulemaking.

Section 117.51. Principle. - Need; Clarity.

The need and purpose of this section is not apparent. It does not provide any information or discussion of policy or requirements that is not already set forth in the other substantive provisions of the proposed regulation. This section reads more as a "table of contents" rather than a regulatory provision. It is duplicative of other sections in the proposed regulation and it should be deleted.

Purpose of the regulation - Clarity.

Both the Regulatory Analysis Form and the Preamble note the number of rapes and sexual assaults that have occurred in Pennsylvania. However, the Department did not quantify the number of victims that did not receive appropriate and necessary emergency services and/or emergency contraception, or incidents where there were problems with communication between hospitals and law enforcement officials or other authorities. The Department should provide more background information on these areas when it submits the final-form regulation.