

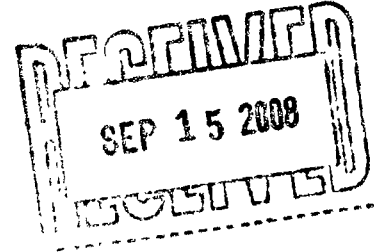


COMMONWEALTH OF PENNSYLVANIA  
DEPARTMENT OF AGING

555 Walnut Street - 5th Floor  
Harrisburg, Pennsylvania 17101-1919

2712

September 12, 2008



Gail Weidman-Jones  
Office of Long Term Living  
Bureau of Policy & Strategic Planning  
P.O. Box 2675  
Harrisburg, PA 17101

Re: Department of Public Welfare, Office of Long Term Living  
55 Pa. Code Chapter 2800—Assisted Living Residence Regulations (Draft)  
IRRC No. 2712

INDEPENDENT REGULATORY  
REVIEW COMMISSION

2008 SEP 19 PM 3:12

RECEIVED

Dear Ms. Weidman:

This letter contains the comments of the Pennsylvania State Long Term Care Ombudsman Office (State Office) to the Department of Public Welfare (DPW), Office of Long Term Living draft of the assisted living residence regulations. The State Office is housed within the Department of Aging, and works closely with the 52 Area Agencies on Aging (AAAs) serving older adults by implementing the Ombudsman program at the local level. The State Office was established through state and federal law, and administers a State Long-term Care Ombudsman program. This includes providing resources to AAAs or other contractors to investigate and resolve complaints related to the health, safety, or rights of older individuals who are consumers of long-term care services (visit [www.aging.state.pa.us](http://www.aging.state.pa.us) for more information). The State Office formed a workgroup comprised of local Ombudsmen representing regional geographic areas, to review the draft regulations. The State Office and workgroup comments listed below are focused on resident rights and the role of the Ombudsman within the draft regulations.

Under Title VII of the Older Americans Act (OAA), an Ombudsman identifies, investigates and resolves complaints *made by or on behalf of older individuals* who are consumers of long-term care services. The law relates to action, inaction, or decisions of providers or their representatives, of long-term care services, of public agencies, or of health and social service agencies, which may adversely affect the health, safety, welfare, or rights of such consumers. The Ombudsman program also provides a variety of services to assist residents to maintain a good quality of life and care in nursing home, assisted living, and other types of long-term care settings, including consumers

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living in the community (unique to the Commonwealth, and was an expansion established in state law in 1989). Pennsylvania Ombudsmen include paid staff and volunteers who are formally trained to provide an on-going presence in long-term care facilities, monitoring care and resident rights while giving voice to residents and their families. Consumers of long-term care, institutional and non-institutional, are encouraged to attempt self-resolution of complaints utilizing established administrative procedures prior to a request for assistance from the local long-term care Ombudsman.

Additionally, the Ombudsmen safeguards a client's rights, including privacy, by protecting confidential information while investigating and resolving long-term care facility residents' complaints. The Ombudsman program identifies problems through monitoring complaints and works to resolve problems by involving appropriate public agencies. Although local Ombudsmen have access to long-term care facilities and resident records under the law, they are responsible under those same laws for protecting the confidentiality of those records, complainants' identities, and Ombudsman files.

Our responsibility lies in representing the interests of residents before governmental agencies and seeks administrative, legal and other remedies to protect residents. We are charged to analyze, comment on and recommend changes in laws and regulations pertaining to the health, safety, welfare and rights of residents; and are providing the following comments on the role of the Ombudsman and resident rights concerns within these regulations.

### **§2800.3 Inspections and Licenses:**

The Department notifies the local Ombudsman in advance to participate in the inspection exit proceedings. This notification should take place in the same manner that the Department of Health notifies Ombudsman for nursing home inspections. This would include pre-survey briefing and participation in exit conference.

### **§2800.4 Definitions:**

**Designated Person:** A designated person, unless a legal representative effected under law, does not have the authority to make decisions on behalf of the resident without express written consent from the resident. The resident's record must include written consent by the resident and included in the resident's record.

**Legal Representative:** An individual who holds an effective power of attorney, a court-appointed guardian or other person authorized to act for the resident.

**Long Term Care Ombudsman:** Recommendation to modifying the definition to:

A representative of the Office of the State Long Term Care Ombudsman in the Department of Aging who identify, investigate, and resolve complaints that are made by, or on behalf of, residents; and relate to action, inaction, or decisions, that my adversely

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affect the health, safety, welfare or rights of the residents, of providers or representatives of providers, of long term care services; public agencies; or health and social service agencies. As previously stated, Pennsylvania's Ombudsman program provides a variety of services to assist residents to maintain a good quality of life and care in nursing home, assisted living, and other types of long-term care settings, including consumers living in the community. A number of local ombudsmen advocate for the under 60 population, and this would require additional funding to continue to support this approach.

#### **§2800.21 Offsite Services**

The "offsite services" term is not defined in the definition section. Currently, PCH residents are transported to another location to secure meals and/or medications and outside of the "premises" as defined in these proposed regulations. This has caused problems for PCH residents; therefore, if assisted living facilities will be providing services to a more "frail" population, it would not support the concept of aging in place.

#### **§2800.22 Application and Admission:**

Portions of this section should be revised to correspond to the Department of Health nursing facilities regulations since assisted living facilities will be providing care for more medically complex consumers. We recommend the following:

§2800.22 (a)(2) Medical evaluation completed 60 days prior to admission or 7 days after admission on a form specified by the Department.

§2800.22 (a)(3) Assisted Living resident assessment completed within 7 days after admission. There should also be language that the resident should be encouraged to participate in the planning process and to be present when the plan is reviewed, if the resident so desires.

§2800.22 (a)(4) should be revised to require the support plan developed within 14 days of admission rather than 30. This would parallel the present nursing facility requirements.

§2800.22 (a)(5) - Change from "...prior to admission or within 24 hours after admission..." to "...prior to or at time of admission...". A consumer should have the right to be fully informed in advance about his care, treatment and changes and to direct his own plan of care prior to signing the contract.

Add a provision to clarify that a resident who is capable of managing his/her own affairs may, but is not required to, name a responsible person at time of admission. Ombudsmen have received complaints from mental health advocates stating that their clients have been denied admission to nursing facilities because they do not have a responsible party named. Other consumers have contacted the Ombudsman directly for assistance when admission to a nursing facility was denied due to the consumer's

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unwillingness to name a responsible party. Our recommendation is to encourage or educate a consumer on the importance of identifying a responsible person but this should not be a requirement for admission.

#### **§2800.25 Resident-residence contract:**

In order for residents to better understand, we recommend the heading be changed to ALR-resident contract.

§2800.41, §2800.42 and §2800.43 on Resident Rights should be moved to precede this section to ensure a resident understand his or her rights.

§2800.25(a) - 2800.25 (a) – Same comment as 2800.22(a)(5). Change first sentence from “Prior to admission or within 24 hours after admission...” to “Prior to or at time of admission...” A consumer should have the right to be fully informed in advance about his care, treatment and changes and to direct his own plan of care prior to signing the contract.

§2800.25 (c) – In order for a resident to understand the current contract language and his/her right to be fully informed prior to admission to a facility, we recommend the following language:

1. Add the list of excludable conditions detailed in §2800.229 (a) through (g) and detail what will happen if the resident is diagnosed with an excludable condition while residing in the facility. We believe consumers have the right to know this information prior to admission, and it should be shared.
2. Add a provision to address what happens if/when a resident runs out of money—safeguards available to residents. Currently, the regulations do not cover this issue.

#### **§2800.30 Informed Consent Process:**

As advocates for residents living in facilities, this process may result in a waiver of rights and may conflict with §2800.43(c) of the proposed regulations.

Recommendation that under (a)(2), “cognitively impaired resident” should be defined.

As written these regulations seem to place the Ombudsman program in the role of an arbitrator for the residence. We understand that the State of New Jersey has managed risk agreements in their state, and that process should be evaluated and considered.

(b) (1) – The automatic notification by the assisted living facility to the Ombudsman for “cognitively impaired residents” violates resident privacy, consent, and confidentiality under the federal guidelines for the Ombudsman program. As mentioned previously, an Ombudsman investigates and seeks to resolve complaints *made by or on behalf of*

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*individuals who are consumers of long-term care services.* Note, there is no definition for "cognitively impaired resident" in the regulations.

While we agree that the Ombudsman contact information should be made available to residents under any situation, we disagree with any procedure that requires the licensee to contact the Ombudsman—specifically to notify / Ombudsmen of instances that involve cognitively impaired residents. Under no circumstances, should the Ombudsman program be the point of contact for the licensee. Because the Ombudsman program is mandated to be resident-directed, this process should not open the door to establish a licensee—Ombudsman relationship. The Ombudsman program has established credibility with residents regarding their right to keep shared information confidential.

The "cognitive impairment" definition should be defined in the regulations, and criteria should be established along with standards for evaluating a resident's level of cognitive functioning.

Under (a) Resident's Involvement, we have concerns on the process for involving cognitively impaired residents, and this should be addressed in the regulations.

#### **§2800.41 Notification of Rights and Complaint Procedures:**

(f) – A poster provided by the State Long Term Care Ombudsman Office should be prominently posted in all common areas in the facility to be visible to all residents.

#### **§2800.42 Specific Rights:**

(f)(2) Recommend that in this section the "resident's designated person" be deleted.

(r) This section omits the minimum required time that a resident may receive visitors. PA 55 Chapter 2600 (PCH regulations) specifically lists "a minimum of 12 hours daily, 7 days per week."

(y) We believe a resident should be able to choose their own healthcare provider. We recommend that language be revised to mirror PCH regulation §2600.42, "a resident has the right to choose his own health care provider without limitation by the home." This includes the right to select the resident's own pharmacist provided that the pharmacy agrees to supply medications in a way that is compatible with the home's system for handling and assisting with self-administration of resident medications."

We recommend that the following Department of Health nursing home regulations be incorporated into this section to strengthen resident rights:

- a) The resident has the right to refuse treatment. §483.10(b)(4)

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- b) The resident has the right to be fully informed in advance about care, treatment and changed and to direct his own plan of care §483.10 (d)(2).
- c) Self determination and participation: The resident has the right to make choices about aspects of his/her life in the facilities that are significant to the resident. §483.15(b)
- d) The facility must care for its resident in a manner and in an environment that promotes maintenance or enhancement of each resident's quality of live. §483.15.

#### **§2800.44 Complaint Procedures:**

We recommend that there needs to be an independent entity designated to help consumers with an appeals process. Residents must be advised of their right to appeal to this independent entity.

Add (h) requiring providers to maintain a log of complaints and responses to complaints filed under this section (similar to PCH regulations.) Log should be available for Department of Public Welfare inspection and considered part of a resident's record for Ombudsman purposes.

#### **§2800.142 Assistance with Health Care and Supplemental Health Care Services:**

There should be freedom of choice for health care providers of all types for the residents. This is not clearly stated in the regulations. (see §2800.42)

#### **§2800.227 Development of the Support Plan**

This section should be revised to require the support plan to be developed within 14 days of admission rather than 30 days. The resident should also be encouraged to participate in the planning process and be present when the plan is reviewed if they so elect.

#### **§2800.228 Transfer and Discharge:**

This section had a number of inconsistencies and some violations of resident's right to privacy, confidentiality and consent. We recommend the following language:

§2800.228 (b)(3) - Remove the language of practicable notice and replace with 30 day advance written notice to the resident and the legal representative if one exists.

§2800.228 (c) - In the event of a planned closure, residents and DPW should both be notified 60 days in advance.

§2800.228 (f) Notifications to DPW should be made prior to the residence beginning the relocation of residents to ensure that §2800.228(f) can be implemented. This is to

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prevent situations that have occurred in PCH closures where DPW is notified of a closure after the facility has begun relocating residents, making it difficult for DPW and other "appropriate local authorities" to ensure residents are protected.

The Ombudsman program has been impacted financially and our limited resources has strained our responsibility as advocates due to the high number of facility closures since the PCH regulations went into effect. We recommend that the regulations identify DPW as the lead agency who is responsible for relocation assistances and the coordination of that assistance regardless of age.

§2800.228(h)(3) - Remove language of notification to the Ombudsman by the provider. This is in conflict to our confidentiality guidelines and encourages providers to release information about the resident to the Ombudsman without the resident's consent. The Ombudsman under federal law is client-directed. This process also suggests that the Ombudsman is an authority in determining the functional level of care. There are other programs that are trained specifically to make those decisions. While the Ombudsman can be the point of contact for the residents, other entities including DPW should be included in an informal resolution process. The resident should have the right to appeal any residences transfer and discharge decisions.

As previously stated, an "*Ombudsman* investigates and seeks to resolve complaints made by or on behalf of older individuals who are consumers of long-term care services relating to action, inaction, or decisions of providers or their representatives, of long-term care services, of public agencies, or of health and social service agencies, which may adversely affect the health, safety, welfare, or rights of such consumers...".

The regulations implies that the Ombudsman be the central point of contact in resolving transfer and discharge issues, which is in conflict of the Ombudsman role. This also implies that all assisted living facilities involve Ombudsmen in the resolution of any transfer and discharge issue. This would have a financial and resource impact in the number of Ombudsmen the program currently has to advocate for residents. Our concern is also that it reduces the responsibility of the regulatory agency to oversee the transfer and discharge decisions and places it on the Ombudsman program shoulders—which puts the Ombudsman in a conflict of interest.

§2800.228(h)(7) - Strike documented repeated violation of the residence rules as a legal reason for discharge.

The term "appropriate local authorities" should be changed to appropriate local entities, and included in the definitions section, and defined.

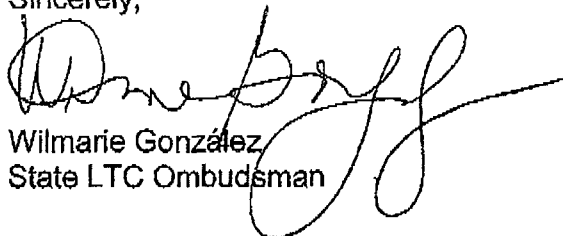
The State Long Term Care Ombudsman Office recommends the establishment of a formal appeal process when a resident wants to appeal a transfer/discharge notice. The committee would recommend the establishment of an outside entity such as the Office of Hearings and Appeals so that the residents are guaranteed a system of due process.

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The State Long Term Care Ombudsman Program appreciates the opportunity to provide comments on this important proposed regulation. We hope the above information clearly defines what an Ombudsman's role is in advocating for individuals who receive long term care in the assisted living facilities. Our responsibility as Ombudsmen is to ensure that anyone contacting the program must, therefore, know that the confidential nature of their communications to us will not be breached. Protecting the identity and information communicated to the Ombudsman is the only way to create the necessary trust in our program that enables us to advocate for vulnerable residents. Without this trust, the credibility of the program is undermined and its ability to improve the lives of residents is destroyed. For this reason the Older American Act provisions governing release of resident and complainant identifies and disclosure of information are extremely restrictive-far more restrictive than the confidentiality requirements for any other OAA program. We respectfully request that the changes and improvements to the draft regulations, as identified in this submission, be considered for inclusion in the final form regulations. Thank you.

Sincerely,

A handwritten signature in black ink, appearing to read 'Wilmarie González', with a long, sweeping horizontal line extending to the right.

Wilmarie González,  
State LTC Ombudsman