This document is a comment on the preliminary DRAFT final regulation. On June 24, 2009, the Department of Public Welfare provided a DRAFT final regulation for public review and comment. The DRAFT final can be found at : http://www.irrc.state.pa.us/Documents/SRCDocuments/Regulations/2712/AGENCY/Document-12700.pdf.

This is an informal process. The Department will consider these comments in preparation of a formal final regulation to be submitted at a later date.

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2712

July 21, 2009

Office of Long Term Living
Bureau of Policy and Strategic Planning
PO Box 2675
Harrisburg, PA 17105

RE: Proposed Assisted Living Residence Regulatory Package

Attention Bill White:

Frederick Mennonite Community, a 130 bed licensed personal care community submits these comments on the proposed Assisted Living Residence Regulatory package as provided on June 24, 2009, for additional consideration prior to the Department's final submission for approval.

Should the regulations be finalized as written the impact would impose significant costs to FMC and we would not be able to apply for the new AL license as I will explain. FMC would have to either increase costs to the resident or significantly reduce its care and services which would place a further burden on our frail elders. In 2007 FMC has provided **$135,435 of benevolent care** to the AL residents who otherwise would not have been able to live here, **$142,036 in 2008** and **$65,175 thus far in 2009**.

Although the intent of the regulations to provide Medicaid waiver program for personal care residents under new assisted living regulations appeared as a positive alternative to care the impact to communities to meet the new requirements is overwhelming.

In reviewing the regulations, these are areas of specific concern to me:

**The proposed changes would not improve the health or safety of the residents as they are proposed. They would instead focus on the construction of physical plant amenities and duplicative administrative documentation that have little to no bearing on the care delivered to the resident, and which are likely to make the assisted living level of care too costly for many Pennsylvanians to afford.** To pay for these requirements, our home will need to increase costs to the resident, reduce care and services, or allow the costs to impact our viability. As a non-profit provider, Frederick Mennonite Community has provided over $60,000 in benevolent care subsidies in the first 6 months of this year to the residents in Personal Care. Further burdening us as providers with deeper revenue shortfalls jeopardizes the availability of a level of care that is already a predominantly private pay phenomenon. One of the intents of establishing separate Assisted Living regulations was to ensure access to care for Pennsylvania seniors who need these services but cannot afford them. These regulations do not provide this.

**1.2800.3 (b)** The language in the proposed regulations permits the Department to survey a residence at any time, without a standard for justification, and as frequently as it wishes. No other long-term care provider is subject to such a standard. We propose that the regulations require annual surveys, with additional inspections when evidence of reliable complaint. **2800.3 (c).** The Statute clearly instructs the Department to conduct an abbreviated licensure visit in the assisted living [if the] residence has established a history of exemplary compliance. **The removal of this language in the proposed regulation is unacceptable.**

**2. 2800.11 Licensure Fees**: Even though the Department has adjusted the initially proposed licensure fees, the newly proposed $300 initial application fee coupled with the per bed fee of $75 still results in a significant burden on the provider. Those organizations who are interested in providing Assisted Living Services would still be met with a cost prohibitive entrance fee into the market – resulting in many organizations taking the discussion of ALR licensure off the table. A 100 bed facility would have to divert $7,800.00 allocated to Resident care services to even apply for licensure.

**3. 2800.16 (3)** Reporting every time a resident is sent to the hospital for a medical illness is more extreme than is required in skilled nursing. Our nurses notify the attending physician when a medical intervention is needed and the physician decides whether the resident needs to be sent to the hospital for further evaluation. This additional paperwork only adds to more time that a nurse has to spend away from resident care in order to comply with a burdensome regulation. Residents in Assisted Living Residences will be old, frail individuals who will be susceptible to illness. Often times, these individuals will be receiving care intermittently in Assisted Living and Nursing Homes. Mandating a report for each time a resident changes level of care for what will commonly be routine illness, is not necessary. **FMC endorses the reporting requirements currently found in the 2600 Personal Care Home Regulations.**

**3. 2800.220 Bundling of Core Services**: The proposed bundling of Core Services in this version represents a radical departure from the previous proposal. This section is now more onerous and we will not support it as written.
The additional items that the Department seeks to have Assisted Living Residences offer can easily be listed by facilities choosing to provide those services, under an Enhanced Services Charges addendum. Each item (those listed in 2800.220(b)(11) and 2800.220(c) and -3- (d), could be listed with individual charges as applicable. To offer any other comprehensive bundling will result in residents who do not use those services having to bear the responsibility of covering their costs. Only residents who use the individual services should be charged for the service. This avoids a hidden use tax as proposed.
**FMC strongly urges the Department to reevaluate this section in its entirety; otherwise, we will not support passage of this regulatory package.**

**4. 2800.56 Administrator Requirements**: In order to have a qualified person as the Administrator designee there needs to be additional clarification on this issue and we recommend that in 2800.56(b) training be clarified as ***—qualifications as defined in 2800.53(a)(1-5).*** Skilled Nursing Home requirement for Nursing Home Administrators are required to be present 36 hours per week. This recognizes the inherent off-site needs to successful operations of long term living organizations, so should the Assisted Living regulations. We urge the adoption of the same 36 hours per week average. **We also recommend that an exception be made for individuals currently serving as Personal Care Home Administrators.** In order to ensure there is an adequate supply of administrators

available for this new sector of care; and to take into account the experience and coursework registered by current Personal Care Home Administrators.

5. **2800.11(g)(1):** This section is particularly disturbing. As written, no current Personal Care Home resident who has outspent their resources and is the beneficiary of benevolent care by a non-profit facility would be permitted to apply for an ALR waiver and be transferred to a unit licensed as an assisted living unit. With a number of our residents receiving benevolent care, many would likely seek waiver assistance for their long term care. **Unless the words or transfer are removed, FMC will not support this proposed regulatory package.**

6. **2800.22 (a):** Why did the Department chose to substantially alter a provision that was not universally identified by members of the workgroup or commentators (during the public comment period) as problematic? As proposed in this version of the regulatory package, numerous issues abound. In subsection .22(a)(2), the addition of —initial creates unneeded additional paperwork that in no way contributes to improved quality care. FMC asks the Department to produce any empirical, clinically-driven evidence that would support duplicative administrative processes leading to improved quality outcomes for assisted living residents. Further, the elimination of the 15 day post admission timeframe only serves to ensure that more valuable staff time will be taken away from residents and instead focused on completing paperwork requirements when the 30 day prior assessment has to be repeated during the first week of admission because of resident condition changes. Even those in relatively good health can suffer dramatic changes in 30 days. In subsection .22(a)(3), the same flawed logic is applied to Support plans. **FMC will not support these changes. The 15 day post admission timeline present in the first draft of the proposed regulation must be reinstated.**

7. **2800.22(b)(3):** We strongly believe that it is inappropriate for the Department to have the authority to approve or disapprove of an Assisted Living Residence's resident handbook. This provision exists nowhere else in the continuum of care, and should not exist here either. The presumption is that not only will the Department have to approve the initial release of the handbook, but also approve any alterations and amendments to the handbook. We fail to see how the Department will have the resources to allocate to the review and approval of all resident handbooks and all amendments to existing handbooks. Delays and backlogs are inevitable, and providers will be left to wait and watch as the Department tries to keep pace. **This provision should be stricken.**

8. **2800.25(b): FMC is expressing concern with the lack of equity in the allowance to terminate a residency contract.** Automatic renewal of the residency contract on a month-to-month basis is an appropriate method of treating the relationship. However, there is no basis for allowing the resident to terminate the contract with 14 days notice to the provider, while binding the provider to 30 days notice of termination to the resident. The administrative responsibilities placed upon the residence in order to discharge a resident, whether at the provider's request or the resident, demands a 30 day timeframe. Moreover, the general principle in contract law is to all both parties 30 days notice to terminate a month-to-month contract. It seems reasonable to uphold that principle. **Both parties should be held to the same notification requirements, and the appropriate time frame is 30 days.**

9. **2800.28(b):** The language of this provision matches the language of .25(b), providing for only 14 days of notice of termination by the resident. As mentioned in the above comment to .25(b), 14 days is an insufficient time allotment to process a discharge. We are suggesting **a 30 days notice of termination for both the Assisted Living Residence and the resident.**

10. **2800.42(l):** FMC encourages residents to decorate and furnish their living spaces with personal items from their own home, but this is not without real concerns. FMC requests that language be included that would allow unsafe items that are inconsistent with Fire safety/Life safety regulations to be prohibited without fear of regulatory violations under this section. Recommend to change 42(l) to: "A resident has the right to furnish his living unit and purchase, receive, use, and retain personal clothing and possessions**, provided that the resident's possessions and furnishings do not create an unsafe environment for himself or others"**.

11. **2800.51 (b):**The Department **must omit inclusion of any language in a regulatory package that references interim policies.** Interim policies can change.

12. **2800.54(a)(4):** Does this new addition to the regulatory package mean that all staff would need to be fluent in every and all languages in order to comply? The Department must realize this is not possible, nor is it feasible. Additionally, from a Human Resources perspective, selective hiring for applicants who have diverse ethnic and racial backgrounds could result in a disparate impact- discrimination. **FMC does not support discrimination in any manner and therefore requires the Department to omit this proposed language**.

13. **2800.61:** Due to the overwhelming cost of utilizing agency staff FMC routinely attempts to cover unanticipated staff absences with regular staff who meet the training requirements specific to this proposed regulatory package. In extreme cases though, agency staff may need to be utilized. By the very nature of the staffing emergency, it is impossible for us to ensure that an agency employee contracted to cover one shift could be appropriately oriented per the proscriptive requirements of this chapter. This new addition to the previously submitted regulatory package is untenable. **FMC requests an exception to the staff orientation requirement and seek its removal and return to the previous version.**

14. **2800.91.** Requiring that emergency numbers be posted by **each telephone with an outside line is untenable.** Residents frequently have several telephones and some are portable that they move from one area of their living to another. It is impossible to keep a large posting of numbers by **each** phone as this regulation is requiring.

15. **2800.98:** FMC is concerned that the requirement to have two rooms available for indoor activities, as opposed to the one room that is currently required of Personal Care Homes, will be cost prohibitive and may prevent a number of facilities from pursuing an Assisted Living license without incurring construction/remodeling costs. This is especially true if one of those congregate rooms must be at least 15 square feet per living unit up to 750 square feet. **These costs may be quite significant and may have a great impact on the accessibility of Assisted Living in Pennsylvania.** An appropriate compromise would be to allow the dining room to function as the lounge area and count as one of the two wheelchair accessible rooms. Without this allowance accessibility will suffer.

16. **2800.101(b): FMC is strongly objecting to this proposed regulation.** The proposed square footage requirements of 175 per living unit for existing facilities and 250 per living unit for newly constructed facilities are simply unacceptable. FMC is finishing a 3.5 million dollar renovation of the oldest part of our assisted living units. There is no way that we will be able to meet the resident living unit requirements as written. For example a kitchen with sink with hot and cold water and a microwave in each is not possible. We have experienced several fire safety issues involving having the fire company respond when residents used their microwaves improperly. The higher the square footage of the living unit, the higher the cost profile to the provider, and by extension the higher the cost to the consumer. Having a square footage minimum that is within the top 10% nationally does not enhance the level of care or intrinsically heighten the dignity of the resident occupying the room. That is accomplished through the delivery of quality care. **What it does is it ensures that low-income individuals will not be able to buy their way into an Assisted Living residence in vast expanses of the Commonwealth.** A square footage minimum of 125 for existing facilities and 150 for newly constructed facilities provides an appropriate floor that ensures a dignified quality of life for residents, is within the mainstream nationally, and does not close the market on significant portions of Pennsylvania's geography. Many providers will offer rooms well beyond the 125 or 150 square foot minimum due to market realities where they are operating.

17. **2800.107 (d):** The requirement that written emergency procedures be reviewed and submitted annually to the local emergency management agency is unnecessary. It will **suffice to perform this review and submit to the local EMA once every 3 years**, unless a major renovation to the physical plant.

18. **2800.141(a): FMC strongly recommends that allowances be made for a medical evaluation post-admission.** It is not always feasible and practicable, for instance during an emergency placement, for the residence to have an evaluation performed prior to the resident's admission to the residence. The current 2600 Personal Care Home regulations currently allow for a medical evaluation for up to 30 days after admission, and this provision has been working well. Previous sections in this regulatory package allow for 15 days post admission. **FMC advises that the residence be allowed to perform the medical evaluation for up 15 days after admission to the residence.**

19. **2800.142(b) (iii):** Act 56 clearly notes that the residence "may require residents to use providers of supplemental health care services designated by the assisted living residence". Therefore this **section (iii) should be deleted as it is contrary to statutory provision.**

20. **2800.171(a)** Our concern is the inclusion of social appointments in this provision. To mandate that the residence procure transportation to every social appointment that each resident makes will represent a serious administrative burden and divert allocation of resource away from care. There is also no limitation to the requirement. For example, a resident of a residence may want to attend the graduation of a grandchild from college in a distant location, perhaps out of state. The language as drafted would still demand that the residence bear the burden of providing or coordinating that trip. **The recommendation is that the language be amended to include only social activities scheduled by the residence.**

**21. 2800.171 (b) (4)** Many times only one transportation driver is needed to transport a small group of residents to an activity such as shopping. To require that the transportation driver completes the same training as a direct care staff is not appropriate. This section references back to 2800.65 which has an extensive list of required training that I agree is appropriate for those who do direct nursing care; but not for transportation drivers. A driver **only needs the training that is listed in section (a) (1-7). FMC therefore suggests that section (4) be amended so that it is specific when only a transportation driver is transporting residents.**

**22. 2800.171 (d)(1-4) and (e)(1-4):** The provisions in these paragraphs are simply untenable as drafted. The residence cannot be held liable for adhering to the timeframes outlined in these sections. The windows of time outlined are outright mandates, without any concern for external factors such as weather and traffic delays. Metropolitan mass transit systems are not held to these requirements, and it is unreasonable to insist that an Assisted Living Residence must be. In sections (d) (1-4) and (e) (1-4) the phrase **the residence shall make every effort to should be inserted** instead of the time mandates.

**23. 2800.183(d):** The current language would prevent the residence from keeping "floor stock medications". FMC keeps floor stock medications, this makes it possible to order OTC medications in bulk, thus keeping costs down for the residents. We suggest adding "**Except for stock medications....**

**24. 2800.202(4):** A physician may prescribe medications for specific conditions such as alleviation of anxiety on a *pro re nata* basis. This should not be construed by surveyors as a chemical restraint. Clarification is needed to avoid similar issues that occurred with the application of the 2600 regulation in Personal Care Homes. When a physician has made the clinical judgment that a resident needs a *pro re nata* medication for a specific condition (to alleviate anxiety) this should not be considered a chemical restraint. **This is critical for the benefit of the resident and must be changed to allow the physician to order *pro re nata* with specific instructions for its use.**

**25. 2800.220(b)(6):** Insertion of the phrase **"and other household services"** is an overly broad and inclusive phrase that could mandate a residence to engage in household chores above and beyond what prudence would dictate. **This phrase should be eliminated.**

**26. 2800.220(b)(9) and (c) (1) (i):** Suggest **delete [24 hour] and add Supervision as necessitated in the support plans of the residents, as well as 24 hour** monitoring and emergency response.

**27. 2800.220(c) (1)(vii)** Suggest that **"basic cognitive support service" be removed from the basic core package, as these are services not required by all residents within the residence.**

**28. 2800.220(c)(2): Recommend deleting (c) (2) (i-iv) and include "All other services. Services provided by the residence that are not included in the basic core package may be purchased by the resident according to the changing needs of the resident and as indicated in the support plan".**

**29. 2800.220(d)(7)** Staffing costs are extremely expensive and if we need to provide escort service anytime it is requested by a resident we will need to add this charge to the resident. ***Eliminate [or requested by the resident].***

**30. 2800.224** As written this regulation requires duplicative documentation and represents a significant burden with added staff time which translates into cost. **We urge the return to the system that is working well in Personal Care Homes** so that the above identified resources can be allocated to things that will actually improve resident care. **Eliminate sections (a) (b) (c)** and add language like that in the 2600 PC regulation.

**31. 2800.226(c) FMC recommends the change to read: "**The administrator or designee shall notify the Department within 30 days after a resident with mobility needs is admitted to the residence and compile a monthly list of when a resident develops mobility needs**, which shall be available to the Department upon request"**.

**32. 2800.227(b):** A licensed practical nurse has the requisite knowledge and expertise to review and approve a support plan. **Supervision by a Registered Nurse is not necessary**, and simply represents an additional cost.

**33. 2800.227(c):** Suggest changing to the following: "The support plan shall be revised within 30 days upon completion of the annual assessment or upon changes in the resident's needs as indicated on the current assessment. The residence shall review each resident's support plan on a **annual** basis and modify as necessary to meet the resident's needs"

**34. 2800.227(k):** The support plan should not be attached to the resident contract. The resident contract is kept in the business office which is a sound business and legal practice standard. The support plan is to be a living document to assist and direct the staff in resident care and should not sit in a file in the business office. **FMC recommends eliminating the attachment of the support plan to the resident-residence contract.**

**35. 2800.228(a):** Experience has shown that this regulation as written can potentially lead to a serious consequence for us as it relates to transfer and discharge. As written, the requirement that the "facility *ensure* the transfer and discharge is appropriate to meet the resident's needs" is not consistent with resident rights. For example, a cognitively impaired resident wishing to be discharged home alone and without support services due to refusal, would clearly not permit the residence to meet the intent of this section. No alternative for compliance exists since the resident ultimately has the right to make poor decisions. Adult Protective Services may monitor the resident post-discharge, but will not take any action until harm occurs, and similarly, the residence cannot be expected to assume any type of guardianship to ensure safe choices on behalf of the resident with cognitive impairment. **All of the existing section must be stricken**. FMC supports the adoption of the following suggested language: **At the resident's request, in accordance with the notice requirements indicated in the resident's agreement, the residence shall provide assistance in relocating to the resident's own residence or to another residence that meets the needs of the resident to ensure a safe and orderly relocation. In the event that such assurances cannot be determined, the residence must show documentation that the resident was apprised of possible consequences, the designated person (if applicable) was made aware, and the local Office on Aging, Adult Protective Services was notified for follow-up post discharge.**

**36. 2800.228(b)(2):** This language as written severely limits the residence's ability to ensure protection of resident rights as related to their choice of where they call home. FMC cannot assume the liability of having non-trained, non-professional family members attempting to provide care that we have already determined is beyond their trained, professional abilities. We already make available to resident's under the 2600 regulations, additional supports and services as needed, in order to facilitate aging in place. The state should not force us to have additional liability and potentially cause greater harm to residents by requiring us to allow residents to remain in their communities after a professional determination is made that the care requirements exceed their ability. **We strongly insist that the entire paragraph simply be removed.**

**37. 2800.228(e):** We strongly disagree with the requirement that the residence must track transfers and discharges in a tracking chart. To require that transfers or discharges of residents be noted anywhere in addition to that particular resident's chart is unnecessary and inappropriate. Nowhere else does this mandate exist, and it should not be placed on Assisted Living Residences either. **This provision should be deleted.**

**38. 2800.228(h)(1-3):This is a statutory requirement.** The Act is very clear on the issue of when a residence may transfer and discharge residents. The following language is recommended in order to more accurately adhere to the framework outlined in the statute.

***Suggested Language*** .

(h) The only grounds for transfer or discharge of a resident from a residence are for the following conditions:

(1) If a resident is a danger to himself or others and the behavior cannot be managed through [interventions,] services per 2800.220[planning] or informed consent agreements.

(2) If the legal entity chooses to voluntarily close the residence, or a portion of the residence

(3) If a residence determines that a resident's functional level has advanced or declined so that the resident's needs cannot be met in the residence. [under § 2800.229 (relating to excludable conditions; exceptions) or within the scope of licensure for a residence. In that case, the residence shall notify the resident and the resident's designated person. The residence shall provide justification for the residence's determination that the needs of the resident cannot be met. In the event that there is no disagreement related to the transfer or discharge, a plan for other placement shall be made as soon as possible by the administrator in conjunction with the resident and the resident's designated person, if any.] **The residence shall provide all supporting documentation regarding the discharge to the Department, upon request.** If assistance with relocation is needed, the administrator shall contact appropriate local agencies, such as the area agency on aging, county mental health/mental retardation program or drug and alcohol program, for assistance. The administrator shall also contact the Department.

**39. 2800.229(f): This is a statutory requirement.** Act 56 clearly indicates that the power to request an exception lies with the residence alone. To provide the consumer with the opportunity to request this exception, or even to allow the consumer to demand the residence to apply for the exception on the consumer's behalf, exceeds the scope and authority of the statute. **The paragraph must be stricken.**

opportunity to request this exception, or even to allow the consumer to demand the residence to apply for the exception on the consumer's behalf, exceeds the scope and authority of the statute. **The paragraph must be stricken.**

**40. 2800.229(h)(1-2):** Paragraph (h) is not necessary as all record keeping and notations required under the statute are provided for elsewhere in section 229. **This sub-paragraph should be deleted.**

**41. 2800.231(f)(1):** The requirement that an individual diagnosed with Alzheimer's Disease or dementia and residing in a Secured Dementia Unit be assessed quarterly to determine whether the placement is appropriate is excessive. Once an individual has progressed to the point where it has become necessary to place them in a Secured Dementia Unit, their condition is not going to reverse. Alzheimer's Disease is a degenerative disease from which there is no escape and no cure. **Assessments that coincide with an annual Support Plan revision are sufficient.**

**42. 2800.234(d)(1):** Quarterly support plan updates go beyond what is required. Residences are constantly monitoring the progress of individuals in Special Care Units to assess their care needs, but to mandate that the residence utilize valuable staff time simply to process paperwork is unduly burdensome. **Support plans should be updated annually or if change of condition exists.**

**43. 2800.251(c):** Electronic forms are being used in some homes and the language contained in the proposed paragraph appears to limit the residence to the use of paper forms. Adding to the paragraph **to allow for the advent of electronic medical records** is requested.

**44. 2800.251(e):** Change to read: "Resident records shall be made available to the resident and the resident's designated person during normal working hours. Resident records shall be made available upon request to the resident and family members**, within the confines of applicable state and federal law".**

I hope that you consider these recommendations and suggestions when finalizing the Assisted Living regulations. We believe that senior Pennsylvanians need the best quality, **affordable** care possible. I hope that the regulatory body will keep this in mind when reviewing these recommendations.

Thank you for your thoughtful review of these recommendations.

Sincerely,

Zenta Benner, NHA
Chief Operating Officer

CC: Independent Regulatory Review Commission