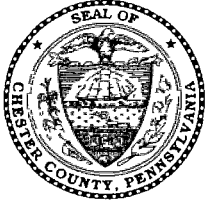


14-514

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# THE COUNTY OF CHESTER



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Carol Aichele  
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Director

## DEPARTMENT OF AGING SERVICES

601 Westtown Road, Suite 320  
P.O. Box 2747  
West Chester, PA 19380-0990

ADMINISTRATION: Phone: (610) 344-6009 Fax: (610) 344-5288  
INFORMATION & ASSISTANCE/CARE MANAGEMENT

Phone: (610) 344-6350 Fax: (610) 344-5996  
TTY: (610) 344-5233 E-Mail: ccaging@chesco.org  
WEBSITE: www.chesco.org/aging

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## MEMORANDUM

To: Gail Weidman, Office of Long Term Care Living

From: Donna Eaves, Long Term Care Ombudsman

*Donna Eaves*

Subject: Comments on Regulation No. 14-514

Date: September 12, 2008

As Long Term Care Ombudsman for Chester County for the past eighteen years, I am pleased to submit comments on Regulation Number 14-514, the draft regulations for licensure of assisted living facilities in Pennsylvania. I commend the Department for drafting these regulations which will provide additional safeguards and rights to our frail, elderly assisted living consumers.

### Section 2800.22 Application and admission

- (a)(2) Medical evaluation completed 60 days prior to or **7 days** after admission on a form specified by the Department,
- (a)(3) Assisted living resident assessment completed within **7 days** after admission....
- (a)(4) Support plan developed and implemented within **14 days** after admission.
- (a)(5) Resident-residence contract completed prior to **or at the time of** admission.

### Section 2800.25 Resident-residence contract

- (a) Prior to or **at the time of admission**, a written resident-residence contract should be in place. I believe it is essential that a resident be fully aware prior to or at the time of admission what services she can expect to be provided by the residence, what rights she has as an assisted living resident and the costs for those services.

### Section 2800.57 Direct care staffing

- (b) Direct care staff persons shall be available to provide at least **2 hours** per day of personal care services to each resident, **regardless of mobility**.

Section 2800.30 Informed Consent Process

- (a) I am opposed to the inclusion of these agreements as they favor licensees by limiting their liability while providing no safeguards to ensuring they will not be misinterpreted or used as a means to neglect residents. Residents already have the right to direct their care and to make decisions contrary to the support plan or house rules. There are adequate options available to licensees if the resident poses a risk to self or others.
- (b)(1) Ombudsman should be removed from the Informed Consent process for the following reasons: The Ombudsman role is not defined adequately; automatic notification of the ombudsman by the licensee is a breach of residents' confidentiality; as defined by the Older American's Act (copy enclosed) Ombudsmen are involved in advocating for residents only with their consent; to provide these services to assisted living residents would require additional Ombudsman staff hours, creating a need for additional funding for the Ombudsman program.
- (b)(1) The regulation fails to define a "cognitively impaired resident" and who makes the determination as to resident's decisional capacity.
- (f) Ombudsman should be deleted from availability to assist when negotiations are unsuccessful, as it is unclear what role the Ombudsman would play in this process. The Ombudsman program is resident-directed and therefore we cannot take a position other than what the resident is requesting. This mandate would require additional Ombudsman staff hours in light of the number of consumers who could potentially request Ombudsman assistance, and therefore a need for additional funding for the Ombudsman program.

Recommendation: If this process is required, the language used by New Jersey for their Managed Risk agreements is recommended (copy attached) with the following additions:

- A resident should have the right to terminate the agreement at any time
- The licensee should not be allowed to make execution of such an agreement a standard condition of admission.
- These agreements should be required to be filed with the Department so that the scope and usage by each licensee can be monitored.

Section 2800.227 Development of the support plan

- (a) The Support Plan should be developed within **14 days** of admission.
- (e) The Support Plan should be revised **within 14 days** of the annual assessment or upon a change in the resident's needs.

Sections 2800.228 Transfer and Discharge

- (b)(1)(iv) Fails to specify what measures the resident or her designated party can take if she disagrees with the decision, or what the Ombudsman role would be in the process. Residents should be given the right to appeal through a PDW administrative hearing process and remain in the facility pending the appeal. The name, mailing address and telephone number of the state and local LTC Ombudsmen should be provided in the 30-day notice of discharge to assist residents in the appeal process.
- (h)(3) Ombudsman should be removed from this section for the following reasons: Automatic notification of the Ombudsman is a breach of the resident's confidentiality; Ombudsmen cannot assess resident's level of care or make a determination as to whether a resident's care needs can be met by the assisted living; Ombudsmen are resident-directed and can act only with the resident's consent; Ombudsmen cannot act as a agent of the Department by being required to report their findings to the Department as this creates a conflict of interest; the involvement of the Ombudsman in every transfer and discharge would require additional Ombudsmen staff hours and an increase in funding to provide these services.

Section 2800.41 Notification of rights and complaint procedures

- **Addition of : (f)The LongTerm Care Ombudsman poster shall be displayed in a conspicuous location on every floor or unit of the residence.**

Section 2800.42 Specific Rights

I support the residents' rights outlined by the PALCA (PA Assisted Living Consumer Alliance), attached, and strongly agree that all rights mentioned throughout the regulations, as well as the additional ones suggested here, need to be specified in this section so that they will be included in the resident-residence contract and will appear on the Residents' Rights poster required to be displayed in the Assisted Living residence.

Encls.

cc: Wanda Stonebraker, Director  
Arthur Coccodrilli, Chair, IRRC

**The Older Americans Act of 1965**  
**Public Law 89-73**  
**Title VII**

**Sec. 711 OLDER AMERICANS ACT OF 1965 114**

**CHAPTER 2—OMBUDSMAN PROGRAMS**

**SEC. 711. DEFINITIONS.**

As used in this chapter:

- (1) OFFICE.—The term “Office” means the office established in section 712(a)(1)(A).
- (2) OMBUDSMAN.—The term “Ombudsman” means the individual described in section 712(a)(2).
- (3) LOCAL OMBUDSMAN ENTITY.—The term “local Ombudsman entity” means an entity designated under section 712(a)(5)(A) to carry out the duties described in section 712(a)(5)(B) with respect to a planning and service area or other substate area.
- (4) PROGRAM.—The term “program” means the State Long-Term Care Ombudsman program established in section 712(a)(1)(B).
- (5) REPRESENTATIVE.—The term “representative” includes an employee or volunteer who represents an entity designated under section 712(a)(5)(A) and who is individually designated by the Ombudsman.
- (6) RESIDENT.—The term “resident” means an older individual who resides in a long-term care facility.

(42 U.S.C. 3058f)

**SEC. 712. STATE LONG-TERM CARE OMBUDSMAN PROGRAM.**

**(a) ESTABLISHMENT.—**

- (1) IN GENERAL.—In order to be eligible to receive an allotment under section 703 from funds appropriated under section 702 and made available to carry out this chapter, a State agency shall, in accordance with this section—
  - (A) establish and operate an Office of the State Long-Term Care Ombudsman; and
  - (B) carry out through the Office a State Long-Term Care Ombudsman program.
- (2) OMBUDSMAN.—The Office shall be headed by an individual, to be known as the State Long-Term Care Ombudsman, who shall be selected from among individuals with expertise and experience in the fields of long-term care and advocacy.
- (3) FUNCTIONS.—The Ombudsman shall serve on a fulltime basis, and shall, personally or through representatives of the Office—
  - (A) identify, investigate, and resolve complaints that—
    - (i) are made by, or on behalf of, residents; and
    - (ii) relate to action, inaction, or decisions, that may adversely affect the health, safety, welfare, or rights of the residents (including the welfare and rights of the residents with respect to the appointment and activities of guardians and representative payees), of—
      - (I) providers, or representatives of providers,

of long-term care facilities, or of any other residential facilities for older individuals.

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January 30, 2001 (12:46 PM)

**Sec. 712 OLDER AMERICANS ACT OF 1965 116**

1 Error in amendment made by section 701 of Public Law 102-375 Should insert a comma

**(5) DESIGNATION OF LOCAL OMBUDSMAN ENTITIES AND REPRESENTATIVES.—**

(A) DESIGNATION.—In carrying out the duties of the Office, the Ombudsman may designate an entity as a local Ombudsman entity, and may designate an employee or volunteer to represent the entity.

(B) DUTIES.—An individual so designated shall, in accordance with the policies and procedures established by the Office and the State agency—

- (i) provide services to protect the health, safety, welfare, and rights of residents;
- (ii) ensure that residents in the service area of the entity have regular, timely access to representatives of the program and timely responses to complaints and requests for assistance;
- (iii) identify, investigate, and resolve complaints made by or on behalf of residents that relate to action, inaction, or decisions, that may adversely affect the health, safety, welfare, or rights of the residents;
- (iv) represent the interests of residents before government agencies and seek administrative, legal, and other remedies to protect the health, safety, welfare, and rights of the residents;
- (v)(I) review, and if necessary, comment on any existing and proposed laws, regulations, and other government policies and actions, that pertain to the rights and well-being of residents; and (II) facilitate the ability of the public to comment on the laws, regulations, policies, and actions;
- (vi) support the development of resident and family councils; and
- (vii) carry out other activities that the Ombudsman determines to be appropriate.

(C) ELIGIBILITY FOR DESIGNATION.—Entities eligible to be designated as local Ombudsman entities, and individuals eligible to be designated as representatives of such entities, shall—

- (i) have demonstrated capability to carry out the responsibilities of the Office;
- (ii) be free of conflicts of interest and not stand to gain financially through an action or potential action brought on behalf of individuals the Ombudsman serves;
- (iii) in the case of the entities, be public or nonprofit private entities; and
- (iv) meet such additional requirements as the Ombudsman may specify.

(D) POLICIES AND PROCEDURES.—

- (i) IN GENERAL.—The State agency shall establish, in accordance with the Office, policies and procedures for monitoring local Ombudsman entities designated

*Roles  
of the  
Local  
Ombudsman*

(1) IN GENERAL.—The State agency shall establish procedures for the disclosure by the Ombudsman or local Ombudsman entities of files maintained by the program, including records described in subsection (b)(1) or (c).  
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January 30, 2001 (12.46 PM)

**Sec. 712 OLDER AMERICANS ACT OF 1965 118**  
man entities of files maintained by the program, including records described in subsection (b)(1) or (c).

(2) IDENTITY OF COMPLAINANT OR RESIDENT.—The procedures described in paragraph (1) shall—

(A) provide that, subject to subparagraph (B), the files and records described in paragraph (1) may be disclosed only at the discretion of the Ombudsman (or the person designated by the Ombudsman to disclose the files and records); and

(B) prohibit the disclosure of the identity of any complainant or resident with respect to whom the Office maintains such files or records unless—

(i) the complainant or resident, or the legal representative of the complainant or resident, consents to the disclosure and the consent is given in writing;

(ii)(I) the complainant or resident gives consent orally; and

(II) the consent is documented contemporaneously in a writing made by a representative of the Office in accordance with such requirements as the State agency shall establish; or

(iii) the disclosure is required by court order.

(e) CONSULTATION.—In planning and operating the program, the State agency shall consider the views of area agencies on aging, older individuals, and providers of long-term care.

(f) CONFLICT OF INTEREST.—The State agency shall—

(1) ensure that no individual, or member of the immediate family of an individual, involved in the designation of the Ombudsman (whether by appointment or otherwise) or the designation of an entity designated under subsection (a)(5), is subject to a conflict of interest;

(2) ensure that no officer or employee of the Office, representative of a local Ombudsman entity, or member of the immediate family of the officer, employee, or representative, is subject to a conflict of interest;

(3) ensure that the Ombudsman—

(A) does not have a direct involvement in the licensing or certification of a long-term care facility or of a provider of a long-term care service;

(B) does not have an ownership or investment interest (represented by equity, debt, or other financial relationship) in a long-term care facility or a long-term care service;

(C) is not employed by, or participating in the management of, a long-term care facility; and

(D) does not receive, or have the right to receive, directly or indirectly, remuneration (in cash or in kind) under a compensation arrangement with an owner or operator of a long-term care facility; and

(4) establish, and specify in writing, mechanisms to identify and remove conflicts of interest referred to in paragraphs

(1) and (2), and to identify and eliminate the relationships described

*Consent  
required  
for Ombuds  
intervention*

*Conflict of  
Interest*

New Jersey --

**8:36-5.18 Managed risk agreements**

(a) The choice and independence of action of a resident may need to be limited when a resident's individual choice, preference and/or actions are identified as placing the resident or others at risk, lead to adverse outcome and/or violate the norms of the facility or program or the majority of the residents. When the resident assessment process identified in N.J.A.C. 8:36-7 indicates that there is a high probability that a choice or action of the resident has resulted or will result in any of the preceding, the assisted living residence, comprehensive personal care, home or assisted living program shall:

1. Identify the specific cause(s) for concern;
2. Provide the resident (and if the resident agrees, the resident's family or representative) with clear, understandable information about the possible consequences of his or her choice or action;
3. Seek to negotiate a managed risk agreement with the resident (or legal guardian) that will minimize the possible risk and adverse consequences while still respecting the resident's preferences;
4. Document the process of negotiation and, if no agreement can be reached, the lack of agreement and the decisions of the parties involved.

(b) Managed risk agreements shall be negotiated with the resident or legal guardian and shall address the following areas in writing:

1. The specific cause(s) for concern;
2. The probable consequences if the resident continues the choice and/or action identified as a cause for concern;
3. The resident's preferences;
4. Possible alternatives to the resident's current choice and/or action;
5. The final agreement reached by all parties involved;
6. The date the agreement is executed and, if needed, the time frames in which the agreement will be reviewed.

(c) A copy of the managed risk agreement shall be provided to the resident or legal guardian and a copy shall be placed in the resident's record at the time it is implemented:



**These are the rights we believe applicants should have:**

#### APPLICANT RIGHTS

- (a) The right to have an initial interview and tour of the ALR prior to admission.
- (b) The right to have an initial screening upon deciding to apply for admission.
- (c) The right to a written decision regarding acceptance into ALR including the reason for denial of admission.
- (d) The right to appeal (or seek exception) to the Department if admission denied because of an excludable condition.
- (e) The right to have a medical evaluation from a provider of the resident's choice prior to admission.
- (f) The right to have a comprehensive needs assessment, to participate (along with others invited by the resident) in the assessment process prior to admission or within 72 hours of admission, in the case of an urgent or emergent admission due to hospital discharge, and to receive a copy of her current assessment upon completion, without charge.
- (g) The right to participate (along with others invited by the resident) in the process of developing a comprehensive support plan prior to admission or within 14 days of admission following an urgent or emergent admission due to hospital discharge that accommodates one's needs and preferences and that facilitates independence, and to receive a copy of her current support plan upon completion, without charge.
- (h) The right to receive at the interview written information including:
  - a. The range and pricing of each of the services provided at the residence, including services provided directly and services provided through identified third-party providers.



- unit; and assisted living services and cognitive support services.
- vi. A copy of the standardized form residency/services agreements that the resident will be asked to sign.
  - vii. Written information regarding the "informed consent" process and protections.
- (j) The right to a standardized written admission/residency agreement in plain English that references the support plan that is completed and signed prior to or, in the event of an emergency admission, within 24 hours after admission.
  - (k) The right to consult a department established "independent review panel" for guidance on an "informed consent" agreement, what it means, how it works, what to consider, and whether it is fair and appropriate.
  - (l) The right to not be forced to contract for services that consumer does not want.
  - (m) The right to rescind the residency agreement for up to 72 hours after the initial dated signature of the contract and pay only for the services received. rescission of the contract must be in writing addressed to the home.
  - (n) The right to share a room with a spouse or significant other.

**These are the rights we believe residents should have:**

## **RESIDENT RIGHTS**

§ 2800.41. Notification of rights and complaint procedures.

(a) Upon admission, each resident and, if applicable, the resident's designated person, shall be informed of resident rights and the right to lodge complaints without intimidation, retaliation, or threats of retaliation of the residence or its staff persons against the reporter. Retaliation includes discharge or transfer from the residence.

(b) Notification of rights and standardized complaint procedures shall be communicated in an easily understood manner and in a language understood by or mode of communication used by the resident and, if applicable, the resident's designated person.

(2) Incoming mail may not be opened or read by staff persons unless upon the request of the resident or the resident's designated person.

(g) A resident has the right to communicate privately with and access the local ombudsman.

(h) A resident has the right to practice the religion or faith of the resident's choice, or not to practice any religion or faith.

(i) A resident shall receive assistance in accessing health services and securing transportation to these services..

(j) A resident shall receive assistance in obtaining and keeping clean, seasonal clothing. A resident's clothing may not be shared with other residents.

(k) A resident and the resident's designated person, and other individuals upon the resident's written approval shall have the right to access, review and request corrections to the resident's record. Access to records shall be provided immediately. A resident and the resident's designated person, and other individuals upon the resident's written approval shall have the right to purchase, at a cost not to exceed the community standard, photocopies of the resident's records or any portions of them within 24 hours of a request, excluding weekend days.

(l) A resident has the right to furnish his living unit and purchase, receive, use and retain personal clothing and possessions.

(m) A resident has the right to leave and return to the residence as she chooses.

(n) A resident has the right to lock the door to her living unit and not be subjected to unannounced entries into her living unit.

(n) A resident has the right to terminate her residency at any time, with 14 days advance notice.

(o) A resident has the right to freely associate, organize and communicate privately with his family, friends, physician, attorney and any other person.

(p) A resident shall be free from any and all restraints, including chemical and physical restraints.

- (z) A resident has the right to freely contract for services from providers of resident's choosing at one's own expense, as long as caregiver complies with the residence's reasonable policies and procedures.
- (aa) A resident has the right to reasonable accommodations of resident needs and preferences
- (bb) A resident has the right to refuse treatments or services prescribed or recommended
- (cc) A resident has the right to self administer medications.
- (dd) A resident has the right to file complaints, grievances, or appeals with any individual or agency and recommend changes in policy, home rules, and services without retaliation, intimidation or threat of discharge.
- (ee) A resident has the right to not have the ALR or any ALR employee assume power of attorney or guardianship or representative payee. The right to choose to have ALR or ALR administrator serve as representative payee if and only if certain condition are met. The ALR or administrator may not be appointed to serve as representative payee unless the resident, family, and legal representative are first given a standardized disclosure form provided by the department that explains the following: what representative payee means, that other agencies may be available to provide representative payee service for little or no fee (i.e., mental health associations, associations of retarded citizens (arc), etc.), that representative payee is voluntary, that the resident can terminate the representative payee relationship at any time, and how to terminate the relationship. This section must also include a provision that the administrator becoming the resident's representative payee cannot be a condition for admission.
- (ff) A resident has the right to receive all written and oral communications in a format that is accessible to persons with cognitive and sensory disabilities.
- (gg) A resident has the right to receive all written and oral communications in a language that is understood by the resident with limited English proficiency.
- (hh) A resident has the right to choose and involve a personal advocate.
- (ii) A resident has the right to have written notice provided to resident or designated person of a report of suspected abuse or neglect involving the resident.
- (jj) A resident has the right to age in place, including the right to receive hospice care where prescribed.
- (kk) A resident has the right to have records kept confidentially.
- (ll) A resident has the right to notice of and to challenge waivers of regulations that are requested by an ALR and to challenge such a

- (f) A resident has the right to a refund of the resident's pre-paid rent on the day of discharge in the case where 30 day notice has been provided.
- (g) A resident has the Right to a full accounting and to return of monies held by the facility (under financial management agreement with the resident) within 7 days of discharge.
- (h) Assisted Living must follow uniform Discharge and Transfer rules. To allow residents to age in place, discharge and transfer provisions as described below should be established:
  - a. A resident shall not be discharged involuntarily except in the following circumstances:
    - i. The facility has documented that
      - 1. the resident presents an imminent physical threat or danger to self or others which cannot be managed by interventions or service planning;
      - 2. The resident has failed to pay after reasonable efforts by the facility to obtain payment and is not eligible for publicly funded programs that can provide payment;
      - 3. The resident has medical needs which cannot be met in an assisted living facility, even with all reasonable assistance from third-party providers OR
      - 4. The facility closes;
  - b. The facility shall ensure that a transfer or discharge is safe and orderly and that the transfer or discharge is appropriate to meet the residents' needs. This shall include ensuring that a resident is transferred or discharged with all her medications, durable medical equipment, and personal property.
  - c. The resident shall have the right to choose among the available alternatives after an opportunity to visit the alternative facilities. These procedures shall apply even if the resident is placed in a temporary living situation.
  - d. If the facility initiates a discharge of the resident, or if the licensee chooses to close the facility, the facility must provide a 30 day advance written notice to the resident and the resident's representative explaining the specific reasons for the discharge, the suggested location to which the resident could be discharged, and the resident's right to appeal, the name and number to the local ombudsman, and the right to remain in the facility during the appeal. In limited emergency situations defined by the Department where a delay in discharge would jeopardize the health or safety of the resident or others in the facility, written notice may be as far in advance as practicable instead of 30 days in advance.