#2712

"The future of long term care"
PHCA
PENNSYLVANIA HEALTH CARE ASSOCIATION

PALA

panpha
an association of nonprofit senior services

May 25, 2010

The Pennsylvania Health Care Association (PHCA)/Center for Assisted Living Management (CALM), Pennsylvania Association of Not-For Profit Homes for the Aging, (PANPHA) and the Pennsylvania Assisted Living Association (PALA) would like to take this opportunity to thank you for meeting with us to discuss our most significant concerns with the final-form Assisted Living Residence (ALR) regulations.

As we have indicated throughout the development of the ALR regulation, our organizations strongly endorse the concept of assisted living as a safe and appropriate setting for many older and disabled Pennsylvanians and are committed to working with the Department of Public Welfare/Department of Aging to develop a robust, high-quality assisted living industry.

In fact, we applaud the Department in their efforts and recognize the improvements that have been made to the regulation, many of which were made as a result of our collective comments on the proposed regulation. However, we have identified four "Structural Defects" with the regulation that either have been drafted in such a manner that providers simply cannot operationally make them work or strains the intent of the Act. We have also provided a listing of other significant issues that, if not addressed, when combined with the 'Structural Defects' are likely to limit the number of providers willing to seek licensure as Assisted Living Residences. This will decrease resident access to this level of care and services and adversely impact Pennsylvania's efforts to find lower cost alternatives for Pennsylvanians in need of 24 hour care and services but not the services provided only in nursing facilities. On behalf of PHCA/CALM, PANPHA and PALA we respectfully submit for your consideration the following comments.

"Structural Defects" with Regulation 14-514

2800.220 Service Provisions

First and foremost, the inclusion of the opt-out provisions in §2800.220(d) (relating to service provisions) is of grave concern to our member facilities and raises the issue as to whether this service framework is in the best interest of the consumer. Although well intended, as currently written, this provision has a great potential to be detrimental to the health and safety of ALR residents, and very difficult, if not impossible, to initiate from an operations perspective in an assisted living facility. As we understand this subsection, a resident would have the choice to not accept meal services, laundry services and/or housekeeping services from the ALR under either of the Core Packages, without any consideration of the implications this decision may have on the health and safety of the resident or on the effective operation of a facility. For many of the current residents our collective members serve, this ability to 'opt-out' to save money or realize flexibility that the residents or their families/responsible parties think they want at the time has a great potential to be detrimental to their overall health and safety.

For example, if at the time of admission a resident presents with symptoms of malnourishment, for this resident to opt-out of meal services totally or only accept one or two meals a day would be contraindicated to the residents care needs and the residence must have the ability to overrule that resident's decision to opt-out of this service. In addition, if the family agrees to provide the service to the resident and the family fails to deliver the service, the residence will ultimately have an obligation as a condition of licensure to step-in and provide the service to protect the health and safety of the resident. As currently drafted, a residence would have little ability to predict when they will need to meet the unplanned care and service needs of a resident who has chosen to 'opt-out'. This ignores the practical realities of how residences staff their operations and charge for costs that they will incur whether the resident chooses to opt out or not. There are many more scenarios that an ALR could face under this provision that will place a resident at risk or in harm's way, and it is not clear to us how the provision could be effectively put in to operation to address all potential negative outcomes. We therefore respectfully request that the opt-out provision be **eliminated.**

If the Department is unwilling to eliminate the "opt-out" language, then we strongly urge that this provision be written in a manner that provides the residence with the final decision as to whether the resident may opt-out of the service. We ask that the Department consider the following language:

Suggested Language

(d) *Opt-out.* If a resident wishes not to have the residence provide a service under subsection (c)(1)(ii)-(iv), the resident's request shall be granted as long as the resident's request is not contraindicated by the resident's support plan and the residence determines that the resident's request does not pose a threat to the health and safety of the resident, other residents, or the

residence staff, or is otherwise inconsistent with the resident's care and service needs. If these conditions are met the resident-residence contract must state the following:

As indicated above, this issue is of grave concern to our members and may in the end be the one provision that keeps our members from seeking ALR licensure.

2800.4 Definitions and 2800.220 Basic Core Services

The second area of the regulations that cannot be put into operation based on industry standard best practice is related to the inclusion of "Basic cognitive support services", as defined in 2800.4 (relating to definitions), in the Independent Core Service Package". Some of the services currently included in the definition of "Basic cognitive support services" are considered to require assistance with activities of daily living (ADLs) and the description of the Independent Core Service Package states that this core package shall be provided to residents who DO NOT require assistance with ADLs. Specifically, the inclusion of the following services: measures to address wandering; dementia-specific activity programming and specialized communication techniques, in the definition of "Basic cognitive support services" are in direct conflict with the description of the type of residents that will qualify for the Independent Core Service Package.

While we agree that intermittent cueing, redirecting and environmental cues could be considered "Basic cognitive support services" and would not necessarily be considered providing assistance with ADLs, measures to address wandering, dementia-specific activity programming, and specialized communication techniques are services that the profession characterizes as elements of behavioral supervision and directed ADL services. Furthermore, these services are services that are typically provided in Special Care Units, not in the general care units. The inclusion of these services will increase the cost to consumers that qualify for the Independent Core Service Package with no commensurate benefit. For example, measures to address potential wandering may require significant provisions that will limit consumer movement. We therefore respectfully request that the Department consider the following amendments.

Suggested Language

Basic cognitive support services –We recommend that subparagraphs (iv), (v), and (vi) be removed from this definition.

Specialized Cognitive Support Services – We recommend that the revisions contained in the basic cognitive support services definition that we ask to have deleted above be included in this definition.

Requested Revision
(vii) Measures to address wandering
(viii) Dementia-specific activity programming
(ix) Specialized communication techniques

2800.44 Complaint Procedures

The third "Structural Defect" we would like to raise relates to the provisions contained in 2800.44(h) (relating to complaint procedures). The language in this subsection appears to promote litigation. Concern exists as to whether this section forbids the practice of an ALR from mutually consenting to an arbitration agreement with a current or potential resident. It is vital that a firm statement be made by the IRRC and standing legislative committees that the language of this provision be interpreted to mean that the administrative process of submitting a complaint to the Department is not a substitute for a private cause of action, whether through the filing of a law suit in court or the pursuit of a claim for damages through an arbitration agreement. To interpret this language any other way would be to abrogate the practice of mutually agreed upon arbitration agreements, which must be done through an act of the legislature rather than through a regulatory process. Current state and federal law allows for voluntary arbitration provisions in resident-residence contracts and this statement conflicts with such provision. We ask that this subsection be deleted, as it violates the standard utilized in the Independent Regulatory Review Act, Section 5 (b)4.

2800.30 Informed Consent

The final "Structural Defect" deals with Informed Consent. Although we recognize that the Department has amended the Informed Consent agreement provisions contained in §2800.30 (relating to informed consent process) to be consistent with Act 56, we continue to take issue with the manner in which the liability provisions are presented in the regulation. Specifically, the liability provisions set forth in subsection (i) are not clearly stated and therefore create concern and confusion for our member facilities and the public at large. The language contained in Act 56 is clear in that the informed consent agreement releases the facility from liability for adverse outcomes resulting from actions consistent with the terms of the informed consent agreement and the language in the regulation should also be stated in that manner. All providers and interested parties should be able to read the regulation and have a full understanding of the intent of the provision, without the need to research other documents. We therefore respectfully request that the liability language contained in subsection (i) be amended to conform to the language in Act 56, i.e., "the execution of an informed consent agreement releases a residence from liability for adverse outcomes resulting from actions consistent with the terms of the informed consent agreement."

In addition, the Department has interjected new terms in the informed consent process language, the terms "competent" and "incompetent". These terms can have many different meanings depending on the setting in which they are used, and we therefore request that the Department include definitions of these terms in 2800.4 (relating to definitions).

Other Significant Issues with Regulation 14-514

Although the following issues are all important they do not rise to the level of the first four. We believe, however, that those issues listed below, if not addressed, are likely to hinder the development a dynamic and robust ALR industry in Pennsylvania.

2800.229(f) Excludable Conditions

The language of the statute is clear and unambiguous when addressing the issue of petitioning the Department for an exception to caring for residents with an excludable condition. Section 1057.3(E) states that no consumer presenting an excludable condition may be admitted or retained by an ALR "unless an exception, **upon the written request of the Assisted Living Residence**, is granted by the Department". The intent of this provision is to allow the facility to determine when it is and is not safe to keep a resident, and what conditions they are or are not equipped to manage. This paragraph not only extends to the resident the right to petition the ALR to request a waiver from the department, but also mandates that the ALR record the resident's request on a form supplied by the Department. This paragraph exceeds the intent of the statute and erodes the ability of the ALR to determine what is the appropriate level of care within its own facility, which was built into the framework of the statute as evidenced by Sect. 1057.3(a)(12) [relating to the ALR's ability to restrict outside providers of supplemental health care services].

Accordingly, we request the deletion of this subsection in total.

2800.22 Application and admission

The provision set forth in §2800.22 (b.1) (relating to application and admission) while possibly not technically in conflict with the provision set forth in §2800.142 (a) (relating to assistance with medical care and supplemental health care services) may give the appearance of being so.

Subsection 2800.22 (b.1) states "A certification shall be made, prior to admission, that the needs of the potential resident can be met by the services provided by the residence." In accordance with §2800.142 (a) ALR's are not required to provide supplemental health care services, but have the option to provide or arrange for these services.

We respectfully request that consideration be made of adding language to clarify that an ALR is not required to be the provider of supplemental health care services but can contract for these services if they so chose.

> *Suggested Language*
> A certification shall be made, prior to admission, that the needs of the potential resident can be met by the services provided either directly by the residence or through contractors, subcontractors, agents or designated providers.

2800.42 Specific Rights and 2800.142 Assistance with medical care and supplemental health care services

Although we believe the law is somewhat ambiguous regarding whether or not a resident can select or retain their primary care physician, we support the Department's desire to provide that right to residents of ALRs and accept the relevant language contained in §§2800.42 and

2800.142. However, we believe that the resident's primary care physician should be required to follow the policies/procedures of the ALR, as is the case with other Supplemental Health Care Services, and request that the Department add that provision.

22800.56 - Administrator staffing –

We very much appreciate the amendments made by the Department as they relate to the requirements contained in §2800.56 (relating to administrator staffing), however we do have significant concerns regarding the administrator designee requirements contained in subsection (b). Specifically, our concerns are regarding the requirements contained in paragraphs (1) and (2).

Paragraph (b)(1) requires the administrator designee to have 3,000 hours of direct operational responsibility for a senior care housing facility etc. It is not clear to us what is meant by "direct operational responsibility" and request that the Department include a definition in the regulation. We recommend a definition such as "involved in a professional capacity or leadership role of a senior care facility in part or whole."

More importantly, paragraph (b)(2) requires the administrator designee to pass the Department-approved competency-based administrator training test. This requirement develops a very high standard for the administrator designee to the point that an ALR will essentially be required to have two administrator level positions on staff, eliminating any flexibility this was intended to provide while ensuring appropriate oversight in the absence of the Administrator. This requirement will impact the cost of the Core Packages provided to residents and may result in some consumers not having ALR as a viable long term care option.

We agree that the administrator designee must be well trained and qualified to manage the ALR in the administrator's absence; however, we believe this can be accomplished by maintaining the requirements in paragraph (1), with the recommended amendments and paragraph (3) and the deletion of paragraph (2).

800.53 Qualifications and responsibilities of administrators

We are grateful to the Department for recognizing the reasonableness of including provisions in subsection (a)(6) that allow a personal care home administrator to qualify as an assisted living administrator if certain requirements are met. We do, however, have concern that as written the provision will not allow an existing personal care home adequate time to determine whether or not to seek licensure as an ALR, and in essence force their hand to make that decision in order for their personal care home administrator to qualify under this subsection. To provide ample opportunity for an existing personal care home to make an informed decision regarding ALR licensure, we respectfully request that the 1 year timeframe provided for in subparagraph (6)(ii) be extended to a 2 year period subsequent to the availability of the Department-approved competency-based training test, not one year after the effective date of the regulations.

2800.65 Staff orientation and direct care staff person training and orientation

We are in agreement with the provisions contained in subsection (g) that direct care staff persons may not provide unsupervised assisted living services until completion of training in the defined areas; however we are not supportive of the requirement that this training be completed in 18 hours. At this time, we do not know how many hours will be required to complete the Department-approved direct training course as specified in paragraph (2) of subsection (g). We therefore recommend that the number of hours be removed from this section.

2800.227 Support Plan

The language contained in 227(b) and (c) adds a great deal of administrative overhead without any appreciable increase to resident care. First, the requirement that an RN supervise the development and finalization of a resident's support plan is unnecessary. A licensed practical nurse has the requisite knowledge and expertise to review and approve a support plan. Supervision by a Registered Nurse is not necessary, and simply represents an additional cost. Furthermore, RN's are in short supply and their time must be judiciously appropriated.

Additionally, the requirement that the support plan be reviewed on a quarterly basis without any change in the resident's condition to prompt such a review is another provision that adds administrative overhead without benefitting the resident. The requirement of support plans to change as the resident's condition changes is both adequate and appropriate. It also should be noted that to adequately review the support plan would necessitate some sort of assessment of the resident. To force a resident to be examined on a quarterly basis is invasive and intrudes on the resident's privacy.

2800.101 Resident living units

We acknowledge and appreciate the movement made by the Department to develop living unit provisions that are reasonable for the industry and the resident. However, we continue to believe that the best method for establishing the appropriate living unit size is to let the market place dictate so residents have the choices they want and can afford, whether it is a 225 square foot living unit or a 100 square foot living unit. We believe that in order for assisted living to be a vibrant sector of the long term care continuum, consumers should have choice regarding the size of the living unit they want and can afford and that Government should not presume to know what consumers want and are willing to pay for. We continue to believe that the regulations should set a true 'floor' for living unit size to maximize consumer choice by ensuring that fewer consumers are priced out of the Assisted Living market. We do appreciate the efforts of the Department to include an exceptions process in the regulation, but do not feel that a case-by-case review of residences whose main barrier to ALR licensure is unit size represents the best level of service for consumers or the best use of Departmental licensure staff.

2800.11 Procedural requirements for licensure or approval of assisted living residences; special care designation and dual licensure

While we appreciate the fact that the Department lowered the fee structure, for a 100 bed facility in the final draft regulation, the licensure fee would still amount to $7800 per year, which is greater than other states with AL with the exception of Washington State which is $7900. This $7800 when compared to the current licensure fee for a 100 bed personal care home of $30 or a 100 bed nursing home of $300 seems seriously out of line. Frankly, the language in Act 56 of 2007 is clear in that the licensure fees for ALR's is meant to augment the funds otherwise provided by state government to pay for quality assurance. With fees of the magnitude proposed in this final draft regulation it would seem that they will do more than augment state funds. Finally, but most importantly, high licensure fees may hinder the ability of facilities to become licensed as ALR's thus reducing consumer choice. We request that the Department consider lowering the licensure fees for ALRs, which we believe will encourage the development of this industry.

2800.64 Administrator training and orientation

In reviewing the language contained in 2800.64 (administrator training and orientation) it appears that an ALR has the option to develop their own administrator training course for their administrator, as long as the course includes the topics set forth in subsection (b) and the course is approved by the Department. We are seeking clarification from the Department that this is an accurate interpretation of the regulation.

Other Issues

Stakeholder Process. The Department has indicated in the preamble and in the comment/response document that it intends to share drafts of forms with stakeholders for their review and comment prior to implementation and work with stakeholders to develop sample policies and procedures to assist ALRs to comply with the final-form regulation. We are encouraged by the Department's willingness to use an open process in the development of these documents and strongly recommend that the Department continue to use an open public process after the promulgation of the regulation to issue clarifications and interpretations of policies and procedures. To that end we would also recommend that instead of developing an Licensing Measurement Instrument (LMI) similar to the one developed for personal care homes, the Department develops interpretive guidelines in an open public process similar to the guidelines developed by the Department of Health for nursing facility surveyors.

Fire Safety. Another issue of concern is related to the Certificate of Occupancy requirements for ALRs. Although this issue is not one that can be resolved in the final-form regulation, it has significant implications on the future availability of assisted living residences in Pennsylvania.

Currently, many personal care homes (PCHs) that wish to seek licensure as an ALR do not hold an I-2 certificate of occupancy, which is the type of occupancy that the Department asserts a PCH home must hold in order to serve residents that cannot self-preserve. We request that the Department work with the regulated community on a process to be put in place that would allow these homes to seek ALR licensure, if they so choose, that ensures the safety of the residents so they can be cared for in these facilities, while the issue is dealt with in greater detail in the appropriate forum including the Legislature. Absent an acceptable process, much quality, otherwise qualified facilities will not be able to obtain licensure as an ALR.

Conclusion

In conclusion, PHCA/CALM, PANPHA and PALA would like to once again thank you for the opportunity to provide our comments on the final-form ALR regulation. We continue to be committed to working cooperatively with the Department in its efforts to develop assisted living in Pennsylvania and are hopeful that the IRRC and Department will consider our concerns in order to assure a robust and quality assisted living industry.

If you need clarification or would like to further discuss any of our concerns we are happy to make ourselves available.

Ronald Barth
President
PANPHA

Orla Nugent
President
PALA

Stuart H. Shapiro, M.D.
President & CEO
PHCA

2712

From: Jewett, John H.
Sent: Thursday, May 27, 2010 2:32 PM
To: Gelnett, Wanda B.
Cc: Smith, James M.; Johnson, Leslie A. Lewis; Wilmarth, Fiona E.
Subject: FW: Final Assisted Living Regulations
Attachments: IRRC FINAL letter 5 27 2010.pdf

The attached letter should be filed under "final comments" for #2712. Thanks

From: Stuart Shapiro [mailto:sshapiro@phca.org]
Sent: Thursday, May 27, 2010 2:27 PM
To: Jewett, John H.
Cc: Orla Nugent; Timothy W. Coughlin, LifeServices Assisted Living President and Chief Executive Officer; russ@panpha.org; Anne Henry; Stuart Shapiro
Subject: Final Assisted Living Regulations

John,

Thank you, Jim, and Fiona for meeting with PALA, PANPHA, and PHCA.

On behalf of PALA, PANPHA, and PHCA attached is a letter containing our collective comments. We have listed the number of issues which we believe, if addressed, will allow Pennsylvania to develop a robust assisted living sector.

Please share these with Jim and Fiona whose email addresses I can not seem to find.

Have a terrific weekend.

Stuart.

Stuart H. Shapiro, M.D.
President and CEO
Pennsylvania Health Care Association
315 North Second Street
Harrisburg, PA 17101

Phone: 717 221 7925
Fax: 717 221 8690
Cell: 717 599 2080