

262-7

**From:** jd@theadvocacyalliance.org  
**Sent:** Monday, October 19, 2009 1:32 PM  
**To:** IRRC  
**Cc:** laura@par.net; mjoy@theadvocacyalliance.org; md@theadvocacyalliance.org; ajh@theadvocacyalliance.org  
**Subject:** Comments Regarding Final-Form Regulations - Preneed Funeral Arrangements  
**Attachments:** Final-Form Regulations - Preneed Funeral Arrangements Comments.pdf; Preneed Funeral Arrangements PAR comments.doc

Mr. Kaufman,

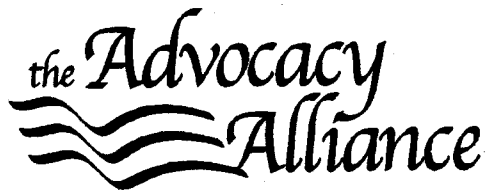
Please find attached our comments regarding Final-Form Regulations - Preneed Funeral Arrangements for your consideration.

(See attached file: Final-Form Regulations - Preneed Funeral Arrangements Comments.pdf)(See attached file: Preneed Funeral Arrangements PAR comments.doc)

Thank you,

Jen Duggan  
Administrative Director of Community Mental Retardation/Information Services The Advocacy Alliance  
846 Jefferson Avenue  
P.O. Box 1368  
Scranton, PA 18501  
Phone: (570) 342-7762  
Toll Free: 1 (877) 315-6855  
Fax: (570) 558-6828  
Email: [jd@theadvocacyalliance.org](mailto:jd@theadvocacyalliance.org)

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INDEPENDENT REGULATORY  
COMMISSION



Administrative Offices • 846 Jefferson Avenue • P.O. Box 1368 • Scranton, PA 18501  
(T) 570-342-7762 • (TF) 1-877-315-6855 • (F) 570-207-9194 • (E) [info@theadvocacyalliance.org](mailto:info@theadvocacyalliance.org) • (W) [www.theadvocacyalliance.org](http://www.theadvocacyalliance.org)

October 19, 2009

Kim Kaufman, Executive Director  
Independent Regulatory Review Commission  
333 Market Street, 14<sup>th</sup> Floor  
Harrisburg, PA 17101

**Re: Final-Form Regulations – Preneed Funeral Arrangements**

Dear Mr. Kaufman:

The Advocacy Alliance, formerly known as the Mental Health Association in Northeastern Pennsylvania, was founded in 1956 and incorporated as a nonprofit in 1965. In 2000, after 44 years of service, a new name, the Advocacy Alliance, was selected to more accurately describe the organization and services provided to persons who have a mental illness, persons who have mental retardation and other developmental disabilities, and older adults. The Advocacy Alliance currently provides reliable and cost-effective representative payee services to over 2,200 individuals with mental illness and/or mental retardation and older adults.

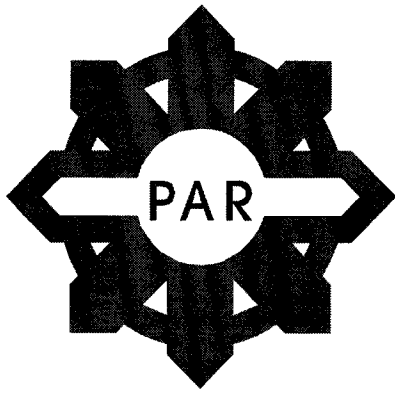
As a provider of representative payee services, the Advocacy Alliance has first hand knowledge of the undue burden the approval of the Final-Form Preneed Funeral Arrangements will place on the individuals we serve. With more than 97% of the individuals we serve receiving Supplemental Security Income (SSI) and Medicaid benefits, and who have planned for their burial needs by establishing irrevocable burial accounts, the approval of this regulation will jeopardize their eligibility to continue to receive SSI and Medicaid benefits. It is imperative that funds set aside for funeral arrangements are not counted against the individual as an asset, so that they may continue to receive critical benefits.

The Advocacy Alliance concurs with the attached comments compiled by Pennsylvania's Network for Autism and Intellectual Disabilities (PAR) and strongly urges the Independent Regulatory Review Commission to disapprove the Final-Form Preneed Funeral Arrangements.

Should you have any questions or need further information, please do not hesitate to contact me toll free at 1-877-315-6855 or via email at [ajh@theadvocacyalliance.org](mailto:ajh@theadvocacyalliance.org).

Sincerely,

Alex J. Hazzouri  
CEO



Pennsylvania Association of Resources  
for Autism and Intellectual Disabilities

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1007 North Front Street  
Harrisburg, PA 17102  
Phone 717-236-2374  
Fax 717-236-5625

October 6, 2009

The Honorable Michael P. McGeehan, Chairman  
House Professional Licensure Committee  
333 E. Main Capitol Building  
P.O. Box 202096  
Harrisburg, PA 17120

**Re: Final-Form Regulations - Preneed Funeral Arrangements**

Dear Representative McGeehan,

Thank you for the opportunity to provide comments on the above-referenced final-form regulations. PAR is a statewide association whose members provide the full range of supports and services to more than 49,000 individuals with mental retardation including over 8,000 children and adults living with autism in over 7,800 locations in the Commonwealth. PAR members provide \$1.4B in mental retardation services in Pennsylvania and employ 29,000 Pennsylvanians.

PAR provided comments on the proposed Preneed Funeral Arrangements regulations on November 14, 2007. Our intention in submitting our 2007 comments and these comments two years later has been to help the Committee, the State Board of Funeral Directors and the IRRC protect the ability of consumers with mental retardation and autism to purchase and manage preneed funeral services.

While some of the issues were raised in the preamble, in the State Board's summary of comments and responses, they were not addressed in the actual regulations and therefore remain an issue for this association and its members and the consumers and families that we support.

Excerpts from our 2007 comments that remain unresolved are included below. PAR's additional comments are noted in brackets and bolded text.

***General Comments and PAR's Overriding Concern:***

The services and supports our members provide to our Commonwealth's most vulnerable citizens are done so with very limited resources. SSI and Medical Assistance (MA) eligibility can be lost if an individual has higher income or greater resources than permitted by federal law. To remain eligible for SSI and MA an individual can have no more than \$2,000 in assets. Federal law excludes an irrevocable burial fund as long as the amount does not exceed \$1,500.

Our community system is always looking for ways to maximize resources and identify and implement efficiencies. One of these proven efficiencies is the ability for individuals and their

families to prearrange their funeral arrangements without these funds being counted as an asset. The current ability for individuals to pre-arrange their funerals has worked well for our system and has provided a cost-effective means of honoring the desires of individuals and their families consistent with their choice and available funds. PAR is committed to both preserving choice for individuals with mental retardation and their families, and ensuring that these services are not unnecessarily restricted.

The overwhelming majority of the individuals our members serve are supported through Medicaid and Social Security, and it is imperative that funds set aside for funeral arrangements are not counted against the individual as an asset. Otherwise, their eligibility to receive funding for critical services is jeopardized.

PAR does not believe the State Board of Funeral Directors has any interest in eroding the benefits that individuals with mental retardation and autism receive. However, the proposed regulations appear to have a potentially negative impact on individuals receiving services in the community disabilities system. This is PAR's overriding concern.

**Section:** §13.228 *Transfer of a preneed funeral contract by customer*

**[This section was not changed to address PAR's concerns. Our comments and recommendations below still stand.]**

**Discussion:** The proposed regulations do not address how a funeral director should handle the transfer of a contract of an individual receiving Social Security and/or Medicaid benefits, or an otherwise irrevocable contract.

As you are aware, the House of Representatives' Professional Licensure Committee shares our concerns related to Medicaid and Social Security benefits, as outlined in their October 3, 2007 letter to the Independent Regulatory Review Commission (IRRC) (with regard to §13.228 Transfer of a preneed funeral contract by customer). The IRRC also expressed concerns on this issue in their October 24, 2007 letter to you. PAR supports the comments and recommendations raised by both the House Committee and the IRRC, referenced below:

The House Committee letter states,

*The Committee is aware of the requirements for a trust to be irrevocable for the purposes of spend-down for SSA or Medicaid benefits and would suggest that the board contact SSA and Medicaid to determine if the preneed contracts would still be considered irrevocable according to SSA and Medicaid if the proposed changes occur.*

The IRRC letter states, (emphasis ours)

*In its comments, the House Committee expressed concerns with the impact of this regulation on the calculation of resources in determining eligibility for benefits from Social Security or Medical Assistance (MA) programs. The Board claims that customers will be able to set aside the preneed funds and avoid having them calculated as a resource because the account, money or trust remains "irrevocable."*

*Subsection (b) directs the transfer of the preneed funds from one funeral entity to another at the direction of the customer. However, nothing in this section states that the funds are "irrevocable" or that none of the funds may be returned to the customer. In fact, the words "revocable," "irrevocable" or "irrevocability" do not appear in the proposed regulation or the Preamble. In the final-form regulation, the Board should clarify whether preneed funds would be irrevocable, and how the funds would be protected from classification as an asset for the purposes of Social Security or MA programs.*

*The Board should also respond to the questions raised by the House Committee as to whether the preneed funds can be irrevocable yet still transferable. There is also a concern with the Law. Section 13(c) of the Law includes the following sentence: "... If any such licensed funeral entity shall accept any money for such contracts, he shall, forthwith, either deposit the same in an escrow account in, or transfer the same in trust to, a banking institution in this Commonwealth, conditioned upon its withdrawal or disbursement only for the purposes for which such money was accepted...."*

*It is unclear how the proposed regulation is consistent with the Law since none of its provisions guarantee that the money will be used for the purposes for which it was accepted. These purposes are set forth in the original preneed contract. The final-form regulation should ensure that the purposes in the original contract are fulfilled.*

In the absence of guidance on transferring funds, the impact on consumers and providers of mental retardation and autism services is not clear. For example, if a funeral entity transfers a contract to another funeral entity, and tells that second entity the preneed funds are irrevocable, there are no assurances that the second entity will ensure that the funds remain irrevocable.

Maintaining the irrevocable status of the funds is critical for Medicaid and Social Security recipients, and if a change is made, and the provider of service is not notified (or even if the provider is notified), it could lead to many administrative issues, not the least of which is ensuring that the funds are not counted towards the consumers' assets. PAR echoes the IRRC's comments on this issue, included below:

*The provisions of this section are very clear that the current funeral entity must transfer all the preneed funds, interest and earnings to the new funeral entity as requested by the customer. However, there is nothing that directs the actions of the new entity or what it may do with the funds. Nothing in the proposed regulation requires that the new funeral entity honor the terms and conditions of the original contract or that it use all the preneed funds, interest and earnings for funeral services. For example, what would prevent the new funeral entity from giving a portion of the funds to the customer and reducing the list of services? The Board should clarify how the new funeral entity must treat the original contract and the funds.*

**Recommendation:** PAR strongly recommends that the State Board address the issues and recommendations related to Medicaid and Social Security benefits as outlined by the House Committee and the IRRC, and clarify in §13.228 that funds set aside for preneed funeral arrangements by individuals reliant on means-tested benefits like Medicaid will not count as an asset.

[The State Board responded to stakeholder concerns on §13.228 in the preamble to the final-form regulations, stating,

*The HPLC suggested that the Board verify that the portability provisions would not cause preneed customers to run afoul of the spend-down requirements for social security and medical assistance programs. IRRC echoed this suggestion. Under regulations of the Department of Public Welfare, to be considered irrevocable, the burial reserve funds must be deposited with a financial institution or a funeral director under a written agreement which provides that the funds cannot be withdrawn before the death of the named beneficiary. 55 Pa. Code § 178.5(a). Revocable funds are those funds, whether principal or interest, withdrawn and used for purposes other than the beneficiary's burial expenses, and those revocable funds are counted as a resource. 55 Pa. Code § 178.73(4). Under regulations applicable to the Social Security Administration, funds in an irrevocable trust or other irrevocable arrangement which are available for burial are funds which are held in an irrevocable burial contract, an irrevocable burial trust or an amount in an irrevocable trust which is specifically identified as available for burial expenses. 20 CFR § 416.1231 (b)(6). Because §13.228 requires that the contract expressly allow the customer to transfer the contract and funds to another funeral entity, but does not require that the customer be permitted to rescind or cancel or revoke the agreement and have the funds returned to the customer, the funds will remain irrevocably placed with a funeral director for purposes of those programs.*

*Because a revocable contract might be considered illusory and therefore unenforceable, the HPLC also questioned whether the language should be clearer as to a preneed contract being irrevocable but still transferable. In this rulemaking, the Board does not intend to provide that any customer may revoke, rescind or cancel a preneed agreement at will. The Board intends only that a customer who has entered into a preneed contract must be able to transfer that preneed account to another funeral entity to perform the services and provide the funeral merchandise.*

[PAR contends that while the State Board may not intend confusion and in fact states it does not intend to provide that customers may revoke a preneed agreement at will, the absence of clarity in the actual text of the regulations will have an adverse impact once the regulations are implemented. We respectfully request that the Committee's 2007 recommendations, supported by the IRRC and PAR, are addressed before the regulations are finalized. We understand this means the final-form regulations would have to be disapproved by the IRRC, but the risk to consumers with disabilities outweighs the need for this regulation to be finalized.]

**Section:** §13.224 *Depositing and reporting preneed funeral funds*

**[Since the State Board did not address PAR's concern in this section, our recommendation stands.]**

**Discussion:** §13.224(a) would require a funeral entity to deposit the entire amount of the funds received for prepaid services and merchandise in trust within 10 days. This section would also limit the ability of funeral directors to create, control or otherwise use a merchandise company, for the purposes of depositing less than 100% of the funds in trust.

The Future Interment Law allows for the retention of 30% of the funds deposited by consumers for merchandise purchases (per 63 PS §480.2). This provides merchandise companies the ability to not only offer prearranged merchandise, but to promote prearranging to their clients.

The current regulations do not restrict a funeral entity from using a merchandise company for the sale of preneed merchandise. §13.224(a) would restrict the creation, control or otherwise use of a merchandise company by a funeral director for the purpose of retaining 30% money. If promulgated, the proposed rules will provide a competitive advantage to third party merchandise sellers in the sale of preneed merchandise, reducing the number of funeral directors offering prearrangements, thereby limiting the options available to consumers.

This section does not seem to comport with the Future Interment Law or current practice within the industry and it is not clear how it will provide added protection for consumers. In fact, as proposed, the regulations could eliminate the leverage currently held by consumers.

**Recommendation: Delete this section and retain current practice.**

**Section:** §13.229 *Sale or transfer of preneed funeral contracts or preneed funeral funds by funeral director*

**[Since the State Board did not address PAR's concern in this section, our recommendation stands.]**

**Discussion:** §13.229 would require a funeral director (1) a funeral entity that acquires the preneed contracts or funds from another preneed business to notify each customer within 30 days and provide them with the opportunity to transfer the contract and the funds to another funeral entity; and (2) require a funeral director ceasing preneed business to notify each consumer and provide them with the opportunity to transfer the funds to a funeral director of their choosing.

Currently, if a funeral entity ceases or sells their preneed business, the funeral home taking over the business is required to certify that they will honor the contracts of the predecessor. If the new entity is willing to honor the contracts that they have acquired, and must certify that they will, the public is protected. In requiring the acquiring owner to notify each consumer, the proposed regulations could significantly reduce the number of funeral directors offering preneed, thereby reducing competition, which in itself is a protection for consumers.

The IRRC also questioned the need for the 30-day notification requirement.

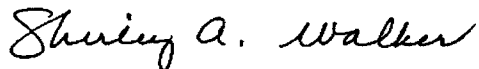
**Recommendation: Delete this section and retain current practice.**

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**For all of the reasons noted above, PAR respectfully urges the Committee not to support the final-form preneed funeral arrangements regulations and to urge the IRRC to disapprove the regulations.**

Thank you for considering our comments and recommendations. If you have any questions, please do not hesitate to contact me.

Sincerely,



Shirley A. Walker  
President and CEO

Cc:

Michael J. Yeosock, Chair  
State Board of Funeral Directors,  
Bureau of Professional and Occupational Affairs,  
Department of State  
P.O. Box 2649  
Harrisburg, PA 17105

Kim Kaufman, Executive Director,  
Independent Regulatory Review Commission  
333 Market Street, 14th Floor  
Harrisburg, PA 17101

Kevin Casey, Deputy Secretary,  
Office of Developmental Programs  
Department of Public Welfare  
P.O. Box 2675  
Harrisburg, PA 17105-2675