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INDEPENDENT REGULATORY
REVIEW COMMISSION

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November 14, 2007

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State Board of Funeral Directors
P. O. Box 2649
Harrisburg, PA 17105-2649

Re: Proposed Rulemaking on Preneed Funeral Arrangements and Preneed Activities of Unlicensed Employee (Published in the Pennsylvania Bulletin on August 25, 2007 and September 29, 2007)

Thank you for the opportunity to provide comments on the above-referenced proposed rulemaking. The Pennsylvania Association of Resources for Autism and Intellectual Disabilities (PAR) is a 501(c)(3) nonprofit organization that supports 45,000 individuals with intellectual disabilities including 8,000 people living with autism who receive community services and supports through our member agencies in 5,600 locations in the Commonwealth.

Included below are PAR's comments and recommendations on both sets of proposed rules. Our intention is to provide the State Board of Funeral Directors with comments and recommendations that will protect the ability of consumers to purchase and manage preneed funeral services, specifically with regard to consumers with intellectual disabilities and autism.

August 25, 2007 Proposed Rules (Preneed Funeral Arrangements)

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. As such, 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 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 disabilities and their families, and ensuring that these services are not unnecessarily restricted.

Because the overwhelming majority of the individuals our members serve are supported through Medicaid and Social Security, 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 intellectual disabilities 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*

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 disability 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.

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

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*

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.

September 29, 2007 Proposed Rules (Preneed Activities of Unlicensed Employee)

Section: §13.206(a) Utilization of unlicensed employees by a funeral entity

Discussion: §13.206(a)(4) requires a licensed funeral director who engages an unlicensed employee to consult face to face with each pre-need customer before entering into or offering to enter into a pre-need funeral contract. This section seems unnecessary and could prevent our consumers, who have an intellectual disability (mental retardation) or who are living with autism, from being able to enter into pre-arranged funeral service agreements. Existing regulations (49 Pa Code Chapter 13) already allow unlicensed employees to make tentative arrangements without a licensed funeral director in certain circumstances.

Consumers who have interacted with an unlicensed employee may not want to meet “face to face” with a licensed funeral director. In fact, they might feel pressured with that kind of required face to face encounter. The consumer may prefer to conclude a sale by mail, speaking over the phone to a licensed funeral director, or via the Internet. Travel considerations for individuals with disabilities are also an issue. PAR does not support limiting consumer choice, which this section appears to do by requiring a face to face meeting. In an age when many, if not most, transactions are completed by mail, phone, or the Internet, it is unreasonable to require a “face to face” meeting.

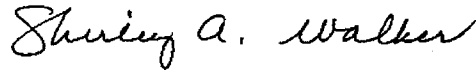
The shortage of licensed funeral directors nationwide is well-known to the Board. In recognition of this fact, as Judge Jones noted in *Walker v. Flitton*, at least thirty-four states already allow unlicensed agents of funeral directors to sell preneed funeral plans.

A better provision to protect the public would be to require a notice on any document to be signed by a consumer (or his guardian/power of attorney/health care representative) that the consumer had the right to an in-person meeting with a licensed funeral director before signing the document. The consumer could also be allowed, in writing, to waive this right to meet.

Recommendation: Add language to this section permitting the consumer or his guardian or power of attorney to waive the right to meet in person.

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: Representative P. Michael Sturla, Chairman, House Professional Licensure Committee
Kim Kaufman, Executive Director, Independent Regulatory Review Commission
Kevin Casey, Deputy Secretary, Office of Developmental Programs*