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C DALE McCLAIN

September 12, 2008

Ms. Gail Weidman
Department of Public Welfare
Office of Long-Term Care Living
Bureau of Policy and Strategic Planning
P. O. Box 2675
Harrisburg, PA 17105

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INDEPENDENT REGULATORY
REVIEW COMMISSION

Re: Comments of the Pennsylvania Bar Association on the Assisted Living Facilities Proposed Regulations, Reference No. 14-514

Dear Ms. Weidman:

Enclosed please find the Pennsylvania Bar Association's Comments on the Assisted Living Facilities Proposed Regulations. The PBA appreciates the opportunity to comment on this proposed rulemaking. If there are any questions about our Comments, please do not hesitate to contact me.

Sincerely,

C. Dale McClain
President

cc: Independent Regulatory Review Commission
House of Representatives Aging and Adult Services Committee
Senate Public Health and Welfare Committee



COMMENTS ON THE PENNSYLVANIA BAR ASSOCIATION ON THE ASSISTED
LIVING FACILITIES PROPOSED REGULATIONS, CHAPTER 2800 OF 55 PA CODE TO
THE INDEPENDENT REGULATORY REVIEW COMMITTEE
(REFERENCE REGULATION NUMBER 14-514)

The Pennsylvania Bar Association has great respect for the fact that the Legislature embraces the need for a level of care known as “assisted living” within Pennsylvania. We believe the Office of Long Term Living and the Department of Public Welfare have made an excellent beginning – identifying many elements that will serve as the foundation for a carefully crafted set of regulations to serve some very frail and vulnerable Pennsylvanians. However, while we want to be supportive of the process and certainly of the need for the development of regulations for the assisted living industry, we have also discovered several areas of deep concern.

Therefore, we formally oppose several elements of the proposed Assisted Living Regulations in its current format and content because they do not represent the best interests or needs of the elderly community in our Commonwealth.

The Pennsylvania Bar Association includes more than 800 attorneys in its Elder Law Section whose practices are primarily dedicated to Pennsylvania’s senior citizen community. The services these lawyers render to their clients include advice and counsel regarding retirement life and end of life decision making, housing placement issues, contract review, completing applications for living arrangements and for public benefits, and they often continue to assist their clients when adverse decisions require an appeal to the appropriate authority.

Seniors have a variety of housing alternatives available in Pennsylvania. Unfortunately, not all of these alternatives are feasible for all seniors for both economic and service delivery reasons. Consumers who are both “private pay” and on “public benefit” are potential patrons of assisted living, but they must be able to distinguish between what is offered at each level of care in order to make an informed decision prior to signing any contract for care.

One of the ubiquitous (and we think fundamental) questions arising from our contacts with clients is, “What is the difference between Personal Care and Assisted Living?” We were earnestly hoping that the proposed regulations offered us a clear method of distinction – a way that would make the differences clear to us so that we could better advise our clients. Unfortunately, we are all as much in the dark after these regulations were issued as before.

Another question often posed by our clients is, “How can I make a fair comparison between facilities so that I know that my needs will be met and that I can afford to go there?” It seems to us that this is a very basic question. Yet again, we are unable to give clear direction to these

clients because the regulations as written offer little in the way of comparison of what we think should be distinct levels of care.

A third question also arises with frequency, “What if the facility says they can no longer meet my needs and they want to discharge me. Do I have any recourse to object, any way to appeal their decision?” Well, at the moment, we do not think so, but “Caveat Emptor” should be emblazoned across the front of their Resident Agreement.

While the Assisted Living Statute and the proposed regulations are an important conceptual step in Pennsylvania’s commitment to help seniors to “age in place”, the current regulations fall short of providing the framework necessary to achieve this objective. As attorneys, we have focused our comments upon those sections of the proposed regulations which interfere with our ability to adequately and effectively represent this vulnerable population of consumers. We are also concerned that the proposed regulations do not provide an over-arching and fundamental set of “Rights” that afford even unrepresented seniors a modicum of security that their long term living purchase will be a sound one – and in the event it is not, that they have a clearly defined path for redress.

In light of the foregoing comments, the Pennsylvania Bar Association, on behalf of its 29,000 members, is providing the following section-by-section specific comments to the proposed Assisted Living regulations, as published on August 9, 2008, with reference regulation number 14-514.

**Specific Comments of the Pennsylvania Bar Association to the
Independent Regulatory Review Commission
Regarding the Proposed Assisted Living Regulations**

The Regulations lack an initial, pre-admission assessment that would identify if a particular consumer can be adequately served at a particular facility.

Although there is a short-form, pre-screening checklist to determine whether the consumer has conditions that would require exclusion from the facility or is permissible to be admitted, real comprehensive consumer needs assessments need not to be completed until “within 15 days” after admission to an assisted living facility. The care plan need not be completed until “within 30 days” after admission to the facility.

As proposed, the regulations put consumers in the position of having to move into a facility without knowing for certain if they will be able to remain there. With the possible exception of an immediate hospital discharge, an assessment tool that is completed by the consumer in conjunction with a medical staff person of the facility, should determine whether she can live in the facility successfully, what are her care needs, whether they can be met (and whether they can be met in a way that comports with the consumers’ choices around how and when to receive care), and what are the costs associated with her care in that facility. Where monthly fees are calculated by establishing a “base rate” – that is increased with every “extra service” determined to be needed – the consumer has the untenable choice of packing up and leaving, or paying the additional fees. The choice should have been on the front end of the contract – not 30 days hence. Thus, we specifically recommend that the Department revise the following sections: §

2800.22 and § 2800 25 to reflect our recommendation that except in the event of an urgent admission due to immediate discharge from a hospital or nursing facility, care needs and preferences must be identified through a comprehensive assessment and a support plan of care delivery must be completed prior to admission.

In the event of an emergent discharge to and admission into an Assisted Living Residence, the facility must complete the assessment within 72 hours of admission and the support plan within 7 days of admission. Under no circumstances must a consumer be required to commit to a resident-residence agreement without having had an assessment completed and a support plan developed.

There is no apparent “appeals process” for a consumer to follow when inappropriate or questionable discharges or refusal to supply needed care occurs.

Other than involving the Ombudsman, the regulations offer no course of action that provides a consumer with an avenue of appeal to any adverse decision. Currently, residents of long term care (nursing homes or personal care homes) know that they can be discharged from a facility for lack of payment, willful divestment of resources promised to be available for their care, and for certain medical reasons (contagious conditions, etc), or for behavioral conditions that the facility is ill-prepared to address. If “assisted living” falls somewhere between nursing and personal care homes on an envisioned “continuum of care”, it would seem appropriate that the same conditions are used to evaluate discharge in assisted living as well. However, many reasons for discharge can exist. As such, under the Assisted Living system envisioned by the proposed regulations a consumer and their legal practitioner or Agent has no practical way to challenge a denial of admission or a decision to discharge. All appropriate regulatory and legislative actions must be taken to impart to consumers the right to and a process through which to challenge the decisions made by their facility that relate to the extent of their care, the cost of their care, and the basis for terminating the care delivery and requiring discharge. In particular, protections should also be in place whereby a resident is not evicted from the residence without a prior hearing by an appropriate tribunal.

The Regulations offer no protection against deceptive marketing practices.

The most likely inhabitants of assisted living facilities will be the frail elderly. This population is easily influenced, and often more easily deceived. Some seek the counsel of attorneys before making life-changing decisions but many do not. Some have appointed a legal Agent, or have close family who can advise them; but this is not universally so. Elderly consumers need to be protected against deceptive practices that cause them to believe certain services are available that are not. Marketing pieces that depict happy elders are one thing – showing happy elders boarding a bus when the facility does not have a bus – would be deceptive. Written claims that consumers can age in place - no matter what - would be deceptive. Some measure of safe-guards that require a facility to adhere to “truth in advertising” should be a part of the Regulations. Similarly, the final regulations must include some elaboration on the permissible uses of the term “assisted living” and protections against facilities suggesting they provide assisted living services even when they are not so licensed.

The Regulations lack a set of “Core” (basic bundle) Services - § 2800.25 and § 2800.220.

The regulations allude to “core” services and mandates that a fee schedule must be provided to the consumer. However, there is no indication that a “minimum” package of services be available to consumers universally. The industry calls this “bundling”, when a group of services are included for a set price per diem. Other services may be available, but for an additional fee. It is very difficult for a senior to compare different residences when services are bundled this way, unless there is a “standard” or “minimum” bundle. If every residence were required to offer a minimum set of services (with each facility determining their own price), the consumer could truly compare “apples to apples”, and evaluate each residence on price as well as environmental, convenience and other elements. The consumer may not need other services, but a list of the additional costs for them would also assist them in evaluating which residence to consider. We believe the “basic bundle” for assisted living services should include:

- 24 hour supervision, with emergency response system
- Medication Management/Oversight
- Development of an individualized Plan of Care
- Three meals plus snacks
- Bi-Weekly housekeeping services
- Weekly laundry (bed linens and towels)
- Assisted for either emergency or an unanticipated reduction in ADL’s
- Assisted with a minimum set of IADL’s like:
 - o Weekly assistance with personal laundry
 - o Provision of transportation to medical appointments
 - o Daily availability of socialization activities

Informed Consent Regulations, § 2800.30 (a-j), are insufficient to protect the rights of the resident/consumer when a dispute occurs over resident behaviors and choices.

The waiver of a residence’ liability through the “informed consent” process articulated in the Proposed Regulations is a very serious step and should not be taken without appropriate counsel to the resident or their legal representative. The Regulations suggest the optional use of the Ombudsman in this process, (“automatically” for cognitively impaired residents) but we believe this is outside of their lawful role. Where a resident has legal representation (an Agent under a power of attorney, or a known attorney at law), at a minimum they should be encouraged first to seek this counsel before entering into any negotiation that would shift the risk assumption for their choices to them and away from any liability to the residence. A full and complete disclosure to the resident and their representative as to the care planning alternatives available should be made in writing to the resident prior to any negotiation meeting.

We further recommend that an Independent Review Committee, within the Department of Public Welfare, or the Office of Long Term Living, be created to hear disputed negotiations before discharge occurs.

Thank you for the opportunity to comment on these important regulations.