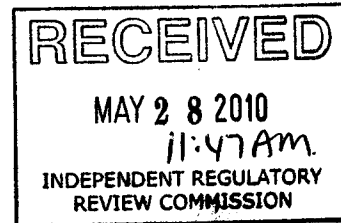




COMMUNITY LEGAL SERVICES
OF PHILADELPHIA

May 28, 2010

2712



By Email and First Class Mail
Independent Regulatory Review Commission
333 Market Street, 14th Floor
Harrisburg, PA 17101

Re: Regulation ID #12-514 (IRRC #2712)
Department of Public Welfare
Assisted Living Residences

To the Independent Regulatory Review Commission:

Community Legal Services, Inc. ("CLS") hereby submits our comments on the final-form 2800 Regulations for Assisted Living Facilities.

CLS provides free legal representation to low-income Philadelphia residents, including many clients who will be greatly affected by the implementation of the final-form regulations. Our clients include elderly and disabled individuals who need assisted living services, as well as low-wage workers whose livelihood is providing long term care services.

We believe that the final-form regulations are an improvement, in some areas, over the proposed regulations that were issued in 2008. In other areas, we are concerned that the final-form regulations do not offer sufficient protection to the consumers who will live in them. Both the areas that we support and the areas of concern are outlined below.

Areas of Support

Section 2800.22 (Application and Admission) requires a written decision when an admission is denied due to a supposed inability to meet a person's needs. This is an important protection which will help to uphold consumers' rights under the Americans with Disabilities Act not to be unlawfully excluded from services and facilities. Similarly, **section 2800.229 (Excludable Conditions; Exceptions)** requires the residence to document how it responds to a request by a resident or applicant to seek an exception relating to an excludable condition, and when an excludable condition affects a decision to admit or transfer/discharge. We strongly support these important provisions.

We also applaud the inclusion of an appendix where all residents' rights are clearly articulated. This will make it easier for consumers to locate and understand their rights upon admission, during residency, and upon discharge. We commend the Department for adding consumer-friendly language to this section by prohibiting mental, physical and sexual abuse and exploitation, neglect, financial exploitation and involuntary seclusion.

PWalz@CLSPHila.org Direct Dial: 215.227.2400 x2431 Fax: 215.227.6486

WWW.CLSPHILA.ORG

3638 NORTH BROAD STREET, PHILADELPHIA, PENNSYLVANIA 19140 P 215.227.2400 F 215.227.2435

Section 2800.220 (Service Provision) defines the core package of services that will be provided to consumers at assisted living residences. Defined base core packages will help make costs more transparent and predictable to residents. It will also help consumers compare the prices and services offered by different facilities. Accordingly, we applaud the Department for issuing regulations that define both the broad array of services that are available within a facility and the fixed core packages that consumers would be purchasing upon admission to any facility.

Section 2800.224 (Initial Assessment and Preliminary Support Plan) requires assessments and support plans to be completed prior to admission, in most cases, laying out the care needs of the new resident and the plan for addressing them. This is a huge improvement over the proposed regulations, which allowed facilities to wait up to 15 days after admission before performing assessments of residents' needs and up to 30 days after admission to complete support plans detailing the services to be provided to meet those needs. This provision, as well as the incorporation of the final support plan into the resident-residence contract as required by **Section 2800.227 (Development of the Final Support Plan)**, help to ensure that residents receive the services they need during the initial weeks after they move in, as well as throughout their residency.

Problematic Areas

Although the final-form regulations include many positive changes for consumers, some important changes recommended by the Pennsylvania Assisted Living Consumer Alliance (PALCA), of which CLS is a member, were not made. We enumerate and discuss these concerns below.

Section 2800.25 (Resident-Residence Contract) seems to require a co-signature by a designated party "if the resident agrees." There should be no requirement for the designated person to co-sign a contract. The designated person is simply an individual chosen by the resident for notification in case of an emergency, termination of service, or assisted living residence closure. An agreement to be contacted in case of an emergency should not bind the designated person to financial liability under the terms of the contract. Although the final-form regulations state a resident must "agree" to this, we anticipate boilerplate contracts that recite the resident's supposed agreement to the designated person co-signing. Collection suits brought against unsuspecting "designated persons" who thought they were just agreeing to be a contact person have been a major problem in the nursing home context, and the federal statute governing nursing home residents' rights prohibits nursing homes from requiring a co-signature as a condition of admission. 42 U.S.C. § 1396r(c)(5)(A). Assisted living residents need and deserve the same protection.

Section 2800.30 (Informed Consent Process) removes the "imminent risk" and "substantial harm" tests for requiring informed consent. The new language permits a provider to initiate the process whenever it perceives a "risk of harm" to a competent resident, other residents or staff members. This test is too broad. It puts consumers at risk of being required to get extra care, at potentially great expense, if the residence sees any risk of any harm. It also puts consumers at risk of possible eviction from the residence for behaviors that do not create a significant risk.

Section 2800.51 – Criminal Background Checks: In our comments to the proposed regulations, CLS expressed concern that the adoption by reference of the criminal background provisions of the Older Adults Protective Services Act (OAPSA) would incorporate unconstitutional law (those lifetime ban provision having been found unconstitutional in Nixon v. Commonwealth, 839 A.2d 277 (Pa. 2003)). We urged, instead, the adoption of the Department of Aging’s interim OAPSA policy, which allows facilities to hire people with at least five years of work experience in care-giving jobs since the date of their conviction or release from prison, whichever is later. The interim draft regulations did just that, adding the following language: “(b) The hiring policies shall be in accordance with the Department of Aging’s Older Adult Protective Services Act policy.” The final version, however, has been changed to delete reference to the “interim policy”, instead referring to the “policy posted on the website”. Instead of incorporating by reference the specific terms of the interim policy that attempted to cure the constitutional defects of the statute, the new language would incorporate by reference whatever policy the Department of Aging chooses to post. In addition, the term “interim policy” at least suggests that the Department’s policy is different from the statute. A provider who does not know about the Nixon decision and the interim policy would not be given much clue by the new language that the statutory language does not apply.

Section 2800.56 (Administrator staffing): We are concerned by the change allowing a direct care staff person to supervise the residence during the hours when the administrator or designee are not present. This change means that an individual with the minimal training of a direct care staff person can be left in charge of the facility for up to three quarters of the time (all hours besides the 40 hours in which the administrator or designee are required to be present). We strongly support the requirement that the administrator designee pass the administrator training test.

Section 2800.64 (Administrator Training and Orientation): Assisted living residences will be permitted to serve individuals who need the level of care traditionally provided by a nursing home. As a result, the resident population will have a higher acuity level than is found in personal care homes, which are prohibited from admitting or retaining residents with nursing home level needs. It is therefore a significant health and safety concern that the number of hours of required training for assisted living administrators is only 100 hours, no higher than the number required for personal care home administrators. Similarly, 18 hours of training for direct care staff, as required by **section 2800.65 (Staff Orientation and Direct Care Staff Person Training and Orientation)** is grossly inadequate. Please note, however, that we strongly support the regulations’ specification of a minimum number of training hours.

Section 2800.101 (Resident Living Units) significantly reduces new and existing unit sizes for single and double occupancy units¹ and permits facilities to house residents in rooms with an average 7’ ceiling height. CLS supports the view that Pennsylvania’s assisted living consumers should benefit from rooms sized in accord with “marketplace” standards of at least 250 square

¹ New construction unit size is reduced from 250 square feet to 225 square feet for single occupancy units. For double occupancy units, new construction unit size is reduced to 300 square feet from 330 square feet. Similarly, standards for existing structure unit sizes were reduced from 175 square feet to 160 square feet for single occupancy units. For double occupancy units, the standard was reduced to 210 square feet from 235 square feet.

feet, and up to 500 square feet, for a single bedroom living unit. The 160 square foot requirement for existing construction fails to provide sufficient space for a wheelchair user to meet the Americans with Disabilities Act Accessibility Guidelines. As a result, residents will be limited in their mobility and independence, and wheelchair users will have difficulty finding accessible units.

Even more troublesome is the brand new provision, which was not in either the proposed or the interim draft regulations, permitting an exception to the room size requirements at the Department's discretion. No process, standards, or criteria are articulated for residences seeking to be excused from the room size requirements. In contrast to the provisions relating to waivers in section 2800.19, the regulations do not provide for public posting of the exception request or a period of public comment prior to final review and decision. Since an "exception" is in fact a "waiver," the same requirements should exist. An exception process for new construction is particularly inappropriate. If an assisted living residence is built after the effective date of these regulations, the operator of such a facility is on notice as to size requirements, and no exception could reasonably be granted under such circumstances.

Section 2800.203 (Bedside Rails) adds subsection (b), which provides limitations on the use of bed rails. However, these requirements do not meet or exceed the rules for bed rail use in personal care homes, as articulated by the Department in interpretive guidance available at <http://www.dpw.state.pa.us/PartnersProviders/LongTermLiving/PCHNewsletters/003675863.htm>. In personal care homes, bedside rails can only be used when: a physician has completed a recent assessment and specified that bed rails are appropriate for the resident; the rails and space between rails and mattresses meet the guidelines of the Food and Drug Administration; staff complete frequent physical checks of residents while bed rails are in use; and the resident's assessment and support plan addresses the resident's needs and health and safety protections necessary for the use of the rails. By contrast, the final-form assisted living regulations require only that the resident's assessment or support plan address the medical symptoms necessitating use of the rails and the health and safety protections necessary for their use. In this regard, the personal care home standards are clearly higher than the proposed standards articulated for assisted living facilities. Since the statute requires the assisted living regulations to "meet or exceed" the requirements of the personal care home regulations, this regulation is not consistent with the intent of the General Assembly.

Section 2800.142 (Supplemental Health Care Services) allows the residence to designate any medical care provider other than the resident's primary care physician. While CLS recognizes that the statute permits assisted living residences to require residents to use supplemental health care providers designated by the residence, to the extent that this requirement is prominently disclosed in the admission agreement, the breadth of this statutory and regulatory provision infringes on consumers' autonomy and freedom of choice. As written, it would permit the residence to designate not just home health and skilled nursing providers, but also psychiatrists, neurologists, cardiologists, and a host of other medical specialists.

Section 2800.131 (Fire Safety) changes the proposed regulation's requirement that each floor and each living unit have a fire extinguisher (except if contraindicated by the resident's support plan) and merely requires a fire extinguisher for every 3,000 square feet, including

public walkways and common areas. Since residents will now be permitted a kitchen area where electric appliances would be in use and thus creating potential fire hazards, the dilution of the fire extinguisher requirement is a significant concern. Fire safety has long been a major concern in personal care homes. Indeed, the impetus behind the creation of the original personal care home licensing regulations was the history of deadly fires in those facilities due to the lack of fire safety requirements. Fire safety is of even greater concern in assisted living residences, where it is anticipated that there will be many more residents with higher acuity needs and mobility impairments.

The International Building Code (IBC) and the Pennsylvania Building Code (PBC), which adopted the IBC in 2004, require facilities housing individuals incapable of self-preservation to have sprinkler systems as a means of fire suppression. Assisted living facilities clearly will house many such persons. It is not clear from the regulations whether the IBC and PBC will be enforced with regard to assisted living facilities. Moreover, enforcement of those codes is generally left to individual municipalities, which can lead to inconsistent or non-existent oversight. Since it is unclear which building code requirements will be applied to assisted living facilities, this provision is inadequate to protect the vulnerable individuals who will reside in assisted living residences.

Thank you for your consideration of our comments. I can be reached at (215) 227-2400, extension 2431 or by email at pwalz@clsphila.org.

Sincerely,



Pamela Walz, Esq.

cc: Representative Phyllis Mundy, Chair, House Aging and Older Adult Services Committee
Senator Pat Vance, Chair, Senate Health and Public Welfare Committee
Jennifer Burnett, Deputy Secretary, Office of Long-Term Living, Department of Aging
Elaine Smith, Bureau of Policy and Strategic Planning, Department of Public Welfare

Jewett, John H.

From: Pam Walz [PWalz@clsphila.org]
Sent: Friday, May 28, 2010 11:34 AM
To: IRRC
Cc: pmundy@pahouse.net; vance@pasen.gov; Burnett, Jennifer; elasmith@state.pa.us; Smith, James M.; Jewett, John H.
Subject: Comments on Assisted Living Regulations ID No. 12-514
Attachments: CLS Assisted Living Regulations Comments.pdf

To the Independent Regulatory Review Commission:

Community Legal Services, Inc. hereby submits the attached comments concerning Regulation ID #12-514 (Department of Public Welfare, Assisted Living Residences). Thank you for your consideration of our comments on this important regulation.

Pamela Walz, Esq.
Aging and Disabilities Unit
Community Legal Services, Inc.
3638 N. Broad Street
Philadelphia, PA 19140
(215) 227-2400, ext. 2431