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INDEPENDENT REGULATORY REVIEW COMMISSION
333 MARKET STREET, 14TH FLOOR, HARRISBURG, PA 17101

October 15, 2008

Honorable Estelle B. Richman, Secretary
Department of Public Welfare
333 Health and Welfare Building
Harrisburg, PA 17120

Re: Regulation #14-514 (IRRC #2712)
Department of Public Welfare
Assisted Living Residences

Dear Secretary Richman:

Enclosed are the Commission's comments for consideration when you prepare the final version of this regulation. These comments are not a formal approval or disapproval of the regulation. However, they specify the regulatory review criteria that have not been met.

The comments will be available on our website at www.irrc.state.pa.us. If you would like to discuss them, please contact me.

Sincerely,

Kim Kaufman/jlw

Kim Kaufman
Executive Director
wbg
Enclosure
cc: Honorable Ted B. Erickson, Chairman, Senate Public Health and Welfare Committee
Honorable Vincent J. Hughes, Minority Chairman, Senate Public Health and Welfare Committee
Honorable Phyllis Mundy, Majority Chairman, House Aging and Older Adult Services Committee
Honorable Tim Hennessey, Minority Chairman, House Aging and Older Adult Services Committee

Comments of the Independent Regulatory Review Commission

Department of Public Welfare Regulation #14-514 (IRRC #2712)

Assisted Living Residences

October 15, 2008

We submit for your consideration the following comments on the proposed rulemaking published in the August 9, 2008 *Pennsylvania Bulletin*. Our comments are based on criteria in Section 5.2 of the Regulatory Review Act (Act) (71 P.S. § 745.5b). Section 5.1(a) of the Act (71 P.S. § 745.5a(a)) directs the Department of Public Welfare (Department) to respond to all comments received from us or any other source.

1. Legislative comment.

We received comments on this proposed regulation from the General Assembly. Each of the following legislators submitted separate comments: Senator Mike Folmer; Representative Phyllis Mundy, Chairman of the House Aging and Older Adult Services Committee; Representative Tim Hennessey, Republican Chairman of the House Aging and Older Adult Services Committee; and Representatives Michael E. Fleck, Catherine M. Harper, Brad Roae, Chris Ross, Barbara McIlvaine Smith and Rosemarie Swanger. Many of their comments identified concerns, issues and questions that relate directly to our review criteria and the Act's requirements for submitting regulations. We recommend that the Department carefully consider these comments from legislators. We will include the Department's responses to these legislative comments as part of our determination of whether the final-form regulation is in the public interest.

2. General - Legislative intent; Economic impact; Protection of the public health safety and welfare; Clarity; Feasibility; Reasonableness; Need; Implementation procedures.

We have several questions related to the implementation of Act 56 of 2007 (Act 56) through this proposed regulation. We will review the Department's responses to these questions as part of our determination of whether the final-form regulation is in the public interest. Our questions and related issues are discussed in the following paragraphs.

A. Distinguishing an assisted living residence (ALR) from a personal care home (PCH)

The General Assembly declared in Act 56, in part, that "assisted living residences are a significant long-term care alternative nationwide" and also that "it is in the best interest of all Pennsylvanians that a system of licensure and regulations be established for assisted living residences." The care and services in the new licensure category of ALRs need to be clearly distinct from a PCH so that customers know the differences in care before they sign a contract and dedicate their income and remaining funds to their new home and well being.

The definitions of PCHs and ALRs at 62 P.S. § 1001 are similar, and Act 56 requires ALR regulations to meet or exceed the regulations of PCH in 55 Pa. Code Chapter 2600. Despite the similarity, Act 56 makes four significant distinctions between ALRs and PCHs with important implications for care.

The distinctions begin in the statutory definitions at 62 P.S. § 1001. First, the definition of ALR includes "supplemental health care services" in the list of items that "are provided for a period exceeding twenty-four hours" in ALRs. The term "supplemental health care services" is absent from the definition of PCH. Second, the care at a PCH is limited in its statutory definition by the description of its residents as those "who do not require the services in or of a licensed long-term care facility."

Third, the concept of "age in place" or "aging in place" is defined in Act 56 as:

> Receiving care and services at a licensed assisted living residence to accommodate changing needs and preferences in order to remain in the assisted living residence.

So, within the statutory definitions, "aging in place" and "supplemental health care services" are reserved by Act 56 for ALRs. Also, a PCH cannot provide the care of a licensed long-term care facility, whereas an ALR does not have this limitation. See 62 P.S. § 1001.

Finally, in addition to the statutory definitions, Act 56 also contains a caveat for PCHs which reads:

> (a) The rules and regulations for the licensing of personal care homes and assisted living residences promulgated by the department shall require that:
>
> * * *
>
> (13) A personal care home **not** provide supplemental health care services to residents, provided, however, that a personal care home

> **may assist** residents in obtaining health care services in the manner provided by 55 Pa. Code §§ 2600.29 (relating to hospice care and services), 2600.142 (relating to assistance with health care) and 2600.181 (relating to self-administration) through 2600.191 (relating to medications) or as otherwise provided by regulations adopted by the department **not inconsistent** with the requirements of this section. (Emphasis added.)

See 62 P.S. § 1057.3(a)(13).

What is the difference between allowing PCHs to "assist residents in obtaining health care services" and ALRs providing "supplemental health care services"? The Department needs to provide an explanation.

It should be noted that this statutory provision did not reference the existing PCH regulations at 55 Pa. Code §§ 2600.231-2600.239 (relating to secured dementia units). In the definition of "special care designation," Act 56 specifically identifies ALRs, not PCHs, as being able to provide "severe cognitive support services" for residents with memory impairments or other problems such as dementia.

We do not believe the regulation or the Preamble clearly emphasize the differences between PCHs and ALRs, or the implications of those differences. The existing regulations for PCHs do not contemplate ALRs as a separate category because they were published as a final rule on April 23, 2005, before Act 56 existed. Now that Act 56 establishes PCHs and ALRs as separate entities, we believe that the Department must clearly distinguish the difference between the two facilities. If a PCH offers many of the same services as an ALR, what will stop consumers from contracting with PCHs when there is no statutory protection for "supplemental health care services" or "aging in place" at a PCH? How will these statutory differences affect residents and licensees in the future?

B. What population does this regulation accommodate for ALRs?

Licensure of long-term care facilities and PCHs was established before Act 56. The Department's licensure of ALRs is intended to fill a gap in care. In our research of this proposed regulation and discussions with those affected by it, however, we found differing interpretations relating to what population is served by an ALR and how it differs from the currently licensed PCHs. In many situations, the care appears to be provided by facilities that were licensed before Act 56.

Our concern is that a person needs to be able to make an informed choice between the care provided by a long-term care facility, a PCH and the new ALR category. We believe this distinction is vital to potential residents and their families in their evaluation of which path best fits their current health needs,

future health needs and ability to pay, and promotes happiness and wellness. The Department needs to provide a clear explanation of how the care in an ALR differs from care currently provided by long-term care facilities and PCHs along with the advantages and disadvantages of choosing one over the other.

C. How will the implementation of this regulation affect licensed PCHs and their residents?

Under their existing Chapter 2600 regulations, the permissible spectrum of care for PCHs extends through hospice care, and it is our understanding that PCHs have provided end-of-life care under their existing category of licensure. We agree with commentators who are concerned that the new category of ALR licensure may affect Departmental policy concerning PCHs in a manner that disrupts current PCH residents receiving higher levels of care. The Department should explain how implementation of ALR licensure will affect PCHs and their residents, whether the proposed regulation will in any manner diminish the ability of licensed PCHs to continue providing the same levels of care as they do now, and how Departmental enforcement actions relating to PCHs and their current care will change as a result of the emergence of this new category of licensure.

D. What specifically does "aging in place" mean for the resident and the ALR?

Part of the declarations in Act 56 is that assisted living residences allow people to "age in place, maintain their independence, and exercise decision making and personal choice." The definition of the term "aging in place" allows a resident to "remain in the assisted living **residence**." (Emphasis added.) How does the Department interpret "residence"? Does this guarantee the resident will remain in the same living unit, or does this mean the resident could be moved to another area within the licensed ALR as their needs change? Consumers need a clear understanding of what aging in place means, and ALRs need to make this clear in their literature and advertising. The Department should explain its interpretation of "aging in place" and any limitations or circumstances that could result in moving the resident.

E. Does the Department have a strategy for revising the existing PCH regulations at 55 Pa. Code Chapter 2600?

Even if a PCH is not allowed to advertise as an ALR, it still may appear to offer many of the same services. If the PCH price is more affordable, consumers may become aware too late that they cannot "age in place" and face imminent transfer to an ALR or a long-term care facility in order to receive Medical Assistance. Given the statutory differences between PCHs and ALRs provided by Act 56, the Department may need to revisit Chapter 2600. If Chapter 2600 is the model or starting point for creating ALR regulations, is it still appropriate as the rule for PCHs since it was promulgated before Act 56 existed?

F. Fiscal impact and the potential for Medicaid funding

Legislators and different statewide groups, including the Pennsylvania Association for County-Affiliated Homes, County Commissioners Association of Pennsylvania, PANPHA, Pennsylvania Health Care Association (PHCA) and Pennsylvania Assisted Living Association, all expressed concerns with the costs of this proposed regulation and the impact on the potential for federal financial assistance via the Medicaid waiver program.

The primary concern is that the costs of upgrading facilities to meet the proposed regulation will deter many from seeking licensure. If an insufficient number of providers seek licensure as ALRs, many long-term facility eligible individuals with little to no income will be forced to move from PCHs to long-term care facilities. One commentator speculated that ALRs "will become a private pay phenomenon."

It is understood that Act 56 gives the Department the authority to promulgate ALR regulations that "meet or exceed standards established in 55 Pa. Code § 2600 (relating to personal care homes)." See 62 § 1021(a)(2)(i). However, this authority does not relieve the Department of its responsibility to justify the need for new requirements in this proposed regulation, or to evaluate and explain the potential impact of new requirements on the goals of Act 56.

A main goal of Act 56 was to ensure "a balance of availability between institutional and home-based and community-based long-term care for adults who need such care." See Paragraph (3) in Act 56. It was not the intent of Act 56 to deny this availability to low-income families who rely on federal and state financial assistance.

The Legislative Budget and Finance Committee (LB&FC) prepared a report pursuant to Act 56, which is titled "State Efforts to Fund Assisted Living Services" and dated June 2008. In the main text and footnotes on page 6 of this LB&FC report, it is stated that the Department is anticipating a reduction in Medicaid costs by reducing patients in nursing facilities via the transfer of these recipients to ALR settings. The Department needs to explain how it intends to seek Medicaid funding and when, as well as the anticipated federal response.

Despite these budget projections, there is no indication that the Department performed an independent survey of existing PCHs to see how many of these facilities could readily be licensed as ALRs under its proposed regulation. The Department has not provided any comprehensive estimates of how many ALR rooms will be available to residents dependent on federal and state assistance.

Before submitting the final-form version of this regulation, the Department should survey existing facilities and the industry across the state to ascertain exactly the number of rooms that will be qualified to be licensed to provide ALR

services under the Department's regulation. The Department should explain how the limitations and requirements in this regulation will result in availability of ALRs to Pennsylvanians at a cost they can afford.

G. Dual licensure

Act 56 envisions and addresses dual licensure which includes the phrase "All inspections of residences **dually licensed as assisted living residences and personal care homes**...." (Emphasis added.) See 62 P.S. § 1021(c). However, this proposed regulation does not address dual licensure. Many legitimate and practical questions were raised about how an existing facility can be dually licensed. Providers may be able to minimize compliance costs using dual licensure for their facility, but they do not know whether dual licensure could be used room-to-room, by an entire wing of a facility or by a separate free-standing building. Other questions include how a dually licensed facility can properly advertise its services and what the fee structure for a dually licensed facility would be? Since the regulation does not address dual licensure, it is completely unclear what type of dual licensure would be acceptable. Furthermore, with the omission of dual licensure, the opportunity to comment on proposed regulatory language was circumvented. We believe the proposed regulation is deficient by not addressing dual licensure. The final-form regulation should specify the requirements and process to obtain dual licensure. Additionally, the Department should provide for public comment on the regulatory language before a final-form regulation is submitted.

H. Levels of care

Another concern from commentators is that the proposed regulation appears to establish a single level of care for ALR residents. In its comments, the Center for Medicare Advocacy, Inc., from Washington, D.C., stated: "ALRs may serve residents with vastly different needs." It contends that one set of regulations covering all types of ALRs will not serve the best interest of the residents. It suggests that the Department establish different levels of ALR care and adjust requirements to various and different needs of residents. Given the wide variety of groups representing seniors, persons with disabilities, persons with acquired brain injuries, and others, the Department should explain why it did not develop different ranges of requirements or levels of care to meet the unique needs of the different types of residents and also provide for choice and availability for consumers.

I. Need for further consultation and an Advanced Notice of Final Rulemaking

The Department is to be commended for convening nine meetings with various stakeholders' groups and other meetings with its advisory committees pursuant to Act 56. See 62 P.S. § 1021(d). While these meetings may have been useful to the Department in developing this proposed regulation, many of

the participants still do not understand why significant parts of their input were not addressed in the Preamble or utilized in the proposed regulation.

Act 56 directed the Department to "develop regulations under this article in consultation with industry stakeholders and other interested parties." See 62 P.S. § 1021(d). We find no limitation in the statutory directive concerning the numbers of times that proposed regulatory provisions may have been reviewed by and subjected to comments from the public. It is clear by the practicality of issues raised in the comments, the intensity of comment, the broad range of commentators and volume of comment that the Department's regulatory language has not yet achieved consensus on many issues. We believe the issues raised deserve careful contemplation because the Department's responses will affect the successful implementation of ALRs the General Assembly envisioned in Act 56. While we compliment the Department's determination to implement Act 56, we recommend that the Department work within a prudent timeframe that allows for consultation and thorough consideration of the issues raised in the proposed rulemaking.

We strongly encourage the Department to organize additional stakeholder meetings with representatives from all segments of the commentators consistent with the directive of Act 56. These groups should include owners, operators, providers, differing segments of the affected public, advocates, current and potential residents, and various experts in related professions and industries. The Department needs to develop a full understanding of the existing physical plants, estimates of future needs for ALRs, and plans for future growth. In this way, it can develop standards that will protect the health and safety of residents who need different levels of care while simultaneously recognizing the unique functions at different types of ALRs. The Department should work with affected parties, experts, concerned citizens, and the General Assembly to develop improved ideas for achieving its policy objectives without imposing unnecessary or unreasonable financial burdens. Additionally, the Department should publish an Advanced Notice of Final Rulemaking to allow the opportunity to review and resolve any remaining issues prior to submittal of a final-form regulation into the formal process.

3. Sections 2800.1. Purpose. and 2800.2. Scope. - Clarity.

As explained in our general comments, we do not believe these sections sufficiently explain the proposed regulation. The Department should use these sections to explain the unique role of ALRs in providing "aging in place" and "supplemental health care services." These sections should also distinguish ALRs from PCHs.

4. Section 2800.3. Inspections and licenses. - Fiscal impact; Reasonableness; Implementation procedure; Clarity.

Subsection (c) of this part of the proposed regulation reads:

> The Department may conduct an abbreviated annual licensure visit if the assisted living residence has established a history of exemplary compliance.

This reflects Section 211(l) of the Public Welfare Code (62 P.S. § 211(1)).

While the regulation defines "exemplary compliance" as "three consecutive years of deficiency-free inspections," the regulation does not explain what would comprise an abbreviated annual licensure visit and how it would differ from a routine inspection. What, if any, portions of the inspection does the Department intend to waive? We cannot evaluate the public interest of the abbreviated inspection without a full explanation of what comprises a full inspection and what the Department will waive for exemplary compliance.

5. Section 2800.4. Definitions. - Consistency with statute and other regulations; Need; Clarity.

Age in place or aging in place

The definition in the proposed regulation is not the same as the statutory definition at 62 P.S. §1001. The Department needs to explain the basis of its authority to amend the statutory definition and the basis for the differences made by the amendment.

Commercial boarding residence

The Department added this definition and included it in the exceptions in Section 2800.2(b). The Department should explain the intent of this definition.

Designated person and legal representative

These two definitions are very similar and seek to define a person who can act on behalf of the resident. There are three concerns.

First, what is the difference between these two terms? When would a resident have a "designated person" who is not also the resident's legal representative?

Second, the Commonwealth would have two terms for the same type of function or position. The Department, in this regulation and in the PCH regulation at 55 Pa. Code § 2600.4 uses the term "designated person." For long-term care facilities, the Department of Health uses the term "responsible

person" in its regulations at 28 Pa. Code § 201.3. This is confusing. The Department needs to explain why different terms are needed and appropriate.

Third, the intent of the phrase "other person authorized to act for the resident" in the definition of a "legal representative" is unclear. How would such authorization occur? Who determines the validity of the authorization? Beyond a court action or the resident's granting of power of attorney to someone, what other processes of authorization exist? The Department should explain the need for this phrase.

Exemplary compliance

This definition reads: "Three consecutive years of deficiency-free inspections." There are two questions.

First, Section 2800.3(c) indicates that the Department may conduct an abbreviated annual visit if the ALR "has established a **history** of exemplary compliance" (Emphasis added). How does the timeframe of "three consecutive years" constitute a "history of exemplary compliance" for the purposes of Section 2800.3(c)? Would two years be appropriate as suggested by commentators?

Second, what constitutes a "deficiency"? This word and its implications are not clear in this definition. Beyond this definition, the word does not appear in the rest of the proposed regulation or in the existing regulations at 55 Pa. Code Chapter 20, relating to licensure or approval of facilities and agencies. Additionally, would the term "deficiency" mean a violation of the regulations or the statute, and would it be related to a potential threat to residents' health and safety or something minor such as a relatively harmless clerical oversight?

Informed consent agreement

The definition in the proposed regulation mirrors the statutory definition except that the regulatory definition includes Paragraph (iii) which does not appear in the statutory definition at 62 P.S. §1001. When a statute contains detailed and concise definitions, those should be used or referenced in the regulation without alteration. Accordingly, Paragraph (iii) should be deleted from the final-form regulation.

Supplemental health care services

This proposed definition does not precisely mirror the statutory definition. The Department needs to explain the basis of its authority to amend the statutory definition and the basis for the differences made by the amendment.

6. Section 2800.11. Procedural requirements for licensure or approval of assisted living residences. - Economic impact; Reasonableness; Need.

Regarding fees, 62 P.S. § 1021(b) states:

> The Department shall, by regulation, set fees for application for assisted living residence licensure and licensure renewal. Fees received by the Department shall augment the Department's funding for quality assurance and shall be used for the purposes of this article.

The Department implemented this part of Act 56 in Subsection (c) which provides for fees of $500 for a license application or renewal and a $105 fee per bed. Commentators believe these costs are excessive and will increase costs to consumers. The Department should provide its calculations, study, fee report form and an explanation in detail demonstrating how the fees specified in Subsection (c) were developed, including how the fees accomplish the directive to augment funding for quality assurance and uses for the purposes of assisted living facilities. In short, the Department needs to provide detailed information why these specific levels of fees are necessary to cover its costs in implementing quality assurance. The Department should also explain how much it estimates these fees will increase costs to residents of assisted living residences.

The Department should also explain whether an application to change maximum capacity under Section 2800.13 requires payment of a fee and if so, what is the amount of the fee?

Finally, the Department needs to explain how fees will be charged to dually licensed facilities, or develop a fee for them.

7. Section 2800.19. Waivers. - Reasonableness; Implementation procedure; Clarity.

This section prescribes a waiver process, but does not specify when the Department must respond to a request. Without a timeframe, the regulation would allow a waiver request to be indeterminate. The regulation should specify a specific amount of time for the Department to respond to a waiver request.

8. Section 2800.22. Application and admission. - Protection of the public health, safety and welfare.

Subsection (a) prescribes several admission procedures including preadmission screening, medical evaluation, assisted living resident assessment, support plans and resident-residence contract. Some commentators question whether these procedures are completed quickly enough to protect a resident's health

and to protect a resident who may later be rejected. The Department should explain how the procedures in Subsection (a) represent an appropriate balance between the need to protect a prospective resident and the practical aspects of admission. The Department also needs to explain how it determined the timeframes for completion of the various admission procedures and why those timeframes are reasonable and protective of the public health, safety and welfare.

9. Section 2800.25. Resident-residence contract. - Economic impact; Clarity.

Paragraph (c)(2) requires a fee schedule that lists core assisted living services. Commentators question whether these services must be listed separately, or whether they can be bundled or unbundled to meet a resident's needs. They also question their relationship to Section 2800.220. The Department should clarify this in the regulation.

10. Section 2800.30. Informed consent process. - Reasonableness; Feasibility.

Some commentators believe the provisions in this section will discourage providers from participating in informed consent agreements. Other commentators believe the provisions do not sufficiently protect consumers. The Department should explain how it developed the informed consent process in the regulation and why it represents the best alternative to accomplish informed consent agreements.

11. Section 2800.51. Criminal history checks. – Feasibility.

This provision requires that "criminal history checks and hiring policies shall be in accordance with the Older Adult Protective Services Act" and its corresponding regulations. A commentator points out, however, that in *Nixon v. Commonwealth*, 789 A.2d 376 (Pa. Commw. 2001), Commonwealth Court found the criminal records chapter of the Older Adults Protective Services Act unconstitutional as applied. In the final-form regulation, the Department should explain how it intends to enforce this provision without violating the *Nixon* rule.

12. Section 2800.56. Administrator staffing. - Fiscal impact; Reasonableness; Consistency with other regulations; Feasibility.

Administrator hours

Subsection (a) states that the "administrator shall be present in the residence an average of 40 hours or more per week, in each calendar month" and adds that "[a]t least 30 hours per month shall be during normal business hours." This is twice as many hours as required by the existing PCH regulation in

Section 2600.56. In addition, Section 2800.64(c) will require that administrators obtain 24 hours in annual training.

In contrast, the existing regulations for administrators at long-term care facilities at 28 Pa. Code § 201.18 are significantly different. Specifically, the existing rule at 28 Pa. Code § 201.18(e) permits a long-term care facility of 25 beds or less to share the services of an administrator with another facility. This is consistent with the Nursing Home Administrators License Act. See 63 P. S. § 1103(b).

The Department should explain the need for the numbers of hours in the regulation for administrators. In addition, the Department should explain how many administrators would be needed for a typical facility to meet the requirements in a year and the associated costs. Additionally, the Department should explain how the administrator staffing requirements accommodate the need for an administrator to attend offsite training sessions and meetings.

Administrator designee

Subsection (b) requires that the administrator designate an employee to supervise the ALR during the administrator's absence and that this "designee" must have the "same training required for an administrator." In effect, the proposed regulation requires ALRs to hire two administrators as designees for each ALR.

In contrast, the rules for long-term care facilities allow the administrator to appoint a responsible employee to act on the administrator's behalf during temporary absences. There is no requirement for equivalent training.

It is unclear why the Department is setting stricter standards for ALRs than long-term care facilities, when ALRs have a similar population, but may also have a population that includes residents in need of less care than those in a long-term care facility. The Department needs to justify the provisions in both Subsections (a) and (b) and why the current standard in the existing PCH regulations is insufficient. The Department should consider alternatives that provide flexibility and ensure protection of the residents without unnecessary costs.

13. Section 2800.60. Additional staffing based on the needs of the residents. - Clarity.

Subsection (d) requires an on-call nurse, but does not specify what level of nurse training would be allowed. In addition, it does not explain whether the position could be filled by a registered nurse or a licensed practical nurse. The Department should specify the training and licensure required for the on-call nurse.

14. Section 2800.63. First aid, CPR and obstructed airway training. - Protection of the public health, safety and welfare; Clarity; Reasonableness.

Subsection (a) requires "sufficient staff trained in first aid and certified in obstructed airway techniques and CPR present in the residence at all times to meet the needs of the residents." This requirement is vague and does not provide a standard of protection that can be understood or implemented by the regulated community. The Department should replace this provision with specific protection requirements.

15. Square footage requirements -
Section 2800.98. Indoor activity space.
Section 2800.101. Resident living units.
Section 2800.104. Dining room. - Economic impact; Protection of the public health, safety and welfare; Need; Feasibility.

The Act 56 directive to establish square footage requirements for individual living units

Under Act 56, regulations for assisted living residences shall "establish minimum square footage requirements for individual living units, which excludes bathrooms and closet space. Exceptions to the size of the living unit may be made at the discretion of the Department." See 62 P.S. § 1021(a)(2)(v). We have two questions.

First, Act 56 provides the Department with discretion to allow exceptions to the size of the living unit. Why doesn't Section 2800.101 allow for exceptions as envisioned in Act 56?

Second, the Department should explain why it is specifying square footage requirements for ALR areas (i.e., indoor activity space and dining rooms) beyond the "minimum square footage requirements for individual living units" as provided by Act 56 and how these square footage requirements will be enforced. We further note that parallel provisions at 55 Pa. Code 2600.98 and 2600.104 do not specify square footages for other areas. The Department should explain the need for these requirements.

Development of square footage requirements

Each of these sections specifies square footage requirements for their respective functions. For example, Section 2800.101, relating to resident living units, specifies that new construction residences must have 250 square feet of floor space, and residences in existence must have 175 square feet plus an additional 80 square feet for a shared living unit. These square footage requirements drive costs that are ultimately borne by the consumer and also the eligibility of a facility for licensure. The Department should provide the

study or research relied upon for determining the square footages it selected and how these best implement Act 56. The Department should also explain why its specific square footage mandates are necessary to protect public health, safety and welfare.

Relationship between square footage, affordability and accessibility

The regulation sets prescriptive square footage limits without exception. If square footage requirements are set too high, the resulting costs may be limiting or prohibitive, depending on income. For example, a person may find it desirable to have a smaller room that costs less and in turn extends the time period the person can afford to live in an ALR. Also, the costs of rooms may simply exceed the ability to pay. We see a strong relationship between square footage, affordability and accessibility.

Some commentators advocate allowing a percentage of rooms to meet a specific square footage or some method that allows flexibility to accommodate rooms below the specified limit when the overall facility complies with the limit. Additionally, a consumer may find it desirable to choose to have a smaller room. As stated above, part of the intent of Act 56 was to allow people to "exercise decision making and personal choice."

Comments and input from PANPHA and PHCA indicate that the minimum 250 square foot rule for new construction is high when compared to the rules in many other states. The Department should examine this input and the ALR programs in other states to see whether other states provide for additional flexibility in the design and construction of individual ALR units. If the Department believes that the laws or regulations of other states are not appropriate for Pennsylvania or are inconsistent with Act 56, it should explain why.

Act 56 directs the Department to specify "minimum square footage requirements." Obviously, these minimums can be exceeded when demand in the market is willing to pay for larger units. The Department should explain how the method of specifying minimum square footages and the specified square footages will best provide for affordability and accessibility of ALRs for Pennsylvania's population.

Square footage requirements for residences in existence prior to the effective date of this regulation

Paragraph 2800.101(b)(2) provides for residences in existence prior to the effective date of this regulation to qualify for licensure by having living units of at least 175 square feet measured wall to wall. Given that this provision largely affects PCHs licensed by the Department, the Department should identify how many licensed PCHs there are in Pennsylvania and how many meet the standard of 175 square feet in each living unit.

How did the Department evaluate the feasibility of existing licensed PCH being able to change their licensure to assisted living?

It is clear from the comments on the proposed regulation that many existing PCH licensees want to be licensed as ALRs. The Department also acknowledged the interest expressed by existing PCHs through provisions such as proposed Paragraph 2800.101(b)(2), which provides a different square footage requirement for residences in existence before the effective date of this proposed regulation.

The Department should explain how it researched and assessed existing licensed PCHs in setting the requirements in the regulation for ALRs. How many facilities in existence did the Department determine would qualify and how many would not? How did the Department determine these limits would sufficiently meet the need for ALR residents?

16. Section 2800.101. Resident living units. – Economic impact; Consistency with Act 56; Reasonableness; Implementation procedure; Need; Clarity.

Kitchen capacity

The statute at 62 P.S. § 1021(a)(iv) requires "kitchen capacity, which may mean electrical outlets to have small appliances such as a microwave or refrigerator,... except where a lock or appliances in a unit under special care designation would pose a risk or be unsafe."

The Department changed this provision from Act 56 and expanded it in the proposed regulation. Paragraph (d)(1) requires appliances for "new construction" by stating:

> ... the kitchen capacity, **at a minimum, must contain** a small refrigerator with a freezer compartment, a cabinet for food storage, a small bar-type sink with hot and cold running water and space with electrical outlets suitable for small cooking appliances such as a microwave oven. The cooking appliances shall be designed so that they can be disconnected and removed for resident safety or if the resident chooses not to have cooking capability in his living unit. (Emphasis added.)

Similarly, Subparagraphs (d)(2)(i) and (ii) require a refrigerator and microwave oven in each living unit for existing ALRs.

There are three areas of concerns and questions. First, why did the Department require refrigerators, microwave ovens and bar-type sinks in living units when Act 56 only specified electrical outlets for small appliances? How much does this requirement increase costs to a resident? If a resident does not

wish to have these items, why should they be required to pay for them? The Department should explain the need to require refrigerators and bar-type sinks in a living unit and how this is consistent with Act 56.

Second, Subsection (d)(1) requires a refrigerator, but does not appear to require a microwave oven. Whereas, Subparagraphs (d)(2)(i) and (ii) require existing ALRs to have both a refrigerator and a microwave. Is there a reason for this difference between new ALRs and existing ALRs?

Finally, for new ALR construction, Subsection (d)(1) mentions the possibility of removing appliances based on safety considerations or if residents opt not to cook in their living units. But, these two considerations are not mentioned in Subsection (d)(2) relating to existing ALRs. Why are safety and "personal choice" considerations not included for existing ALRs?

Required items in living units

Subsections (j) and (q) include lists of required items, including furniture, in each living unit. For example, Subsection (j)(3) requires that each resident's living unit must have "pillows, bed linens and blankets that are clean and in good repair" and Subsection (j)(6) requires a mirror. Subsection (q) states that there must be "drapes, shades, curtains, blinds or shutters on the living unit windows."

Since Subsection (j) is phrased as a requirement that "each resident shall have the following in the living unit," the Department needs to explain the options for residents to exercise personal choice in furnishing their living units if they do not want some of the required items in this subsection. The implementation procedure for these mandates and possible options should be included in the final-form regulation.

17. Section 2800.102. Bathrooms. - Clarity.

Subsection (m) states "a residence shall have at least one public restroom that meets applicable local, State and Federal laws and guidelines and that is convenient to common areas and wheelchair accessible." This requirement is vague. The Department should either state in the regulation the specific "applicable local, State and Federal laws and guidelines" that must be met or delete this phrase.

18. Section 2800.108. Firearms and weapons. - Protection of the public health, safety and welfare; Clarity.

Protection of ALR residents and staff

This section discusses the safety, access and use of firearms, but does not explain the threshold question of safety of firearms and weapons at an ALR.

Residents of ALRs include persons with changing health conditions related to aging, including deteriorating mental and physical conditions, depression and dementia. How can an ALR address considerations involving the safety of other residents and its staff under this provision? We recommend that if the regulation allows firearms and weapons at an ALR that it also allow an ALR to prohibit them in its written policy or to deny admission to a prospective resident if, in the opinion of the ALR, possession of a firearm or weapon by the prospective resident presents a safety problem for the other residents and ALR staff. Additionally, an ALR whose policy allows firearms and weapons should have to disclose that policy to prospective residents in its admissions procedures and documents.

Living area

Subsection (d) prohibits the firearm, weapon or ammunition from the "living area." The regulation should define "living area" so that it is clear whether this means a common living area, the resident's living unit, or both. It should also clarify whether the terms "living area" and "common living area" (which is found in Subsections (c)(1) and (2)) refer to the same "area."

Firearms, weapons and ammunition

Subsection (a) only lists a policy for firearms. The other subsections use the phrase "firearms, weapons and ammunition." For consistency, Subsection (a) should use the same phrase.

19. 2800.131. Fire extinguishers. - Economic impact; Protection of public safety; Reasonableness; Clarity.

This section is very similar to Section 2600.131 in the existing PCH regulations. There are two exceptions.

First, there is Subsection (a) which reads: "There shall be at least one operable fire extinguisher with a minimum 2-A rating for each floor **and living unit**, including the basement and attic" (Emphasis added). Unlike the PCH regulations, this subsection would require a fire extinguisher in each living unit.

Second, Subsection (c) reads:

> A fire extinguisher with a minimum 2A-10BC rating shall be located in **each kitchen and in the living units**. The kitchen extinguisher must meet the requirements for one floor as required in subsection (a). (Emphasis added.)

Commentators expressed concerns with the cost of this requirement and also noted that placing fire extinguishers in the living units may pose a safety risk

for some residents. In addition, it is unclear in Subsection (c) whether a living unit with a kitchen would require two extinguishers. One extinguisher located in the living unit and another one in the living unit's kitchen.

The Department needs to explain the need for fire extinguishers in each living unit and clarify Subsections (a) and (c). As noted above, Act 56 only requires each living unit to have "kitchen capacity," which may mean electrical outlets for appliances. It does not actually require that the appliances be in the living units. In addition, Subsection 2800.101(d)(1) of this proposed regulation allows for removal of appliances for considerations involving safety or personal choice. Why doesn't Section 2800.131 also allow for removal of fire extinguishers from living units for safety considerations when there is a chance that a resident may misuse the extinguisher, or in situations when residents opt not to have kitchen appliances in the room?

20. 2800.142. Assistance with health care and supplemental health care services. - Reasonableness; Clarity.

Subsection (a) includes the sentence:

> ...If the resident has health care coverage for the supplemental health care services, the **approval may not be unreasonably withheld**.... (Emphasis added.)

The Department needs to clarify how it will interpret the phrase "may not be unreasonably withheld." For example, would there be circumstances where the Department would consider it reasonable for a facility to deny a resident the right to use health care providers covered by the resident's insurance?

21. Section 2800.162. Meals. - Protection of public health; Need; Clarity.

Subsection (g) states, "Appropriate cueing shall be used to encourage and remind residents to eat and drink." This provision is vague. What does this require and how can an ALR comply?

Also, how does this apply to residents who are cooking and eating in their own living units? Wouldn't such therapy or service be limited to certain situations as specified in the support plans as established in Section 2800.227, and with the consultation of an occupational therapist, physical therapist or other licensed health care practitioner? The Department should explain the need for Subsection (g) in this section, move it to another area such as Section 2800.227, or delete it.

22. Section 2800.171. Transportation. - Economic impact; Feasibility.

Subsection (d) requires that when a residence provides its own vehicle, all vehicles must be accessible to wheelchair users and any other assistive

equipment the resident may need. Commentators believe that if this applies to all vehicles, residences will choose to not supply vehicles. Another commentator said they have four vehicles, two of which are wheelchair accessible. The cost to upgrade the other two vehicles is about $32,000. Since providing vehicles is optional under Subsection (d), the Department should explain whether this provision will reduce the availability of transportation to residents in general and particularly to residents who use wheelchairs and other assistive equipment.

23. Section 2800.225. Initial and annual assessment. - Consistency with Act 56; Protection of the public health, safety and welfare.

The parallel provision in Section 2600.225(d) of the PCH regulation states:

> If the resident's physician or appropriate assessment agency determines that the resident requires a higher level of care, a plan for placement shall be made as soon as possible by the administrator in conjunction with the resident or designated person, or both.

Act 56 limits ALRs from accepting residents with certain conditions, as does Section 2800.229 of this regulation. 62 P.S. § 1057.3(e). Why didn't the Department include this provision from the PCH regulation in the ALR regulation?

24. Section 2800.227. Development of the support plan. - Protection of the public health, safety and welfare; Need; Clarity.

Subsection (b) requires a licensed practical nurse to review and approve a support plan "under the supervision of a registered nurse." Commentators questioned the need for this provision. The Department should explain the need for supervision by a registered nurse and what level of supervision would be needed to comply with this requirement.

25. Section 2800.228. Transfer and discharge. - Protection of the public health, safety and welfare.

Appeals

Subparagraph (b)(1)(iv) requires

> An explanation of the measures the resident or the resident's designated person can take if they disagree with the residence decision to transfer or discharge which includes the name, mailing address, and telephone number of the State and local long-term care ombudsman.

We have two concerns. First, even though notice is provided, how can this process ensure a resident is being treated fairly and properly before a transfer or discharge occurs? The Department should explain how this provision properly protects a resident who is being subjected to a transfer or discharge.

Second, this process relies on outside services, such as an ombudsman. It is not clear how the Department would be aware of whether these processes are being carried out in a timely manner. How can the Department guarantee timely and fair treatment of a consumer appeal?

Standards for the certification a consumer may not be admitted or retained

Act 56 states the Department "shall by regulation" establish the standards required for certification that a consumer may not be admitted or retained at an ALR. See 62 P.S. § 1057.3(f). We could not find these standards in this section of the regulation. Are they included elsewhere? Such standards and an expedited process for reviewing cases are needed in Sections 2800.228(b)(3) and (d) which include situations when a delay in transfer or discharge could jeopardize the health, safety or welfare of the resident or others.

26. Section 2800.229. Excludable conditions; exceptions. - Consistency with Act 56; Reasonableness; Clarity.

Subsection (d) lists the professionals who qualify as "certification providers" and mirrors a provision in Act 56. See 62 P.S. § 1057.3(f). It is unclear why this subsection is linked only to the excludable conditions. Excludable conditions are listed in a separate subsection of Act 56. It is not clear that certification by a provider for a resident's admission or retention is limited to situations involving the excludable conditions listed at 62 P.S. § 1057.3(e). The Department needs to explain its intent and its interpretation of Act 56 at 62 P.S. § 1057.3(e) and (f).

27. Miscellaneous clarity issues.

Forms, including many described as "specified by" DPW, are mentioned in the following sections: §§ 2800.16(d), 2800.19(a), and 2800.22(a)(1), (2) and (3), 2800.67(b), 2800.141(a), 2800.187(a), 2800.224(a), 2800.225(a), and 2800.227(a). Some commentators raised concerns regarding the specific contents of these forms. PHCA suggested the proposed contents for some forms should be developed via a stakeholders' process. The Department should take advantage of the experience and expertise that may be acquired from the public and regulated facilities in developing its forms. After the development is complete, the Department should describe the basic contents of these forms in the final-form regulation. In addition, the regulation should inform ALRs and residents on how the Department will make the approved forms available.

Facsimile Cover Sheet

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Date: **October 15, 2008**
Pages: 22

Comments: We are submitting the Independent Regulatory Review Commission's comments on the Department of Public Welfare's regulation #14-514 (IRRC #2712). Upon receipt, please sign below and return to me immediately at our fax number 783-2664. We have sent the original through interdepartmental mail. You should expect delivery in a few days. Thank you.

Accepted by: Jennifer Campbell **Date:** 10-15-08

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