

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 22, 2009

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

RECEIVED
JUL 27 2009

ATTENTION: Mr. Bill White

Dear Mr. White:

Menno Haven Retirement Communities is a not-for-profit, Mennonite sponsored organization and member of the Pennsylvania Association of Non-Profit Homes for the Aging. Menno Haven consists of three retirement communities providing care to approximately 1,300 residents. We have reviewed the proposed Assisted Living regulations, and while some changes have been made to the original draft, much of the remaining proposed regulations are unnecessarily burdensome, expensive, and not in the best interest of our residents and seniors in general.

Below is a list of our most significant concerns with the proposed regulations.

1. **Licensure Fee:** We recognize that while the Department has adjusted the initial proposed licensure fees, the newly proposed \$300 initial fee coupled with the per bed fee of \$75 still results in a significant financial burden to our organization. This additional cost is among several factors that has taken providing assisted living licensure off the table for your consideration.
2. **Bundling of Services:** The proposed bundling of services in this version of the proposed regulations represents a radical departure from the previous proposal. Menno Haven believes this section is now more onerous and we cannot support it as written.

As previously stated, we understand the reasoning for bundling core services and continue to strongly urge the Department to adopt a basic set of core services including the items enumerated in 2800.220(b)(1-10). 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 would (those listed in 2800.220(b)(1-10) and 2800.220(c) and (d), 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.

Menno Haven strongly urges the Department to re-evaluate this section in its entirety and closely examine our state PANPHA association's recommended language. Otherwise, renewing our previous stance, we will not support passage of this regulatory package.

3. **Administrator Requirements:** We thank the Department for its attention to our concern about this issue and their attempt to clarify the language dealing directly with Administrator requirements. It is now clear the Department does not wish to set the minimum bar for Assisted Living residences at requiring a fully trained to standard Administrator 24 hours a day, 7 days per week, but rather have a qualified person as the Administrator designee.

We urge that additional clarification on this issue be made and recommend that in 2800.56(b) training be clarified as "*qualifications as defined in 2800.53(a)(1-5)*". The proposed regulation sets forth a requirement for the Administrator to be in the building 40 hours or more per week. This is above the current Skilled Nursing Home requirement for Nursing Home Administrators – they 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 to should the Assisted Living regulations. We urge the adoption of the same 36 hours per week average.

There is also the issue of training requirements for Administrators. We are gratified to see that the Department has allowed for an exemption from the training course for individuals holding a license as a Nursing Home Administrator. This is an appropriate step to take, and we are encouraged by the Department's willingness to take that step. With that being said, we reiterate the need to make an exception 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.

With these simple elaborations, Menno Haven could support this provision as proposed.

4. **Resident Room Requirements:** We believe the proposed square footage requirements work against the ability of seniors to afford care. Building construction costs are already high and costs continue to escalate rapidly. Every square foot added for a minimum room size will mean an increase in daily room rates. If the Department wishes to address access for seniors to facilities, this requirement is contradictory to that intent. In addition to the square footage requirement is the necessity for newly constructed facilities to include a kitchen with hot and cold running water. This is a service that many of our residents would not use since we have dining facilities offering three full meals per day.
5. **Supervision by RN in Assessment and Support Plan Development:** An RN is not needed in the assisted living setting. This would be a requirement that simply adds undue expense to both the resident and facility.
6. **Discharge of a Resident:** The residence must be permitted to maintain control over the transfer and discharge of its residents as is called for in Act 56 of 2007. Certain provisions that were advanced in previous proposed regulations have been appropriately disposed; however, newly inserted language forces this issue to remain as a preeminent concern for us.

7. **Dual Licensure:** When SB 704 was enacted, the legislation clearly and definitively addressed the issue of dual licensure. The legislature delineated in Section 1021(C) that dual licensure was permissible, even going so far as to outline how facilities with dual licensure were to be surveyed by the Department. The regulatory package currently addresses the issue of dual licensure, but does not frame the process in a manner that would allow the greatest flexibility for providers.

We strongly suggest that facilities and providers be afforded the greatest flexibility possible in order to meet the needs of their residents. Accordingly, we recommend that the regulations permit providers to licensure their facilities by door. This flexibility will allow facilities that have suites or pockets of rooms that will not meet all of the physical plant requirements for assisted living units to license those as Personal Care rooms.

There will be no additional strain on the state beyond coordination of the survey dates. The statute notes that when a dually licensed facility is to be surveyed that the Personal Care portion of the facility will be surveyed by Personal Care Home Surveyors, and that the Assisted Living units will be surveyed by Assisted Living Residence Surveyors. The bulk of the responsibility will be with the provider to coordinate scheduling, to track services and staff, and to comply with the differentiation of the regulations. Allow the provider to assume that responsibility, if they so choose.

8. **Informed Consent:** The regulatory language proposed by the Department distorts the legislative language outlined in the statute, which was developed after lengthy and thoughtful discussions. The proposed regulation, as pertaining to liability, imposes the extreme pre-condition on a residence of having to determine that residents or staff are at “imminent risk of substantial harm” before it may initiate actions to address a “dangerous” situation caused by a resident. This standard, which is similar to that necessary for involuntary committal for mental health treatment, is simply unreasonable from a personal security safety perspective and liability perspective. Such a standard is assuredly inappropriate in the context of a residence’s having to react promptly and effectively to a “dangerous” situation caused by a resident. PANPHA’s proposed revision provides the residence, which is ultimately responsible and potentially liable for actions occurring in the residence, the operational flexibility to address the presenting problem.

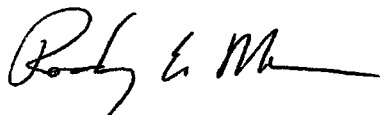
The proposed revision also reflects the statutory intent of the legislation as it relates to releasing the residence “from liability for adverse outcomes resulting from actions consistent with the terms of the informed consent agreement”. The language in Act 56 on this matter could not be clearer, and we fear that the proposed regulation is an attempt to dilute the clear intent of the legislature. The changes in the proposed revision not pertaining to liability serve to balance the rights of the residents, the residence and the residence’s obligations to its other residents. The proposed revisions support the belief that resident input is necessary and appropriate in this process, but any final clinical judgment pertaining to the informed consent agreement must be in the hands of the professional.

9. **Proposed Regulations Ignore Key Provisions of Act 56 of 2007:** The Department’s proposed regulations at several points either exceed the authority granted by Act 56 of 2007 or are contrary to the statute. Those areas include:

- a. **TRANSFER AND DISCHARGE.** The proposed regulations exceed the statutory framework with regards to transfer and discharge. Act 56 clearly notes that the residence, through its medical staff and administration, will determine what services it is comfortable having provided on its campus, and when it feels the needs of the resident can no longer be served at that level may initiate a transfer in Section 1057.3(f) and Section 1057.3(h). The regulations at 228(b)(2) counter the statutory framework when it mandates that the “residence may not transfer or discharge a resident if the resident or his designated person arranges for the needed services.”
- b. **USE OF OUTSIDE PROVIDERS.** Supplemental health care service provision is another area in which the regulations deviate from what the legislature intended. The legislation states that the provider “may require residents to use providers of supplemental health care services designated by the assisted living residence,” so long as it is stated in the contract. Section 1057.3(a)(12). The regulations in Section 142(a) scale back the clearly articulated right of providers to designate preferred providers in contradiction to the statute.
- c. **KITCHEN CAPACITY.** Another item on which the regulations over-reach and are contrary to the statute relates to kitchen capacity. The legislation states that the living units shall have “kitchen capacity,” which “may mean electrical outlets to have small appliances such as a microwave and refrigerator.” There is no mandate in the statute that the residences provide anything more than space and electrical outlets to support kitchen appliances. The regulations go well beyond this definition. The Department proposes not electrical outlets to support microwaves and refrigerators, but the actual provision of microwaves and refrigerators. In addition, the proposed regulations mandate that newly constructed facilities include a sink with hot and cold water. The appliances and sinks are amenities that should be market driven, not called for in a regulation. Consumers will vote with their feet and dollars. If a provider is required to provide these amenities, they will naturally have to charge their residents to recover the cost. This means the resident will bear the burden of the cost whether it is an item they want or not. Regulations should establish minimum requirements and allow the greatest flexibility for consumers and providers.

We appreciate your thoughtful review of our recommendations. We believe having both Assisted Living and Personal Care services for seniors could be beneficial; however, significant changes need to be made to the draft regulations if they are to be affordable for providers and seniors alike.

Sincerely,



Rodney E. Mason, NHA, CASP
President/CEO

cc: Independent Regulatory Review Commission
The Honorable Richard L. Alloway
The Honorable Mark K. Keller
The Honorable Rob W. Kauffman
The Honorable Todd Rock

The Honorable Pat Vance
The Honorable Phyllis Mundy