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INDEPENDENT REGULATORY
REVIEW COMMISSION

#2712

August 26, 2008

Ms. Kim Kaufman
Executive Director
Independent Regulatory Review Commission
3333 Market Street, 14th Floor
Harrisburg, PA 17101

Dear Ms. Kaufman:

I appreciate the Independent Regulatory Review Commission's review of the proposed Assisted Living regulations. These regulations as written will have a major impact on cost of services to the consumer as the cost of compliance with these regulations by the provider will, of necessity, be passed on to the resident consumer. These costs may in fact limit the benefit intended by the regulations as the cost will serve as a deterrent to those who most need the assisted living level of care. Comments offered are as follows:

Section 2800.11 c

Licensure fees to be proposed in this section represent an extraordinary increase over the current fees and are out of synchrony with licensure fees nation wide. To expect that a facility of 100 beds pay an initial \$500 flat licensure fee and an additional day assessment of \$105 per bed is an exorbitant charge and will result in undue hardship for a facility that would be expected to pay a total licensure fee of \$11,000. This fee and bed assessment will result in a charge that will of necessity be passed on to the resident.

Section 2800.15 b. c. d

The definition of "immediately" should be clarified. Is this to mean immediately following the event or with "immediate" to be understood as within 24 hours of occurrence?

2800.16.3

The proposed regulation states that an injury, illness or trauma requiring treatment to a hospital or medical facility is a reportable event. I suggest the reporting of an illness resulting in hospitalization as reportable event as illness in the elderly population with multiple co-morbidities is a natural occurrence and therefore should not necessitate reporting to the Department. An illness that has resulted as an adverse outcome to an event such as medication or treatment would be quite reasonable to be a reportable incident to the Department.

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2800.19.a

The language in this proposed regulation states that the Secretary or the Secretary's appointee "may" grant a waiver of specific requirements of this chapter, etc. I would suggest that the word "may" be changed to "shall" which takes away any discretion on the part of the Department to grant a waiver, provided the conditions as stipulated are met.

2800.19.f

The regulation states that the Department will review waivers annually to determine compliance with the conditions required by the waiver and the Department may revoke the waiver if the conditions required by the waiver are not met. Given the history of the Department to continually change the interpretation of the regulation, it would be important that there be an appeal process included in this condition that should a waiver be revoked, an appeal process would be in place as consistent with the 2800.12 section.

2800.22 b.3

It is reasonable that the resident receive a copy of the facility or resident rules and regulations; however, a printed copy of the handbook seems unreasonable if, in fact, this is shared with the potential resident, and if the resident has already received a copy of the rules and handbook. To require approval for the handbook by the Department seems redundant and totally unnecessary.

2800.25. b

There is an apparent lack of equity in the allowance to determine a residency contract. The proposed regulation states that the contract shall run month to month with automatic renewal unless terminated by the resident within 14 days notice or by the residence with 30 days in accordance with section 228. Based on the activities that occur with termination of the contract, it would seem that a 30-day advance notice on the part of both parties to terminate a month-to-month contract is more reasonable and upholds the general principle in contract law.

2800.25. e

The proposed regulation allows the resident the right to rescind the contract for up to 72 hours after the initial date of signature of the contract or upon receipt of the initial support plan. The initial support plan must be completed within 30 days of admission; therefore, it allows the resident up to 30 days to rescind their actual contract. This seems unreasonable in light of the fact that the resident shall have input into the development of their own care planning process and therefore the support plan.

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2800.30.b.

This proposed regulation states that for cognitively-impaired residents the ombudsman shall be automatically notified by the licensee and that notification should be documented in the resident's file by the licensee. Section 2800.30.a.2 states that a cognitively-impaired resident shall be eligible for an informed consent agreement only if the resident's legal representative is included in the negotiation of the informed consent agreement and executes the agreement. Given the fact that the cognitively-impaired resident has their legal representative included in the discussion for an informed consent agreement, it seems unreasonable to automatically be mandated by the regulation to contact the ombudsman.

2800.42. r

Please review the last statement of this as it appears to have a typographical error. The statement reads: "If a residence adopts such policies and procedures they shall be binding on the *residence*." I would suggest that this statement ought to read: "If a resident adopts such policies and procedures they shall be binding on the *resident*."

2800.56.b

This section states that the designee for the administrator shall have the same training required as that of an administrator. Section 2800.57A states that the designee shall be present in the residence at all times when there are one or more residents present in the residence. Does this require the designee to have the same training as listed in section 2800.64 or does it require the same credentialing and training as the administrator? Administrators are currently in short supply, and educating additional staff as administrators is neither feasible nor practicable. This would be costly for a facility and that cost will inevitably be passed on to the consumer resident

2800.60.d

This regulation states that in addition to the staffing requirements the residents shall have a nurse on call at all times. This requires clarification as to whether that nurse is a Licensed Practical Nurse or Licensed Registered Nurse. It also requires clarification as to whether this is over and above the routine staffing when there may be a nurse in the residence at that time. Requirement for an additional nurse on call will be burdensome and costly to a facility that is already meeting staffing requirements as defined by the regulations.

00.61

This states that when regularly-scheduled direct care staff are absent, the administrator may arrange for coverage by substitute personnel who meet the direct care staff qualifications and training as specified in 2800.54 and 2800.65. This may be very difficult and costly to maintain when regularly-scheduled are absent due to unforeseen circumstances and substitute personnel are required to meet the needs of residents for a particular shift or time frame. I would suggest there be a time where a substitute staff person could be utilized in unforeseen circumstances to meet the direct care needs for a particular resident body and that only regularly-scheduled substitute personnel meet the intent of the training regulations as specified in 2800.54 and 2800.65. This would permit emergency staffing to meet the requirements needed to provide services for residents for a given short period of time.

2800.56

This states that the administrator shall be present in the residence an average of 40 hours or more per week. This is unclear should a facility be licensed as both assisted living and personal care simultaneously. This should be clarified in order that a dually-licensed facility would not require 60 hours of administrative support and that one administrator could oversee both licensed areas provided they met the intent of the regulations and qualifications as defined in the 2600 and the 2800 regulations.

2800.64

This proposed regulation does not provide an exception for a nursing home administrator with a valid license from substituting credits to keep their nursing home administrator license current. It is recommended that a paragraph be added to allow such an exception that permits a licensed nursing home administrator (NHA) employed as an administrator of an assisted living residence to be exempt from training and educational requirements of this chapter if the administrator continues to meet the requirements of the Department of the State for an active nursing home administrator license, since the nursing home administrator is overseeing a higher level of care than assisted living.

2800.96

There appears to be a significant error in the definition. An AED as proposed to be required in each first-aid kit is not an automatic *electronic* defibrillator, but rather it is an automatic *external* defibrillator. The "E" in this acronym "AED" stands for "external" rather than "electronic" and this should be changed in the final regulations.

2800.96.a

The requirement that every first-aid kit include an AED is costly and unnecessary. The average cost of an external defibrillator is \$2,600 and this would be cost prohibitive to have more than one first-aid kit with an AED in each facility.

2800.98.a. & b.

This states that the residence shall have at least two in-door common rooms for all residents. Section b states that the combined living room or lounge shall accommodate all residents at any one time and that there must be a total of 750 square feet if there are more than 50 living units. The availability of two rooms would be cost prohibitive and the square footage may constitute a significant limitation in many facilities becoming licensed as assisted living residences. A suggested compromise would be to permit the dining room to function as the lounge area and count as one of the two wheelchair-accessible rooms.

2800.101. b.2

This section proposes that each living unit must have at least 250 square feet measured wall to wall excluding bathrooms and closet space. I would suggest that square footage is not the determination of appropriate care, but rather that meeting the regulations regarding quality management, appropriate reporting and appropriate staffing suffice to meet the intent of providing an acceptable assisted living residence. The higher the square footage, the higher the cost to the provider, and that cost will be passed on to the consumer making assisted living a very expensive alternative for senior living.

2800.101. j.1

The regulation states that a bed must be provided with a flame-retardant mattress. It makes no exception for a resident who would choose to have their own particular private mattress rather than one supplied by the facility that is fire retardant. Yet the preamble, in the general provisions under 2800.1.b states that "assisted living residences are a significant long-term care alternative to allow individuals to age in place and that this is provided to develop and maintain maximum independence, self determination, and personal choice." I would argue that the prescriptive regulations under this section 2800.101 do not provide flexibility and resident choice.

2800.131.o

The proposed regulation states that there shall be at least one operable fire extinguisher for each floor and living unit. There is strong concern expressed that a fire extinguisher placed in every living unit is an extraordinary measure. In fact, fire extinguishers, when used improperly, can place the resident at risk of harm. This would also invite residents who may not be familiar with the use of the fire extinguisher to use that fire extinguisher should an incident occur. The type of fire extinguisher is also a concern in that if used improperly, can actually spread a flame and increase the significant potential of danger. I would suggest that fire extinguishers placed within a certain square footage in common areas, public areas, and in every kitchen minus the actual resident room, would be an acceptable alternative. I would also suggest that to encourage a resident who has limited

knowledge and experience to use a fire extinguisher has the potential to limit a timely and safe resident evacuation in the event of a fire.

2800.141.a

This proposed regulation states that the resident shall have a medical evaluation within 60 days prior to admission. I would suggest this may serve as a limitation to the admission of specific individuals that may require housing and an assisted living residence and that the medical evaluation would be better required within 60 days prior to admission or within 30 days following admission. It is not always feasible and practicable for the facility to have an evaluation performed prior to the resident's admission, especially during and emergency admission.

2800.161.d

This proposed regulation states that a resident's special dietary needs as prescribed, etc. shall be met. I would suggest that this statement is limiting and that it requires that the residence supply special diets but takes away the resident's choice as to whether or not they prefer to follow dietary prescriptions and restrictions. It is also an antithesis to the entire culture change initiative that encourages resident choice and flexibility in the least restrictive and less institutionalized setting.

2800.162.a

This proposed regulation states that there may not be more than 15 hours between the evening meal and the first meal of the next day, and no more than 6 hours between breakfast and lunch, and between lunch and supper. I would suggest that this clause be re-stated to state that 15 hours between the evening meal and the first meal of day and no more than 6 hours between breakfast and lunch, and lunch and supper be the offered times. However, residents may choose to eat at times other than this, and this should be a clause that allows the resident this leeway. This restriction should be placed upon the facility to supply meals within that time increment, but it should not limit the resident to those hours if they choose otherwise.

2800.162.g

This suggests that all appropriate cueing shall be used to encourage and remind residents. I would encourage a clause to this proposed regulation that would state that cueing would be encouraged based upon the resident's support plan where cueing would be an advantage for that resident.

2800.171.d

This states that if the residence supplies its vehicle for transportation of residents it shall be accessible to resident wheelchair users and any other assisted device. This would imply that if a residence possesses more than one vehicle which is used for transportation

of residents that all those vehicles would be required to have handicap accessibility. I would suggest that this be changed to require that at least one vehicle that would transport residents would be equipped for handicap accessibility and that residents requiring wheelchair transport would be transported in that specific vehicle.

2800.188.b

This suggests that a medication error shall be immediately reported to the resident, the resident's designated person, and the prescriber. I would suggest that the notification to the resident's designated person be made at the request or with the consent of the resident rather than be automatic reporting.

2800.202.4

This proposed regulation states that a chemical restraint for the specific and exclusive purpose of controlling acute or episodic aggressive behavior is prohibited. I would suggest that there are frequently drugs ordered for the sole purpose of alleviating acute anxiety on a PRN (pro re nata) basis. I would suggest that clarification is required in order that these PRN anti-anxiety medications could be administered as ordered and not be considered a violation of the proposed regulation.

2800.220.c.7

This proposed regulation states that escort service to and from medical appointments is transportation provided by or coordinated by the residence. Many residents do not prefer a staff accompaniment to or from medical appointments but rather choose to attend those appointments individually and privately. I would suggest that clarification is required.

2800.224.a. This proposed regulation as written poses potential liability as a violation to both the Fair Housing Act and the American with Disabilities Act. A written basis of denial is in direct conflict with these acts and discriminates against individuals.

2800.225.a

This states that a resident shall have a written initial assessment as completed by either the administrator or designee or a Licensed Practical Nurse under the supervision of a Registered Nurse. This initial assessment is an observation one for the purpose of creating a support plan rather than a care plan, and since it does not result in a diagnosis, it would be quite acceptable that a Licensed Practical Nurse be qualified to complete the initial assessment without the supervision of a Registered Nurse. The addition of a Registered Nurse to oversee a Licensed Practical Nurse limits the Practical Nurse's scope of practice and is also an undue cost and burden to many assisted living residences. In fact, the Licensed Practical Nurse without the supervision of a Registered Nurse may be more qualified to complete the initial assessment than an administrator who may not have

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clinical or medical background. This entire section requires reconsideration and clarification.

2800.227.b

The requirement of a Registered Nurse to oversee the development of a support plan that would be developed by a Licensed Practical Nurse is costly and not necessary. A Licensed Practical Nurse is qualified with appropriate training to develop a support plan for any resident in an assisted living facility.

2800.227.c

This proposed regulation states that the support plan shall be reviewed annually upon changes in the resident's needs and quarterly. I would suggest that quarterly is unnecessary since annual review and with any change suffices to meet the intent of providing quality care to any resident. The requirement of quarterly updates is excessive, time consuming, redundant and increases cost, which will be passed on to the resident.

2800.235

This proposed regulations states that if the residence initiates a discharge or transfer of a resident, the administrator shall give a 30-day advance written notice to the resident, the resident's designated person and the referral agent, citing the reason for the discharge. I would suggest a clarifying statement be added to this to state that in an emergency or based on clinical needs the discharge or transfer can be done based on consent of the resident and the resident's designated person.

Thank you for the opportunity to have offered comment on these proposed regulations. It would be my desire that the Office of Long-Term Living and the Independent Regulatory Review Commission consider these comments knowing that we are all partnering together to provide excellent care to those residents requiring assisted living services.

Sincerely,



Eva Bering
Vice-President of Operations

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cc: Nick@PANPHA.org
Mark@PANPHA.org
Gail Weidman, Office of Long-Term Living