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INDEPENDENT REGULATORY
REVIEW COMMISSION

July 23, 2009

Office of Long-Term Care Living
Attn: Bill White
Bureau of Policy and Strategic Planning
P. O. Box 2675
Harrisburg, PA 17105

RE: Proposed Assisted Living Residence Regulatory Package

Dear Mr. White:

Brethren Village, a CCRC and provider of over 875 residents including 84 personal care home beds, 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.

We applaud the Department's efforts and some changes which have been made to the earlier draft, but we still raise the serious concerns addressed in this comment letter. Although changes from the original proposed regulations have been made, we still do not believe that the proposed regulations for Assisted Living Residences advance the public interest.

The proposed regulations and changes from the previous version continue to impose significant new costs on homes and residents. We agree overwhelmingly with the industry experts and other providers, that the proposed changes would not improve the health or safety of the residents. 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.

Concern was voiced originally by many about lack of publically available information regarding the proposed Medicaid waiver funding referenced in the Act. We continue to hold this concern. Given the significant cost increases that these regulations would initiate, they would not only fail to address the severe insufficiency of the public payment source for low-income Pennsylvanians who need the care provided by an Assisted Living Residence, they could potentially magnify it. We, at Brethren Village believe that the legislature's intent in

passing the Assisted Living Licensure Act was not only to define the term Assisted Living and gain a sense of truth in advertising, but also to ensure access to assisted living services to Pennsylvania's seniors.

Licensure Fees: We recognize that while 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. Organizations interested in providing Assisted Living Services would still be met with a cost prohibitive entrance fee into the market. For our current facility that represents a cost of \$6,600. We find that rate prohibitive in considering application for this licensure. We recommend that the Department follow the Department of Health licensing fee schedule for Skilled Nursing Homes. We support this position allowing for a yearly fee of \$250.00 plus a fee of \$10.00 per bed. Why would the Assisted Living License fees be used to fund the Department? This is unacceptable.

Bundling of Core Services: The proposed bundling of Core Services in this version of the proposed regulations represents a radical departure from the previous proposal. Brethren Village believes this section is now more onerous. Brethren Village strongly urges the Department to reevaluate this section in its entirety and closely examine the language recommended by PANPHA.

Administrator Requirements: 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. We urge the adoption of the same 36 hours per week average.

There is also the issue of training requirements for administrators. Brethren Village is very 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. Brethren Village favors 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 Administrator.

Physical Plant Requirements: The proposed square footage requirements of 175 per living unit for existing facilities and 250 per living unit for newly constructed facilities are excessive and will place Pennsylvania providers at a competitive disadvantage if implemented at these levels. 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.

The square footage minimum of 125 for existing facilities and 150 for newly constructed facilities, which providers have suggested, provides an appropriate regulatory 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. Market forces will result in many providers offering rooms well beyond the 125 or 150 square foot minimum. We renew our belief that it is critical to the viability of Assisted Living here in Pennsylvania that consumers drive the market, with both their feet and their dollars, rather than the Department doing so via square footage requirements that will leave large segments of the Commonwealth without Assisted Living as a viable option.

Along with the minimum square footage requirement, is the necessity for all newly constructed facilities to equip living units with a kitchen that includes a sink with hot and cold running water. The costs associated with equipping each living unit with plumbing for the kitchen will not be insignificant. This is an amenity many will not request or use, as three full meals will be provided by the residence. However, the provision of a country kitchen or a small congregate style kitchen area will adequately meet the needs of residents. Again, many providers will opt to equip all living units with a kitchen sink of some type, but the market should decide whether that is a necessity for Assisted Living.

Supervision by RN in Assessment and Support Plan Development: An RN is not a clinical necessity in the completion of an Assessment or in the development of a Support Plan. This is a mandate that simply increases the cost profile of delivering care. A provision that mandates that an RN review Assessments and Support Plans for accuracy may be reasonable, but to require direct supervision during the completion is not warranted.

Discharge of Residents: 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 Brethren Village.

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.

Brethren Village strongly suggests that facilities and providers be afforded the greatest flexibility possible in order to meet the needs of their residents. We recommend that the regulations permit providers to license 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.

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 staffs 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. A 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 more clear, 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. 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.

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 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 residence provides anything more than space and electrical outlets to support kitchen appliances. The regulations go well beyond this definition. The Department proposes not only 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.

Brethren Village submitted the above response to the regulations as they are presented in the final draft. In order to consider application for the assisted living license, we feel the recommended changes must be put in to effect. Otherwise, the cost and restrictions of those regulations will deter us from pursuing this license.

Sincerely,

Gary N. Clouser, NHA
President

GNC:glk

Cc: Independent Regulatory Review Commission