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INDEPENDENT REGULATORY REVIEW COMMISSION

333 MARKET STREET, 14TH FLOOR, HARRISBURG, PA 17101

February 15, 2011

Honorable Patricia H. Vance, Majority Chairman
Senate Public Health and Welfare Committee
168 Main Capitol
Harrisburg, PA 17120

Re: Regulation #14-522 (IRRC #2878)
Department of Public Welfare
Residential Treatment Facilities

Dear Senator Vance:

On December 22, 2010, we delivered our comments on the above-captioned regulation to Honorable Michael Nardone, then Acting Chairman, Department of Public Welfare. Because the General Assembly had adjourned *sine die*, we were precluded from providing you with a copy at that time.

Enclosed is a copy of our comments. If you have any questions, please contact me.

Sincerely,

Kim Kaufman
Executive Director
sfh
Enclosure

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INDEPENDENT REGULATORY REVIEW COMMISSION

333 MARKET STREET, 14TH FLOOR, HARRISBURG, PA 17101

February 15, 2011

Honorable Shirley M. Kitchen, Minority Chairman
Senate Public Health and Welfare Committee
463 Main Capitol
Harrisburg, PA 17120

Re: Regulation #14-522 (IRRC #2878)
Department of Public Welfare
Residential Treatment Facilities

Dear Senator Kitchen:

On December 22, 2010, we delivered our comments on the above-captioned regulation to Honorable Michael Nardone, then Acting Chairman, Department of Public Welfare. Because the General Assembly had adjourned *sine die*, we were precluded from providing you with a copy at that time.

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INDEPENDENT REGULATORY REVIEW COMMISSION

333 MARKET STREET, 14TH FLOOR, HARRISBURG, PA 17101

February 15, 2011

Honorable Gene DiGirolamo, Majority Chairman
House Human Services Committee
49 East Wing
Harrisburg, PA 17120

Re: Regulation #14-522 (IRRC #2878)
Department of Public Welfare
Residential Treatment Facilities

Dear Representative DiGirolamo:

On December 22, 2010, we delivered our comments on the above-captioned regulation to Honorable Michael Nardone, then Acting Chairman, Department of Public Welfare. Because the General Assembly had adjourned *sine die*, we were precluded from providing you with a copy at that time.

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INDEPENDENT REGULATORY REVIEW COMMISSION

333 MARKET STREET, 14TH FLOOR, HARRISBURG, PA 17101

February 15, 2011

Honorable Mark B. Cohen, Minority Chairman
House Human Services Committee
127 Irvis Office Building
Harrisburg, PA 17120

Re: Regulation #14-522 (IRRC #2878)
Department of Public Welfare
Residential Treatment Facilities

Dear Representative Cohen:

On December 22, 2010, we delivered our comments on the above-captioned regulation to Honorable Michael Nardone, then Acting Chairman, Department of Public Welfare. Because the General Assembly had adjourned *sine die*, we were precluded from providing you with a copy at that time.

Enclosed is a copy of our comments. If you have any questions, please contact me.

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Kim Kaufman
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Enclosure

Comments of the Independent Regulatory Review Commission

Department of Public Welfare Regulation #14-522 (IRRC #2878)

Residential Treatment Facilities

December 22, 2010

We submit for your consideration the following comments on the proposed rulemaking published in the October 23, 2010 *Pennsylvania Bulletin*. Our comments are based on criteria in Section 5.2 of the Regulatory Review Act (71 P.S. § 745.5b). Section 5.1(a) of the Regulatory Review Act (71 P.S. § 745.5a(a)) directs the Department of Public Welfare (Department) to respond to all comments received from us or any other source.

1. General. – Economic and fiscal impacts of the regulation, and protection of the public health safety and welfare; Implementation procedures.

One of the criteria IRRC must consider in determining whether a regulation is in the public interest is the economic or fiscal impacts of the regulation. See 71 P.S. § 745.5b(b)(1). The proposed regulation submittal does not include a plausible evaluation of the economic and fiscal impact of this regulation. This in turn, as outlined by many commentators, also brings into consideration the criterion of the protection of the public health, safety and welfare relating to the proposed regulation. See 71 P.S. § 745.5b(b)(2).

In order to make a determination of whether this regulation is in the public interest, the Department must provide a detailed evaluation of the costs imposed by the final-form regulation, the effect on the revenues of the businesses the providers run. and ultimately how the final-form regulation protects the overall public health, safety and welfare of the children in a Residential Treatment Facility (RTF). The following is a detailed outline of our concerns and the concerns expressed by public commentators relating to the economic impact of the regulation and the accompanying information provided by the Department.

Costs imposed

In the proposed regulation's Preamble the Department states the following relating to fiscal impact:

> The increased costs incurred by an RTF [Residential Treatment Facility] to meet the enhanced staffing and training requirements may result in higher per diem rates for some RTFs, but the expected aggregate reduction in lengths of stay due to high quality behavioral health treatment is expected to offset the fiscal impact of the higher rates. In addition, RTFs that are currently not accredited and choose to remain MA [Medical Assistance] providers will incur the costs associated with accreditation. The Department will be able to build the cost of accreditation into the rates.

In this statement, the Department itself recognizes to some degree increased costs imposed by the regulation. However, in its responses to Questions 17 to 19 on the Regulatory Analysis Form (RAF), the Department makes the following statements relating to "costs and/or savings . . . associated with compliance":

- Regulated community – "Not applicable."
- Local governments – "Not applicable."
- State government – "No fiscal impact is anticipated as a result of these changes."

Many commentators strongly disagree with cost estimates provided in the Preamble and the RAF. Commentators believe the cost of compliance for providers and the Department will involve substantial direct and indirect costs. Commentators cited the following:

- The Pennsylvania Council of Children, Youth and Family Services commented that there are clearly significant costs associated with compliance that the Department has not considered. Estimated costs for consultant fees to accomplish accreditation are $150,000, with the alternative that equivalent staff time would have to be allocated to accomplish accreditation. The staffing requirements will impose significant costs including staffing ratios, staffing structure and training requirements. Detailed examples of partial compliance costs are provided showing an annual estimated cost difference of $723,000 related to staffing requirements.
- The Pennsylvania Community Providers Association stated that the analysis and cost impact assumptions provided by the Department are without foundation and are likely inaccurate . The Department must be accountable for the development of a much more detailed analysis of the fiscal and service system impact of these regulations at the agency, county and state level. Currently RTF programs are required to submit a cost report annually and these should be used as the foundation for the Department to formulate a realistic economic impact assessment.

- The Sarah A. Reed Childern's Center estimated their facility reasonably expects to incur additional costs in the range of $466,000 to $766,000 per year, an increase of 7.7% to 13% if the regulation is enacted as proposed.

- Woods Services, Inc. stated that the imposition of a medical model on non-medically oriented programs is both clinically inappropriate and excessively expensive. It provided an estimate of additional annual costs of $1.3 million with one-time transition costs of $470,000.

- Silver Springs – Martin Luther School says these regulations will not be cost neutral. Their current deficit is $787,000 because the per diem set by the Office of Medical Assistance does not cover costs. The Mental Health Professional as required by the regulations will add $419,000 of costs.

- Perseus House Inc. estimates the proposed staffing ratios combined with travel expenses for family work is that the increases will be anywhere from 30% to 40% dependent on the current rate and the site.

- Southwest Behavioral Health Management, Inc. believes consideration should be given not only to the increased costs to the provider to meet the increased standards, but also to the local economy, and how capacity limits will affect local businesses, tax base and unemployment.

- Devereux Foundation believes the requirements for accreditation will be costly to both the providers who are not accredited (82 current providers according to the Department's response to RAF Question 16) and will be borne by the Department within the rate structure of the providers. The Department's assumptions appear to be based on intuitive judgment and have not been subjected to actuarial methods of estimating costs.

- Other commentators believe that staffing and staffing ratio provisions impose inflexible costs that limit a provider's ability to reduce costs to maintain viability.

In addition to the issues raised by public commentators, we question whether the Department itself will have increased costs as a result of this regulation. While several provisions are similar to existing requirements in Chapter 3800, we question whether the Department will experience increased costs from provisions requiring Department actions including the following sections:

- 23.4. Waivers.
- 23.12 Inspections and certificates of compliance.
- 23.13. Appeals.
- 23.15. Fire safety approval.

- 23.16. Child abuse.
- 23.17. Reportable incidents.
- 23.18. Recordable incidents.
- 23.203. Written plan to create a restraint-free environment.
- 23.221. Description of services.
- 23.331. Inspection of care reviews: general.
- 23.332. Inspection of care reports.
- 23.341. Provider abuse.
- 23.342. Administrative sanctions.
- 23.351. Provider right of appeal.

We recommend that the Department meet with the public commentators, other members of the regulated community, and others who may be affected by the final-form regulation to discuss and evaluate costs imposed by this regulation, and consider whether more costly provisions provide sufficient benefit to make them justifiable. In order to satisfy the criterion of economic impact and fiscal impacts of the regulation, we recommend that the Department provide a detailed analysis of the costs imposed by the provisions in the final-form regulation.

Effect on Revenue

Under Subsection 23.14(a), "an RTF may not exceed 4 units of 12 beds each for a total of 48 beds." This provision limits the size of RTFs in three ways: by units, by beds in the unit and by total number of beds. We have the following concerns:

- Regarding the limitation to 4 units, according to the Department's response to Question 15 of the RAF, 58 of the 82 non-accredited RTFs and 17 of the 81 accredited RTFs exceed the maximum number of units per location. By the Department's numbers, this equates to 75 of the existing 163 providers, or 46%, who would have to downsize to meet the requirements of the regulation.
- Regarding the limitation on the number of beds, several commentators state their facilities exceed this requirement. Consequently, to comply with the regulation, these facilities would have vacant beds in their units.
- Regarding the limitation on the total number of beds to 48, several commentators said they exceed this number.

Additionally, Section 23.102 places limits on the size of child bedrooms, and Subsection (c) limits a room to two children. One provider commented that it

allows four children to a room. While the requirements in Section 23.102 are similar to Chapter 3800, it appears that Chapter 23 will introduce further limitations compared to existing practice.

Overall, our concern is that, based on the public comment, downsizing to meet the regulatory requirements means a facility will not be able to serve as many patients, and consequently will lose revenues as a result of the limitation on the number of units per location.

We recommend that the Department meet with the public commentators to evaluate existing facilities and the loss of revenue they will experience from this regulation. In order to satisfy the criterion of economic and fiscal impacts of the regulation, we recommend that the Department provide a detailed analysis of the revenue loss to existing facilities affected by the regulation in the submittal of the final-form regulation.

Alternatives for children upon displacement

According to several public comments, many existing facilities will either have to downsize or may become financially unviable as a result of this regulation. Commentators question what will happen to children who will be displaced by existing facilities. They speculate that these children will be pushed into other types of treatment facilities, or will end up in hospitals, which would be more expensive overall. In addition to an evaluation of the costs imposed and revenue losses, the Department needs to explain what will happen to children who cannot remain at a facility and the resulting effect on other service providers.

Effect on local economies

In conjunction with downsizing facilities, commentators believe the regulation would cause people at existing facilities to be laid off from their current duties. The Department should discuss this concern with the commentators and provide an estimate of how many people who are currently employed at these facilities would have to seek other employment or become unemployed as a result of this regulation.

Explain how the benefits of the regulation outweigh any cost and adverse effects

RAF Question 21 asks for the above explanation. The Department responded:

> The increased costs incurred by an RTF to meet the enhanced staffing and training requirements may result in higher per diem rates for some RTFs, but the expected aggregate reduction in lengths of stay due to high quality behavioral health treatment is expected to offset the fiscal impact of the higher rates.

Many commentators strongly disagree with this statement. In stark contrast to the Department's evaluation, commentators provided cost estimates and revenue loss estimates, along with projections of possible unemployment caused by the regulation that far exceed what the Department included in its evaluation. We ask the Department to provide the detailed studies and calculations that support the Department's response to RAF Question 21 in the final-form regulation.

Accreditation and regulation

Paragraph 23.291(b)(7) states an RTF shall:

> Receive and maintain accreditation as a child and adolescent RTF by CARF, COA, JCAHO or by another accrediting body approved by the Department as published in a notice in the *Pennsylvania Bulletin*.

A commentator supportive of accreditation observes that to maintain accreditation by these bodies the RTF must meet the accreditation standards. Therein is an opportunity to reduce and simplify the regulatory credentialing and quality assurance process required by the Department, along with the costs imposed directly by the Department's regulations. Given the requirement for accreditation, why are all of the other provisions in the regulation needed and not duplicative of the requirements for accreditation?

Allowable costs

Several commentators expressed concern that some costs are not allowable for reimbursement, such as portions of administrative costs, accreditation costs, preadmission interviews, health care, meals for a visitor, transportation, therapeutic leave, costs for seasonal clothing and barber and beautification services. The Department should explain whether these services are reimbursable and explain why.

Implementation procedures

In the Preamble, the Department states that the regulations will be effective 12 months from the date the final-form rulemaking is published in the *Pennsylvania Bulletin*. A commentator suggests that 12 months is not long enough to create the new services required by the regulation and to replace bed capacity eliminated by the regulation. The Department should explain how RTFs can reasonably implement the regulation in 12 months.

2. What facilities does this regulation affect? – Consistency with statute; Need; Economic impact; Clarity.

The regulation defines the term "RTF - Residential Treatment Facility" as:

> A nonhospital living setting in which behavioral health treatment is provided to one or more children with a diagnosed mental illness, or serious emotional behavioral disorders or a diagnosed substance abuse condition in conjunction with a diagnosed mental illness or serious emotional or behavioral disorder.

The Drug and Alcohol Service Providers Organization of Pennsylvania (DASPOP) commented with several questions and concerns, including "Does this regulation affect licensed drug and alcohol addiction treatment programs including licensed drug and alcohol programs serving the child welfare system and impose additional requirements upon them?" DASPOP also asks what the status is of a facility where young people are treated with a drug and alcohol diagnosis in conjunction with a diagnosed mental illness or serious emotional or behavioral disorder.

We believe that Section 23.2. *Applicability* should provide further guidance than is found in the regulation's definitions. We recommend that the Department clearly delineate in the regulation, such as in Section 23.2, what specific treatments and facilities must comply with Chapter 23.

3. Possible conflict with statutes.

Health Insurance Portability and Accountability Act (HIPAA)

Commentators raised concerns with storage of information relating to HIPAA. For example, a commentator believes that HIPAA would be violated by Section 23.17 since it requires storage of information at business offices. We recognize that an RTF must comply with HIPAA under Paragraph 23.21(a)(9). However, based on public comment, the Department should review the requirements of the regulation in conjunction with HIPAA and provide an explanation of how the regulation is compliant with HIPAA.

Act 147 of 2004

A commentator questions whether the consent to treatment provisions in Sections 23.20, 23.21 and 23.31 for parental consent on behalf of a minor up to age 18 comply with Act 147 of 2004. The Department should review the regulation in conjunction with Act 147 of 2004 and provide an explanation of how the regulation is compliant with Act 147 of 2004.

4. Coordination of RTF requirements with other departments. – Consistency with statute.

The Department cites as statutory authority for this regulation 62 P.S. §§ 201(2), 403(b), 901-922 and 1001-1080. Under 62 P.S. § 921(a), the Department is directed to prevent duplication by calling upon any other department, board or commission of the Commonwealth of Pennsylvania to

cooperate with it in the performance of its duties and responsibilities. Also, under 35 P.S. § 448.803, the Department of Health and other departments shall make every reasonable effort to prevent duplication of inspections and examinations. The Department should explain how it implemented and considered these statutory provisions in the development of the regulation of RTFs.

5. Advanced Notice of Final Rulemaking.

The Department describes in response to RAF Question 22 that stakeholders have been meeting to establish clinical guidelines and program standards for RTFs over the past decade in workgroups, through draft documents, at forums and meetings with recommendations that have been considered in drafting the proposed regulation. This is supported by some comments that describe an open process in developing this regulation. However, some commentators appear to either not have been part of that process, or were unaware of the specific language that resulted from those meetings. Several commentators complained that 30 days was not enough time to develop thorough comments on this regulation.

It is clear by the issues raised in the comments, the intensity of comment, the broad range of commentators and volume of comment that the Department's regulatory language has not yet achieved consensus on many issues. The Department should work with affected parties to develop improved ideas for achieving its policy objectives without imposing unnecessary or unreasonable financial burdens. Additionally, the Department should publish an Advanced Notice of Final Rulemaking to allow the opportunity to review and resolve any remaining issues prior to submittal of a final-form regulation into the formal process.

6. Section 23.2. Applicability. – Consistency with statute; Clarity.

This section is not clear for two reasons. First, as mentioned above, it does not provide sufficient information to determine what facilities are affected and what facilities are not affected. Second, it uses the phrase "children under 21 years of age." We question here and in the definition of "child" the statutory basis for a child to be over 18 years of age.

7. Section 23.3. Definitions. – Clarity.

Child

Child is defined as an individual under 21 years of age. The Department cites as statutory authority for this regulation 62 P.S. §§ 201(2), 403(b), 901-922 and 1001-1080. We did not find a direct definition of the term "child" in these citations. Also, we recognize that age does not reflect the best recognition of the needs of persons with a mental disability.

Several commentators believe that a child should be defined as under 18 years of age. Other statutory provisions define child as under 18, including 62 P.S. §§ 746 and 772. The Department should either amend its regulatory definition of child to a person under 18 years of age or alternatively explain why the definition is consistent with the statute.

Intimate sexual contact

A commentator believes this definition, by using the phrase "unclothed physical contact," could exclude inappropriate contact of a sexual nature involving clothed physical contact. The Department should clarify this definition to address the commentator's concern.

Minor

This term is defined as "a **child** under 18 years of age." (Emphasis added.) As the regulation is written, the use of the term "child," in the definition of "minor" is contradictory because the regulation also defines "child" as "an individual under 21 years of age." The Department should reconcile these definitions.

PRN

In our review of the regulation, we could only find this term used in Subparagraph 23.205(f)(9)(i). We suggest deleting this definition from Section 23.3 and defining the term in Subparagraph 23.205(f)(9)(i).

8. Section 23.4. Waivers. – Reasonableness; Fiscal impact.

Timeframe

This section prescribes a waiver process, but does not specify when the Department will respond to a request. Without a timeframe, the regulation would allow a waiver request to be indeterminate. The regulation should specify a specific amount of time for the Department to respond to a waiver request.

Use of waivers

As stated previously in these comments, according to the Department's response to Question 15 of the RAF, 58 of the 82 non-accredited RTFs and 17 of the 81 accredited RTFs exceed the maximum number of units per location prescribed in the proposed regulation. This could cause extensive requests for waiver of this provision alone. To the extent possible, the Department should consider amendments to the regulatory scheme that would minimize the need for waivers.

9. Section 23.12. Inspections and certificates of compliance. – Need; Reasonableness; Economic impact.

Coordination of inspections

A commentator observes that an accredited facility is already inspected by the accrediting body. We recognize that the statute directs annual inspections. Can the Department coordinate its inspections with the inspections done by an accrediting body?

Post a copy of this chapter

Subsection (c) requires an RTF to post a copy of this chapter. Commentators appropriately questioned the practicality of posting a document that is more than 150 pages long. After a final-form regulation is finished, these regulations will be available on the Pennsylvania Code website (www.pacode.com). We suggest requiring the RTF to post a citation to Chapter 23 and the website where the regulations can be found. The regulation could also require that an RTF make a copy of the regulations available upon request.

10. Section 23.14. Maximum capacity. – Need; Economic impact; Reasonableness; Timetable for compliance; Feasibility.

An RTF may not exceed 4 units of 12 beds each for a total of 48 beds

Subsection 23.14(a) states, "an RTF may not exceed 4 units of 12 beds each for a total of 48 beds." We ask the following questions:

- Given the staffing requirements in the regulation, and in particular Subsection 23.58(b) that specifies staff to child ratios, why is it necessary to limit the overall number of units, children per unit and the ultimate size of a facility to 48 children?
- How was the limit of 4 units determined?
- How was the limit of 12 beds per unit determined?
- How was the limit of 48 beds determined?

The Department should justify the need to limit the size of facilities to the numbers specified in the regulation. In addition, the Department should provide the studies it relied upon in reaching the numbers included in the regulation.

Presenting population

A commentator states the regulation limits the RTF's ability to reallocate beds based on the presenting population at any one time. The limitations could result in facilities using an inefficient allocation of its beds and units because specialized units may be needed to accommodate a particular group of youth. The Department should explain how an RTF would operate under Subsection 23.14(a) when the presenting population differs from the structure envisioned by Subsection 23.14(a).

Section 23.14 is prescriptive and detailed. How does this provision match the physical site of existing facilities? For example, if an existing facility has six units of eight beds, why couldn't that facility qualify without requesting a waiver? Also, why shouldn't a facility qualify whose units have 14 beds? Why does the regulation need to prescribe numbers of units and beds in a unit, rather than just a limitation on the number of children?

Transition plan

In the description of Section 23.14 in the Preamble, the Department states that "RTFs that currently exceed the proposed maximums will have the opportunity to develop and implement a transition plan to reduce the number of beds." There are four concerns. First, why wasn't this plan specified in the regulation? Second, how long can a facility take to make this transition? Third, what would a facility have to demonstrate in order to qualify for the transition? Finally, what alternatives can a facility consider if the transition to 48 beds makes a facility unprofitable? The final-form regulation should include provisions that specify the required components of a transition plan, the process for approval of the plan and how to amend a plan.

11. Section 23.17. Reportable incidents. – Protection of the public.

Reporting restraints

Paragraph (a)(9) requires reporting of use of a drug as a restraint. Should this also include reporting of any restraint such as manual restraint?

Disability Rights Network

The Disability Rights Network requested that Subsection (c) use the term "State-Designated Protection and Advocacy System" rather than "Disability Rights Network." The Department should review this comment and the use of "Disability Rights Network" in Subsection (c). This also applies to Subsection 23.34(e).

12. Section 23.21. Confidentiality of records – Clarity.

A commentator believes the regulation should include the Federal Educational Rights and Protection Act (FERPA). The Department should add FERPA or explain why it is not needed.

13. Section 23.32. Specific rights. – Feasibility; Clarity.

Gender identity

Several commentators requested the addition of "gender identity" to Subsection (a). They cite higher risk of depression and suicide for those who experience this discrimination. The Department should add gender identity to Subsection (a) or explain why it is not necessary.

Communication method

Subsection (d) requires a child to be informed of the rules of the RTF. Some commentators asked that this communication be provided in a language the child understands, including sign language as needed. We agree that the communication of rules is without value if the child cannot understand it. We recommend that the regulation require communication by a method the child can understand.

Excessive medication

This section applies to the children within a licensed RTF, and as such regulates the activities and actions of the RTF. This section includes several reasonable provisions that the RTF can control, such as access to appropriate medical care and advocacy. In relation to Subsection (m) though, the regulation states "a child shall be free from excessive medication." While we agree with the ideal that excessive medication should not be used, we have two practical concerns.

First, "excessive" medication would be a medical judgment taking into account many factors. How would the RTF itself determine whether medication is "excessive"?

Second, what action is the RTF expected to take? Generally speaking, these medical judgments would be under the jurisdiction of licenses issued by the various boards under the Department of State's Bureau of Professional and Occupational Affairs. What avenue does the RTF have to comply with the regulation?

14. Section 23.34. Notification of RTF restraint policy. – Clarity.

Should Paragraph (4) state "provide a copy of the RTF restraint **policy** . . ."? (Emphasis Added)

15. Section 23.41. Family participation in the treatment process. – Protection of the public welfare; Clarity.

A commentator observed that the regulation does not address circumstances where there are court related custody issues. The Department should add provisions to address custody as it relates to family participation or explain why they are not needed.

16. STAFFING – Need; Economic impact; Reasonableness; Protection of the public health, safety and welfare; Implementation procedures.

Sections 23.51 to 23.62 provide detailed requirements for staffing at RTFs. In the Preamble, the Department explains that these sections require enhanced credentials, increased staffing ratios, and more clinically oriented training topics than current requirements, in addition to health and safety training requirements. The Department should provide further support for how it determined the positions are needed and how it determined appropriate credentials for the positions. Also, the Department should explain the effect of the regulation on current RTFs and employees, and why a grandfather provision was not included.

17. Section 23.53. RTF director. – Economic impact; Reasonableness; Protection of the public health, safety and welfare.

Under 55 Pa. Code § 3800.53(a), a director may be responsible for more than one facility. Why wasn't this provision included in this section?

18. Section 23.54. Medical director. – Reasonableness; Economic impact; Implementation procedures.

Subsection (b) requires the medical director to be a board-certified or board-eligible psychiatrist. A commentator states there is a shortage of psychiatrists in Pennsylvania and suggests delegating functions down to the clinical director position. The Department should explain whether there are enough psychiatrists in Pennsylvania to fulfill the need created by this regulation.

19. Section 23.55. Clinical director. – Reasonableness; Economic impact; Implementation procedures.

A commentator is concerned that the credentials for this position as specified in Subsection (b) will increase costs. The commentator also questions whether persons who hold this position could be grandfathered. The Department

should explain the cost of hiring a person with these qualifications. Additionally, the Department should explain why it did not include a grandfather provision in the regulation.

20. Section 23.58. Staff ratios. – Economic impact; Protection of the public health, safety and welfare; Reasonableness; Implementation procedures.

Commentators believe the ratios in this section represent levels required for acute care, which is not representative of the staffing needed for RTF care. Other commentators believe the staffing for awake hours is excessive and prohibitively costly. Some commentators questioned what positions could be counted toward the specified ratios. We recognize the regulations address a potentially broad range of settings. The Department should explain why the staffing ratios in this section are the best alternative and what positions may be included in the ratios. The Department should also explain the cost impact on existing facilities to meet the staffing ratios in the regulation.

21. Section 23.59. Primary contact. – Reasonableness; Need; Economic impact; Clarity.

Subsection (b) lists the primary contact's responsibilities, including serving as a liaison, and coordinating the after care plan. However, commentators question the need for all of the responsibilities listed in the regulation and state the position described is performed by as many as three persons in their facility. They also state that Paragraph (2), requiring participation in the High Fidelity Wraparound and Paragraph (3) requiring promotion "of resiliency through risk reduction and asset-building strategies" are vague and appear to go beyond coordination of care. The Department should review the primary contact responsibilities and explain why they are all needed in regulation and assigned to one position. Additionally, the Department should further explain what is intended by Paragraphs (2) and (3).

22. Section 23.60. Family advocacy. – Reasonableness; Economic impact.

Independence

This section requires an RTF to have on staff, or contract for the services of, a family advocate for every 48 children. Commentators question the potential conflict of interest of a family advocate employed by the facility. We agree. The Department should reconsider whether a family advocate can effectively and freely provide the advice a family needs when the family advocate's advice may impose costs on the RTF and the family advocate's employment, pay and benefits are provided by the RTF.

Qualifications

Subsection (b) lists nine responsibilities of the family advocate, including promoting the observance of children's rights and reviewing grievances. These responsibilities appear to require some degree of expertise in order to effectively carry out the responsibilities. However, the definition of the term "family advocate" in Section 23.3 envisions the family advocate to be "a family member of a child who is currently receiving services . . ." Could a family member who does not have expertise in the responsibilities listed in Subsection (b) perform effectively on behalf of a child?

The definition of family advocate and the responsibilities for that advocate listed in Subsection (b) do not appear to be consistent. The Department should review the definition and Section 23.60 and either amend the regulation as appropriate for the position of family advocate, including the qualifications required, or explain what is envisioned for the role of a family advocate.

Medicaid reimbursement

Finally, is the cost of a family advocate an allowable cost for Medicaid reimbursement? The Department should also quantify the cost of this service.

23. Section 23.61. Supervision. – Protection of the public; Need.

A commentator suggests that the requirements in this section are more applicable to a hospital setting than an RTF setting. On the other hand, another commentator suggests reducing the observation times to seven minutes. The Department should explain why all RTFs need to make visual observations every 15 minutes and document that observation.

24. Section 23.62. Staff Training. – Clarity; Reasonableness; Need; Economic impact.

Hours of training

Paragraph (c)(5) requires a total of 20 hours of training from the list that includes 18 subjects of training. Commentators are confused as to whether annual training must include all 18 topics. The Department should amend this provision so that it is clear what training is required annually.

Amount of training

Other commentators believe the training is excessive. The Department should explain the need for the number of hours of training and the cost of that training.

High fidelity wraparound

A commentator states that high fidelity wraparound is not available in all counties. Why is training in this specific treatment model required under Subsection (c)? Should the regulation allow training in other types of treatment models?

Clarity

We note that the subparagraph designations should be reviewed. Designation of Subparagraph "(xv)" was omitted, but it was later used as the last Subparagraph designation.

25. Section 23.82. Poisons. – Protection of the public health. safety and welfare.

Commentators suggest adding a requirement that states "child use of household cleaning supplies must be directly supervised by staff." This suggestion is made because children have been reported to have ingested cleaning products. The Department should consider adding this provision.

26. Section 23.87. Surfaces. – Clarity.

Should this section include a reference to the possibility of lead paint, as is included in 55 Pa. Code § 3800.87(b)?

27. Section 23.143. Child health examination. – Reasonableness; Protection of the public health, safety and welfare.

Subsections (a) and (b) specify requirements for a medical examination within three days after admission. Commentators believe it will be difficult to schedule this examination in three days. We note that 55 Pa. Code § 3800.143(a) allows 15 days. Why is the timeframe of three days reasonable and needed?

28. Section 23.147. Use of tobacco products. – Reasonableness.

This section limits the "use or possession" of tobacco products. Commentators state they can enforce use of tobacco, but question how an RTF can enforce possession. We agree, particularly for staff who otherwise meet the law relating to tobacco products. We note that Subsection (c) appears inconsistent with Subsection (b) in that Subsection (c) describes allowable use of tobacco by staff. The Department should review this section for consistency and provide clear guidance that an RTF can reasonably comply with.

29. Section 23.188. Self-administration. – Reasonableness.

A commentator suggests that this section be revised to reflect use of medication delivery systems such as patches and inhalers. We agree that, for example, the requirement in Paragraph (1) may be impractical to log a medication use when an inhaler is used "as needed" for an asthma attack. The Department should review this provision and amend it as appropriate to accommodate various medication delivery systems.

30. Section 23.190. Medication performance monitoring. – Economic impact; Reasonableness.

A commentator questions what the Department will do with the information required to be reported by this section. The Department should explain what this information is used for and why it is needed to be reported every six months.

31. Section 23.201. General information. – Clarity; Protection of the public health, safety and welfare.

Time out

Subsections (b) and (c) are not clear regarding time out. Under Subsection (b), time out is designated as a restrictive procedure, and would appropriately be included in the restrictive procedure policy required by Section 23.203. Also, time out is permissible within the limits specified in Section 23.204. The concern is that Subsection (c) states that the only restrictive procedures permitted in an RTF are drugs used as a restraint and manual restraint. As written, Subsection (c) would prohibit time out, which appears to be inconsistent with Section 23.204. In Subsection (c), is the phrase "only **restrictive procedures** permitted" the appropriate phrase, or should Subsection (c) use the phrase "only **restraints** permitted"? We recommend that the Department clarify the status of time out in the regulation.

Harm or injury to a child

Subsection (f) states, "a restrictive procedure may not result in harm or injury to a child." While we agree with this premise, commentators state that it is naive to think an emergency restraint can be expected to have no possibility of harming the child and that risks are included in restraint consent forms. Again, we agree with the safety premise of Subsection (f), however the Department should explain whether the standard imposed by Subsection (f) is always attainable in emergency safety situations.

32. Section 23.205. Emergency safety intervention. – Clarity.

The term "treatment team physician" appears in Subsection (f). It is not clear who this is because the term is not defined. We recommend defining this term or using another term that is defined.

33. Section 23.223. Development of the ISP. – Clarity.

The term "treatment team" appears in Paragraph (d)(1). It is not clear who this is because the term is not defined. We recommend defining this term or using another term that is defined.

34. Section 23.255. Laundry. – Protection of the public health.

Subsection (b) states soiled linen shall be covered while being transported through food preparation and food storage areas. For health reasons, why wouldn't this apply to transportation of soiled linen throughout the facility?

35. Section 23.292. Participation requirements for an out-of-state RTF. – Reasonableness; Adverse effects on competition.

In response to RAF Question 25, the Department states that this rulemaking will not put Pennsylvania at a competitive disadvantage with other states and other states have comparable regulations for their RTFs. A commentator is concerned that this section of the regulation would not require an out-of-state provider to meet in-state requirements such as staffing and the 48 bed limit. The Department should explain how this section appropriately protects in-state facilities from unfair competition with out-of-state facilities.

36. Section 5310.3. Applicability. – Clarity.

The amendments to Subsection (b) do not clearly establish the applicability of Chapter 5310 and its separation from Chapter 23 for two reasons. First, the term "child" differs between Chapter 5310 and Chapter 23. Under Chapter 5310 a "child" is defined as under 18 years of age whereas Chapter 23 defines "child" as under 21 years of age. What is the status of a person 18, 19 or 20 years old?

Second, it is not clear whether and how Subsection (b), and consequently Chapter 5310, relate to Chapter 23. For example, referring to Chapter 3800, Paragraph 3800.3(12) establishes a clear exemption of Chapter 23. We recommend that a similar exemption be added to Section 5310.3 or alternatively that this provision clearly explain its applicability to Chapter 23.