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Genesis HealthCare<sup>SM</sup>

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INDEPENDENT REGULATORY  
REVIEW COMMISSION

September 12, 2008

101 East State Street  
Kennett Square, PA 19348  
Tel 610 444 6350

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REFER TO \_\_\_\_\_

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

Re: Proposed Regulatory Requirements for Assisted Living Residences  
Regulation ID # 14-514 (IRRC ID #2712)

Dear Ms. Weidman:

On behalf of Genesis HealthCare Corporation, a Pennsylvania headquartered national provider of health care and support services to elderly and disabled, I write commenting on the proposed requirements for assisted living residences.

Genesis Healthcare Corporation operates over 2,700 units of assisted living, of which more than 1,000 of those units are located in the Commonwealth of Pennsylvania. Additionally, Genesis operates more than 25,000 skilled nursing facility certified beds in thirteen states stretching from North Carolina/West Virginia through Maine.

Leadership from Genesis HealthCare, at both our corporate and operational level, has participated in the review of the proposed rules submitted by the Pennsylvania Health Care Association (PHCA) and its affiliate, the Center for Assisted Living Management (CALM). Rather than duplicate those extensive comments, I will limit my comments on behalf of Genesis HealthCare endorsing the many constructive ideas amplified in the technical review done by the state association. Our Regional Vice President who has operational responsibility for our eleven assisted living facilities in the Commonwealth felt so strongly about the proposed rules that she has submitted comments on the proposed rules. To emphasize that we share her views and insights, and to avoid any confusion as to why there are two submissions from Genesis HealthCare, I have made her comments an appendix to this letter.

Genesis HealthCare has been an active participant in the development of Act 56. While it took nearly a decade to elevate differentiating assisted living a state priority and to overcoming the many legislative obstacles, SB-704 was enacted, and signed into law. With enactment, there were clear expectations that dependent populations in our state would have new options for securing appropriate shelter and supportive services. The legislative record amplifies three broad strategic goals:

- (i) creating meaningful, affordable options for seniors,
- (ii) expanding the array of adaptable and supportive services, and,
- (iii) addressing the inadequacies of the regulatory myopia that views all shelter based services as either personal care or nursing homes.

Unfortunately, the proposed regulations fall far short. As drafted, these rules fail the affordability standard. As written, they fail the adaptive shelter criteria. As written, they fail to address the needs of those who require less medical and more social/supportive. As written, they fail to programmatically define the boundaries between personal care and assisted living. As written, they fail to clearly differentiate between assisted living and nursing home services. And, as written they impede, rather than stimulate solutions to the escalating demand for appropriate, supportive shelter.

**In short, the Department fails on all strategic criteria.** In many ways, this does not come as a surprise. Fifteen years ago, the Public Policy Institute of the American Association of Retired Persons (AARP) concluded in a manuscript entitled, Assisted Living in the United States: A New Paradigm for Residential Care for Frail Older Persons, the following:

*In summary, developing assisted living requires taking a hard look at populations and their needs and existing programs and their adequacy and challenging cherished assumptions like the "continuum of care" and the need to protect older citizens from harm. It also requires developing goals with a mixture of idealism (highlighting what is desirable for the tenants) and realism (facing the factors that increase costs.) Undertaking such a restructuring task takes energy, leadership and coordination. Embattled state agencies, distrustful of their own powers and the credibility of federal and other state officials, buffeted by interest groups and facing multiple mandates, have strikes against them in undertaking such a visionary task. In that regard, it is impressive that some states have already taken so many steps toward reform, but it is not surprising that some efforts have been half-way or contradictory and others have been aborted.*<sup>1</sup>

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<sup>1</sup> AARP, Assisted Living in the United States: A New Paradigm for Residential Care for Frail Older Persons, (AARP Public Policy Institute, 1993), p. 109

Unfortunately, the proposed rules appear to reflect many of the identified pitfalls. Rather than focus on stimulating exciting new alternatives for dependent populations, the proposed rules suffocate development. In the words of Philip Howard, “We seem to have achieved the worst of both worlds; a system of regulation that goes too far while it also does too little.”<sup>2</sup>

Our mutual challenge is to quickly get the regulations in sync with the statute, and re-written with a view towards achieving meaningful strategic objectives.

### **1. Focus on the Promise of Act 56:**

Perhaps the first step is to revisit the mindset that was embraced in the drafting process. When one re-looks at what is proposed, what jumps out are restrictions that add costs, invoke sameness, emphasize dependency, impede creativity and underscore the need for regulatory protective oversight. Perhaps, even more frustrating is that the proposed rules seem to be a confused compilation of selective passages from existing personal care home and nursing home regulations blurring the expected distinction of a new licensing classification. Again, this “pick and choose” multiple choice approach to assisted living regulations comes as no surprise as the AARP manuscript on Assisted Living cautions:

*“State officials are often immobilized by their desire to protect frail older people. Although sincerely desiring to foster normal settings and lifestyles for disabled older people, compromise of “all or nothing” positions are not easily reached.”<sup>3</sup>*

**If the regulatory drafting process focuses on the legislative promise of Act 56, the emphasis will shift toward actions that stimulate affordable, adaptable, supportive assisted living that promotes independence for the consumer.**

Getting there should not be difficult. No one disputes the demographics of an aging and disabled population – both the current demand and the forecast for the future. We need more of everything, and the expansion of multiple shelter and services options. Adequate shelter is essential for the expansion of home and community based alternatives. Survey after survey underscores the inadequacies of the existing housing stock especially in the urban and rural areas of the Commonwealth.

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<sup>2</sup> Philip Howard, *The Death of Common Sense*, (Random House, New York, 1994), p. 11. Phillips goes on to address the issues of homelessness ...”One of the causes of homelessness (probably third in importance after mental illness and substance abuse) is the shortage of low-cost housing. We made slums illegal and then, with our building codes, made it impossible to build low cost housing.” P. 41.

<sup>3</sup> Op cite, AARP, p. 106.

Modernizing and updating housing units will take time, and money. Realistically, meeting these demands will be market driven, not government driven. The current national economic condition and resulting state fiscal crisis underscores that it will be a very long time, if ever, that the state will take the lead. In short, if there is going to be "creating, expanding, developing and converting" it will come from the private sector.

## 2. Learn from our Neighboring States:

During the past five years all six neighboring states New Jersey, New York, Delaware, Maryland, West Virginia and Ohio have reviewed and revised their assisted living requirements.<sup>4</sup> All of them have wrestled with many of the same issues addressed in the state's initial draft. **Much could be learned from looking at the decisions made in our neighboring states.**

One of the major controversies of the proposed rules relates to per square footage requirements. While we could argue the merits of whether the market or the state should set such requirements, it is instructive to look at what our neighbors have done. All six of the neighboring states have defined minimum standards that are no where near as costly as those recommended by the Department. All seem to recognize that expansive per square footage requirements add capital and operating costs. All seem to put their emphasis on affordable, assisted living.

With regard to stimulating conversions, several of our neighbors have differentiated square footage requirements with differing rules for existing and new construction. Regulators in all six neighboring states seem to recognize that the differentiating focus in assisted living is on supportive services, not shelter space.

It is equally instructive that many of the neighboring states have evolved their requirements for assisted living from a similar regulatory environment as that in the Commonwealth, i.e., starting from sets of rules for board and care and nursing homes, and carving out differing rules for assisted living.<sup>5</sup> Their experiences have led to offering a menu of licensing options that help stimulate creativity and market choices for consumers.

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<sup>4</sup> An excellent resource is the National Center for Assisted Living, Assisted Living State Regulatory Review 2008, (NCAL, WDC) March 2008 – NCAL has posted on their website – [www.ncal.org](http://www.ncal.org) - - a time series of these documents dating back to 2000.

<sup>5</sup> The seminal study of state regulatory evolution is Burton Dunlop and William Scanlon, Understanding the Growth in Nursing Home Care, 1964-1974, (The Urban Institute, WDC) April 1978. .... This was one of the first studies that recognized "*In effect the nursing home, especially the skilled facility unit, is becoming a specialized setting for the sub-acute, recuperative and rehabilitative patient, while the resident needing largely personal care or protective oversight is less often seen there, and increasingly, it appears must be cared for in other settings.*" p. A-5.

Public officials in our neighboring states appear to understand that costs imposed by regulations are ultimately borne by the consumer. Furthermore, there appears to be recognition in each of the neighboring states that dollars siphoned off to fund government oversight are dollars lost to center programs promoting quality life and quality care. Our experiences with the Medicaid provider tax, with nursing home survey and inspection fees, and the ridiculous fees proposed by the Public Safety Authority for implementing Act 52 suggest that there are some in the Pennsylvania state government who do not fully understand this reality. Fees and costs imposed on centers are ultimately passed onto the private consumer; “unfunded mandates” become “implicit taxes.” At some point the burden of these added costs discourage both consumers and investors.

Regulators in Pennsylvania have not been the first to grapple with appropriate placements and the need to create “bright light” clinical differentiators requiring mandatory discharges. Officials in neighboring states have confronted similar challenges and they appreciate the limits of “aging in place.” There seems to be consensus in the other states that regulations should address the process, but that the ultimate decisions should be in the hands of the clinical professionals. Public officials in our neighboring states, seems to understand that unrealistic middleman interference with each placement and discharge decisions is intrusive, burdensome and costly. Moreover, there is an appreciation that assisted living centers operate 24/7; hours that government agencies are not accustomed to matching.

A review of assisted living regulations in our neighboring states also suggests that they have grappled with some of the business issues such as administrative direction, staffing, and fiscal management. In most instances, the public officials in our neighboring states seems to have a more realistic understanding of basic business with an emphasis on what can be done, rather than wishful mandates. Accepting that it is sometimes difficult for career regulators to appreciate the complexities of the services sector, it appears the prudent approach would be to exercise caution and to focus on the objective of the standard rather than a definitive standard. This is particular important when setting questionable deadlines that impose work burden.

### **3. Listen to stakeholders who are prepared to help develop assisted living:**

Howard begins his essay on the Death of Common Sense with the graphic story of how the nuns of the Missionaries of Charity (the order founded by Mother Teresa) were forced to walk away from building a homeless shelter in New York City. The nuns had developed a plan and committed the resources, only to learn that the costs to meet imposed building requirements and the process of getting approvals were excessive. Howard opines, “*A law that dictates either a model home or no home is probably fine for some, but what about those trying to provide housing for the poor?*”<sup>6</sup>

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<sup>6</sup> Howard, op.cite, pg 5.

The reality is that absent the involvement of the private sector and absent an infusion of capital to meet shelter needs, there are limits to what the state will be able to do. If the imposed standards are too costly or too onerous to induce market participation, who benefits? If the rules impede conversion, or lead to private-pay only conversion, have we helped those with marginal incomes? The capital stock of our nursing home sector in the Commonwealth is about 32 years of age; there has been virtually no new construction and limited renovation. As our "used and useful capacity" shrinks, what happens to those whose needs are for shelter and supportive services? At what point does "aging in place" become a cover for abandonment? The Commonwealth's track record meeting its obligations to dependent children, mentally impaired and other special needs populations document glaring deficiencies.

It is unfortunately that the proposed rules carry forward many of the disputes that were raised, debated and resolved by the legislative enactment. Rather than accept the statutory platform, the Department appears to be re-opening issues. It is not clear why, or what is driving this divisive attitude. It is almost as if the individuals responsible for writing the regulations are attempting to thwart the purpose of the enactment.

A meaningful effort was made by PHCA/CALM to craft realistic, constructive comments on the proposed rules. We know that similar efforts have been made by other trade associations and companies that have committed resources to help provide shelter and supportive services. The attached comments from Kristen Santangelo, our Regional Vice President, Assisted Living Operations, are heartfelt professional views underscoring what is possible.

**Partnering requires trust, cooperation and communications. Regulators need to be honest brokers committed to implementing the law, not advocates, attempting to promote preferences.**

**Summary:**

Over forty years ago, Dr. Herbert Shore, one of the pioneers of gerontology, authored an insightful manuscript advocating for the "social components of care." The focus of that manuscript was to emphasize that many dependencies can be address by shelter and social support, not by the costly medical interventions required in nursing homes.<sup>7</sup>

That is the legislative intent of Act 56, signed into state law by Governor Rendell on July 25, 2007. The law was enacted to promote the expansion of assisted living in the Commonwealth. Unfortunately, the proposed rules issued by the Department of Public Welfare thwart that initiative.

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<sup>7</sup> American Association of Homes for the Aging, Social Components of Care, (AAHSA, WDC), 1968.

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As outlined in this letter, much can be learned from our neighboring states to correct the deficiencies of the proposed rule. Additionally, much can be gained by embracing the recommendations of PHCA/CALM and others who operate in the assisted living environment. Ultimately, the right decisions are those that will help address the challenges of meeting the shelter and services needs of dependent populations in the Commonwealth.

Sincerely,



Laurence F. Lane  
Vice President, Government Relations

*Attachment:* September 10, 2008 letter of Kristen Santangelo to the Independent Regulatory Review Commission