

Disability Rights Network of Pennsylvania

A merger of PP&A and the
Disabilities Law Project

Advancing the rights of people with disabilities

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VIA FAX AND U.S. MAIL

September 10, 2007

Ms. Janice Staloski
Director
Bureau of Community Program Licensure and Certification
Department of Health
132 Kline Plaza
Suite A
Harrisburg, PA 17104-1579

Dear Ms. Staloski:

Enclosed please find the Disability Rights Network of Pennsylvania's comments regarding the Department of Health's proposed rulemaking, 28 Pa. Code Chapter 611, Home Care Agencies and Home Care Registries.

Thank you for consideration of our comments.

Sincerely,



Pamela K. Auer
Team Leader, Protection and Advocacy for Individual Rights

Chava Kintisch, Esquire

Enclosure

Cc: Fiona E. Wilmarth, Director of Regulatory Review, IRRC
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INDEPENDENT REGULATORY
REVIEW COMMISSION

**Department Of Health Proposed Rulemaking
Home Care Agencies and Home Care Registries
28 Pa. Code Ch. 611**

**Comments by the Disability Rights Network of Pennsylvania (DRN)
September 10, 2007**

DRN Comment: Because home care agencies and home care registries were added to the Health Care Facilities Act (Act), 35 P.S. §§ 448.101 *et seq.*, as entities subject to the Department's jurisdiction, the Act's implementing regulations at 28 Pa. Code Chapter 51, including § 51.2 (Licensed facilities), must be amended to include home care agencies and home care registries. This is especially important to ensure that the civil rights provisions of 28 Pa. Code §§ 51.11 – 51.13 apply to home care agencies and home care registries.

CHAPTER 611. HOME CARE AGENCIES AND HOME CARE REGISTRIES

GENERAL

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§ 611.2. Affected home care agencies and home care registries.

(a) This subpart applies to home care agencies, home care registries and to entities that meet both definitions, profit or nonprofit, operated in this Commonwealth, as defined in this subpart.

DRN Comment: Act 69, 35 P.S. § 448.903a(1), states: "Nothing in [the Health Care Facilities Act] shall apply to . . . [a] private contract or arrangement entered into by a consumer and caregiver, provided that the caregiver was not supplied, arranged, scheduled or referred to the consumer by a home care agency or a home care registry." We support the language in proposed § 611.4 defining financial management services. We also support the language in proposed § 611.4 defining home care agency and home care registry to exempt from licensure an organization or business entity that only provides financial management services. However, the regulations fail to state affirmatively that a consumer who employs his or her own direct care worker (i.e., uses the consumer-employer model) is exempt from licensure. Proposed § 611.2(a) must follow Act 69 to state positively that the consumer-employer and consumer-employer model are exempt from licensure requirements.

...

§ 611.4. Definitions.

DRN Comment:

- ▶ Activities of daily living and instrumental activities of daily living, which are referenced in proposed § 611.55(b), must be defined according to Act 69, 35 P.S. § 448.802a.
- ▶ Consumer control, consumer direction, disability cultural competency, and the independent living philosophy must be defined. These definitions must be written and approved by persons with disabilities before final-form publication. Please refer to our comments to proposed § 611.55(d)(2).

...

LICENSURE

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§ 611.14. Issuance of license.

(a) The Department will issue a license to operate a home care agency or home care registry, or both, after the Department determines the applicant is a responsible person and an inspection conducted by the Department indicates that the applicant is in substantial compliance with this chapter.

DRN Comment:

- ▶ Act 69, 35 P.S. § 448.806(d.1)(4), requires that “[p]rior to licensing [emphasis added] a home care agency or a home care registry, the department shall determine that all individuals employed by an agency or referred by a registry, staff working within each entity and the owner or owners have obtained criminal history record information, in accordance with the requirements of section 503 of the [Older Adults Protective Services Act]” (and documentation is maintained on file) and, if providing services to persons under 18 years of age, have obtained clearance from the Commonwealth child abuse registry (and documentation is maintained on file). Proposed § 611.52 and proposed § 611.53 require criminal and child abuse background checks before hiring or referring direct care workers and child abuse background checks for office staff. However, proposed § 611.52 and proposed § 611.53 are not sufficient to comply entirely with Act 69. Proposed § 611.14(a) must follow Act 69 and also require criminal and child abuse background checks for direct care workers, staff working within each entity, and owner(s) before a license will be issued.
- ▶ Per the Health Care Facilities Act (Act), 35 P.S. § 448.808(a)(4), proposed § 611.14(a) must require the applicant to be in substantial compliance not only with Chapter 611 but all rules and regulations adopted by the Department pursuant to the Act.

...

§ 611.17. Responsibility of owners of home care agencies and home care registries.

...

(b) The owner, administrator or designee shall immediately report to the Department any catastrophic incident, such as a fire or flood, or any incident that may cause interruption or cessation of the delivery of services, or another interruption of services which would affect the health and safety of the consumers of services.

DRN Comment: Proposed § 611.17(b) must require the owner, administrator, or designee to send a written follow-up report to the Department as soon as possible for documentation purposes. Consumer welfare must be included in addition to health and safety; welfare is included in proposed § 611.17(a).

...

INSPECTION AND SURVEY ACTIVITIES

§ 611.31. Inspections.

...

(c) Inspections to investigate complaints or other allegation of regulatory deficiency will be prioritized in accordance with the level of perceived threat to the health and welfare of consumers.

DRN Comment: Consumer safety must be added to proposed § 611.31(c) as a priority; safety is included in proposed § 611.17(a).

...

§ 611.32. Retention of records.

The documentation required by this chapter and documentation with respect to establishing that the home care agency or home care registry is in compliance with applicable Federal, State and local requirements shall be retained by the home care agency or home care registry onsite. Documentation shall be retained for 4 years after termination of services to a consumer unless otherwise required by applicable Federal and State laws and regulations. Personnel records required under § 611.51 (relating to hiring or rostering of direct care workers) shall be retained for at least 4 years following termination of employment or roster status of a direct care worker. Documentation and records shall be retained even if the home care agency or home care registry discontinues operation. Documentation includes paper and electronic information.

DRN Comment: Proposed § 611.32 must refer to § 611.51(b) (Personnel files), not only § 611.51, to avoid confusion.

§ 611.33. Statement of deficiencies and plan of correction.

(a) After completion of the inspection, the Department will evaluate all relevant information gathered during the inspection and formulate its compliance findings and determinations. In the event that the Department makes a determination of noncompliance with any provision of this chapter, the Department will issue to the home care agency or home care registry a statement of deficiencies.

DRN Comment: Proposed § 611.33(a) must be revised to reflect the Health Care Facilities Act (Act) as follows. Per 35 P.S. § 448.814(a), the Department must issue a statement of deficiencies if, upon not only inspection but also upon investigation or complaint, it finds noncompliance with Chapter 8 of the Act (Licensing of Health Care Facilities) or regulations adopted by the Department pursuant to Chapter 8 or federal law, not only violations of Chapter 611. Per 35 P.S. § 448.814(a), the notice must require the facility to take action or submit a plan of correction that will bring the facility into compliance within a specified period of time.

(b) Upon receipt of a statement of deficiencies, the home care agency or home care registry shall provide the Department, within the time frame set by the Department, a plan of correction. The plan of correction must address the deficiencies cited in the statement of deficiencies and identify the corrective action to be taken, the individuals responsible for the corrective action and the time frames within which the corrective action will be accomplished. The plan of correction shall be attested to by the individual given signature authority by the home care agency or home care registry.

DRN Comment:

► Per the Health Care Facilities Act, 35 P.S. § 448.814(a), proposed § 611.33(b) must require the home care agency or home care registry to take immediate corrective action when feasible after receiving a statement of deficiencies, rather than submitting a plan of correction. Like the plan of correction, the home care agency or home care registry must provide written documentation of this immediate corrective action to the Department, which should be made available under proposed § 611.33(c).

► Proposed § 611.33(b) must state, per the Health Care Facilities Act, 35 P.S. § 448.814(a), that a plan of correction must be submitted within 30 days of receipt of the written notice or sooner if the Department so directs, rather than "within the time frame set by the Department."

(c) Copies of the statement of deficiencies and plan of correction will be readily available on the Department's website for the purpose of public inspection. The agency or registry also shall make available for inspection and examination by any person a copy of the most recent statement of deficiencies and plan of correction.

DRN Comment: We support proposed § 611.33(c), but this paragraph must include a statement that written documentation of an immediate corrective action will be readily available on the Department's website and will be made available for inspection and examination by any person. Please refer to our comment to proposed § 611.33(b).

SANCTIONS AND CORRECTIVE ACTIONS

...

§ 611.42. Reasons for sanctions.

(a) The Department may refuse to renew a license, may suspend, revoke or limit a license of a home care agency or home care registry for any of the following reasons:

...

(9) Serious violation of the laws relating to medical assistance or Medicare reimbursement.

DRN Comment: To be clear, proposed § 611.42(a)(9) should say "Medical Assistance (Medicaid) or Medicare."

...

GOVERNANCE AND MANAGEMENT

§ 611.51. Hiring or rostering of direct care workers.

...

(b) *Personnel files.* Personnel files for direct care workers employed or rostered must include documentation of the date of the face-to-face interview with the individual and of references obtained. Personnel files also must include the other information as required under § 611.52, § 611.53, if applicable, and §§ 611.55 and 611.56 (relating to training requirements; and health evaluations).

DRN Comment:

► Proposed § 611.51(b) must require that personnel files include all documentation required under proposed § 611.54 (Provisional hiring). Proposed § 611.51(b) must require the home care agency or home care registry to maintain in the personnel file any other documentation required under the Health Care Facilities Act or any of its implementing regulations or rules, to ensure that any other existing or future documentation requirements will be maintained in the personnel file.

► Proposed § 611.51(b) must state that all personnel files must be kept in accordance with proposed § 611.32 (Retention of records), which references § 611.51.

§ 611.52. Criminal background checks.

(a) *General rule.* The home care agency or home care registry shall require each applicant for employment or referral to submit a criminal history report obtained at the time of application or within 1 year immediately preceding the date of application.

DRN Comment: Please refer to our comment to proposed § 611.14(a) regarding Act 69's requirement of criminal and child abuse background checks for direct care workers, staff working within each entity, and owners as a licensing prerequisite.

...

(j) *Individuals currently employed or rostered.* A person who is employed by or rostered by a home care agency or home care registry as of _____ (*Editor's Note:* The blank refers to the effective date of adoption of this chapter.) shall obtain and submit a State Police criminal history record or Department of Aging letter of determination, as applicable, to the home care agency or home care registry by _____ (*Editor's Note:* The blank refers to a date 120 days after the effective date of adoption of this chapter.). This subsection does not apply if the home care agency or home care registry obtained a criminal history report meeting the requirements of this subsection when the individual was hired or rostered and a copy of the report is included in the individual's personnel file.

DRN Comment:

► Proposed § 611.52(j) must clarify that paragraph (f), which precedes it, is applicable and that the criminal background check information must be maintained in the personnel file of the individual currently employed or rostered.

► To be consistent with proposed § 611.52(e) (Prohibition), proposed § 611.52(j) must state that a person currently employed or rostered whose State Police criminal history record reveals a prohibited conviction listed in 6 Pa. Code § 15.143 (relating to facility responsibilities) or whose Department of Aging letter of determination states that the individual is not eligible for hire or roster must be immediately terminated by the home care agency or immediately removed from the home care registry's roster.

► The Older Adults Protective Services Act, 35 P.S. § 10225.508(1), states that "[a]n individual who, on the effective date of this chapter, has continuously for a period of one year been an employee of the same facility shall be exempt from [the criminal background check] as a condition of continued employment." Therefore, proposed § 611.52(j) must exempt from the criminal background check requirement direct care workers who have been employed or rostered for the same home care agency or home care registry for a continuous period of one year as of the effective date of the regulations.

§ 611.53. Child abuse clearance.

(a) *General rule.* A home care agency or home care registry that serves persons under 18 years of age shall require each applicant for employment or referral as a direct care worker, and each member of the agency or registry office staff to request a ChildLine verification regarding whether the applicant or member is named in the Statewide Central Register as the perpetrator of a founded or indicated report of child abuse as defined in 55 Pa. Code § 3490.4 (relating to definitions).

DRN Comment: Please refer to our comment to § 611.14(a) regarding Act 69's requirement of criminal and child abuse background checks for direct care workers, staff working within each entity, and owners as a licensing prerequisite.

(b) *Prohibition.* A home care agency or home care registry may not employ or roster an individual when ChildLine has verified that the applicant is named in the Statewide Central Register as the perpetrator of a founded or indicated report of child abuse.

DRN Comment: To avoid confusion, proposed § 611.53(a) should clarify that the prohibition also applies to each member of the agency or registry office staff .

...

(d) *Individuals currently employed or rostered.* A person who is employed by or rostered by the home care agency or home care registry as of _____ (*Editor's Note:* The blank refers to the effective date of adoption of this chapter.) shall obtain and submit a ChildLine verification to the home care agency or home care registry by _____ (*Editor's Note:* The blank refers to a date 120 days after the effective date of adoption of this chapter.). This subsection does not apply if the home care agency or home care registry obtained a ChildLine verification when the individual was hired or rostered and a copy of the verification is included in the individual's personnel file.

DRN Comment:

► Proposed § 611.53(d) must clarify that it applies to each member of the agency or registry office staff in addition to direct care workers.

► Proposed § 611.53(d) must clarify that paragraph (c), which precedes it, is applicable and that the child abuse clearance documentation must be maintained in the personnel file of the individual currently employed or rostered (direct care worker or office staff member).

► To be consistent with proposed § 611.53(b) (Prohibition), proposed § 611.53(d) must clarify that a person currently employed or rostered, including an office staff member, who is named in the Statewide Central Register as the perpetrator of a founded or indicated report of child abuse as defined in 55 Pa. Code § 3490.4 (relating to definitions) must be immediately terminated by the home care agency or immediately removed from the home care registry's roster.

§ 611.54. Provisional hiring.

(a) *General rule.* The home care agency or home care registry may hire an applicant for employment or referral on a provisional basis, pending receipt of a criminal history report or a ChildLine verification, as applicable, if the following conditions are met:

...

(6) The period of provisional hire may not exceed 120 days.

DRN Comment: The Older Adults Protective Services Act, 35 P.S. § 10225.506, only allows provisional hiring for a single period not to exceed 30 days or, for applicants obtaining a federal criminal history, a single period of 90 days. Therefore, proposed § 611.54(a)(6) must limit the period of provisional hire to a single period of 30 days, or a single period of 90 days if the applicant is obtaining a federal criminal history.

(b) *Termination.* If the information obtained from the criminal history report or ChildLine verification, or both, reveals that the individual is disqualified from employment or referral under § 611.52 (relating to criminal background checks) or under § 611.53 (relating to child abuse clearance), the individual shall be terminated by the home care agency or removed from the home care registry's roster immediately. If the individual fails to provide the ChildLine verification or criminal history report, or both, within the 120-day period permitted for provisional hire, the individual shall be terminated by the home care agency or removed from the home care registry's roster.

DRN Comment:

- ▶ "Immediately" must be added to the last sentence of proposed § 611.54(b) to be consistent with the first sentence of this paragraph.
- ▶ Per the Older Adults Protective Services Act, 35 P.S. § 10225.506, the "120-day period" in the last sentence of proposed § 611.54(b) must be changed to a single period of 30 days, or a single period of 90 days if the applicant is obtaining a federal criminal history.

§ 611.55. Training requirements.

(a) Prior to assigning or referring a direct care worker to provide services to a consumer, the home care agency or home care registry shall ensure that the direct care worker has demonstrated competency in accordance with subsection (b) or has satisfied the training requirements in subsection (c), as applicable.

DRN Comment:

- ▶ Act 69, 35 P.S. § 448.806(d.1)(1), applies the training requirements to "[a]n individual with direct consumer contact employed by the home care agency and an individual referred to a consumer by a home care registry." Sometimes, an owner or office staff member provides direct care, for example, when the usual direct care worker is not

available due to an emergency. Therefore, proposed § 611.55(a) must state that if an owner, administrator, or office staff member of a home care agency or home care registry is going to have direct consumer contact, then he or she must also satisfy the following training requirements prior to providing direct care services to consumers.

...

(c) A direct care worker, including a direct care worker providing only assistance with activities of daily living and instrumental activities of daily living, will satisfy the training requirements if the direct care worker has a valid nurse's license or has successfully completed one of the following:

...

(1) The home health aide training program described in 42 CFR 484.36 (relating to the condition of participation: Home health aide services).

DRN Comment: Per Act 69, 35 P.S. § 448.806(d.1)(1)(iii), this home health aid training requirement must be approved by the Department; proposed § 611.55(c)(1) must be revised accordingly. This is especially important to ensure that any home health aide having direct consumer contact or referred by a home care registry is trained in all subject areas in proposed § 611.55(d), including consumer control and the independent living philosophy.

(2) The nurse aid certification and training program approved by the Department of Education.

DRN Comment: Per Act 69, 35 P.S. § 448.806(d.1)(1)(ii), a nurse aid training program approved by the Department of Health (not the Department of Education) meets the training requirement; proposed § 611.55(c)(2) must be revised accordingly. This is especially important to ensure that any nurse aid having direct consumer contact or referred by a home care registry is trained in all subject areas in proposed § 611.55(d), including consumer control and the independent living philosophy.

...

(3) Other training programs, approved by the Department, notice of which will be published in the *Pennsylvania Bulletin* and posted on the Department's website.

DRN Comment: The Health Care Facilities Act, 35 P.S. § 448.806(b), states that "[i]n developing rules and regulations for licensure the department shall take into consideration Federal certification standards and the standards of other third party payors for health care services and such nationally recognized accrediting agencies as the department may find appropriate." Because the Department of Public Welfare has already established training and competency programs in accordance with assurances made in CMS-approved Medicaid Home and Community Based Waivers, proposed

§ 611.55(c)(3) must also state that such CMS-approved Medicaid Home and Community Based Waiver training or competency programs are approved as satisfying the training requirements for direct care workers and other staff/owners that have direct consumer contact. Proposed § 611.55(c)(3) must also state that if such training or competency standards are changed with CMS approval, the Department (of Health) will approve all subsequent changes.

(d) To be eligible for approval by the Department, a competency examination or other training program must address, at a minimum, each of the following subject areas:

...

(2) Consumer control and the independent living philosophy.

DRN Comment: Act 69, 35 P.S. § 448.809a(c), states that “[i]n developing regulations pertaining to section 806(d.1.) [(“Home care agency and home care registry licensure requirements”)], the department shall take into consideration the preferences and philosophies of persons with physical disabilities who receive services through home-based and community-based Medicaid waivers.” We support proposed § 611.55(d)(2) requiring that consumer control and the independent living philosophy be addressed for a competency examination or other training program to be eligible for Department approval. Consumer direction and disability cultural competency must be added to proposed § 611.55(d)(2) because an individual with direct consumer contact or referred by a home care registry must also have understanding of these subject areas to provide effective and appropriate services. Consumer control, consumer direction, disability cultural competency, and the independent living philosophy must be defined in proposed § 611.4, and these definitions must be written and approved by persons with disabilities before final-form publication.

...

(3) Recognizing changes in the consumer that need to be addressed.

DRN Comment: Consumer control and the independent living philosophy must not only be a separate subject area for training but must be incorporated into every other subject area so that those having direct consumer contact will most effectively understand their importance. Accordingly, proposed § 611.55(d)(3) must state that any recognized changes will be communicated to the consumer promptly and that consumer control will be followed.

...

(9) Dealing with difficult behaviors.

DRN Comment: Aspects of a person's disability are often wrongly interpreted as difficult or confrontational. Proposed § 611.55(d)(9) must include communication skills.

Guidelines for this training topic must be developed with direct involvement by persons with disabilities.

...

(16) Home management.

DRN Comment: Following consumer control and the independent living philosophy, proposed § 611.55(d)(16) must clarify that required subject area is to provide knowledge and skills to all individuals that have direct consumer contact or are referred by a home care registry so that the consumer's instructions regarding home management can be implemented.

...

(f) The home care agency or home care registry also shall include documentation in the individual's personnel file that the agency or registry has periodically reassessed the individual's competency to perform assigned duties through direct observation, testing, training or other method approved by the Department or through a combination of methods. Periodic reassessment shall occur at least once per year after initial competency is established, and more frequently when discipline or other sanction, including a verbal warning, is imposed because of a quality of care infraction.

DRN Comment:

► Following consumer control and the independent living philosophy, direct observation in proposed § 611.55(f) that involves a consumer must only take place with the consumer's consent. Consumer consent is required for private interviews during the inspection process under proposed § 611.31(e)(4), which we support.

► Per Act 69, 35 P.S. § 448.806(d.1)(6), "ongoing supervision" of an employee or "ongoing documentation" of the referral of an independent contractor must also be maintained to ensure that the individual "has the skills necessary to provide the care required by the consumer." Because "ongoing" is more frequent than "periodic," the language of 35 P.S. § 448.806(d.1)(6) must also be included in proposed § 611.55(f).

...

§ 611.57. Consumer protections.

(a) *Consumer rights.* The consumer of services provided by a home care agency or through a home care registry shall have the following rights:

...

(2) To receive at least 10 days advance written notice of the intent of the home care agency or home care registry to terminate services. Less than 10 days advance written notice may be provided in the event the consumer has failed to pay for services, despite

notice, and the consumer is more than 14 days in arrears, or if the health and welfare of the direct care worker is at risk.

DRN Comment:

► Medicaid Home and Community Based Waivers, the Act 150 Attendant Care Program, and other publicly-funded programs already have legally-mandated justifications for reduction or termination of services and notice and due process requirements for reduction or termination of services. To avoid confusion concerning these existing requirements, if the consumer's home care services are publicly funded, proposed § 611.57(a)(2) must require the home care agency or home care registry to follow the reduction/termination justifications and notice/due process requirements of the publicly-funded program rather than the conflicting language in proposed § 611.57(a)(2). The proposed language of § 611.57(a)(2) must only apply to a consumer who is solely private pay.

...

(c) *Information to be provided.* Prior to the commencement of services, the home care agency or home care registry shall provide to the consumer, the consumer's legal representative or responsible family member an information packet containing the following information in a form that is easily read and understood:

DRN Comment: When a publicly-funded program, such as a Medicaid Home and Community Based Waiver or the Act 150 Attendant Care Program, is involved, the home care agency or home care registry is already required to provide certain types of information and notices prior to the commencement of services. Therefore, § 611.57(c) must also require the home care agency or home care registry providing services through a publicly-funded program to comply with all information and notice requirements of the publicly-funded program.