

SILVAN B. LUTKEWITTE III, CHAIRMAN  
GEORGE D. BEDWICK, VICE CHAIRMAN  
ARTHUR COCCODRILLI  
S. DAVID FINEMAN, ESQ.  
JOHN F. MIZNER, ESQ.  
KIM KAUFMAN, EXECUTIVE DIRECTOR  
LESLIE A. LEWIS JOHNSON, CHIEF COUNSEL



PHONE: (717) 783-5417  
FAX: (717) 783-2664  
irrc@irrc.state.pa.us  
<http://www.irrc.state.pa.us>

## INDEPENDENT REGULATORY REVIEW COMMISSION

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

January 5, 2011

Honorable Michael Nardone, Acting Secretary  
Department of Public Welfare  
333 Health and Welfare Building  
Harrisburg, PA 17120

Re: Regulation #14-524 (IRRC #2880)  
Department of Public Welfare  
Participation Review Process for Medical Assistance Nursing Facilities

Dear Acting Secretary Nardone:

Enclosed are the Commission's comments for consideration when you prepare the final version of this regulation. These comments are not a formal approval or disapproval of the regulation. However, they specify the regulatory review criteria that have not been met.

The comments will be available on our website at [www.irrc.state.pa.us](http://www.irrc.state.pa.us). We will send a copy to the new Standing Committees when they are designated.

If you would like to discuss them, please contact me.

Sincerely,

Kim Kaufman  
Executive Director  
sfh  
Enclosure

# Comments of the Independent Regulatory Review Commission



## Department of Public Welfare Regulation #14-524 (IRRC #2880)

### Participation Review Process for Medical Assistance Nursing Facilities

January 5, 2011

We submit for your consideration the following comments on the proposed rulemaking published in the November 6, 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. Economic or fiscal impact of the rulemaking.**

In the Regulatory Analysis Form (RAF), the Department has stated that the costs/savings imposed by the rulemaking for the regulated community, local government and state government will be equivalent to the costs associated with a current Statement of Policy. What are the costs associated with the Statement of Policy?

In addition, we ask the Department to complete all parts of Section 20 of the RAF. This section asks for an estimate of the fiscal savings and costs associated with implementation and compliance for the regulated community, local government and state government for the current year and five subsequent years.

#### **2. Section 1187.162. Definitions. – Need; Clarity.**

We have two concerns with the definition of “closed-campus CCRC.” First, what is meant by the phrase “same campus”? Does the nursing facility component of the closed-campus CCRC have to be located within a specific distance of the independent living units?

Second, what is the need for Paragraph (iii) which states, “The CCRC does not market its nursing facility component directly to the general public”?

**3. Section 1187.172. Contents and submission of bed requests. – Need; Reasonableness; Clarity.**

Subsections (a)(4)(iii)(C) and (D) use the phrase “imposition of remedies.” What is meant by this phrase? Why must an applicant provide information to the Department about the “imposition of remedies”? As suggested by a commentator, we believe it would be more reasonable if the provisions focused on violations that lead to the imposition of fines instead of the “imposition of remedies.”

**4. Section 1187.173. Review and public process relating to bed requests. – Implementation procedures; Clarity.**

*Subsection (a)*

Subsections (a)(1) and (2) state that “the Department will use its best efforts” to issue decisions within a certain time frame. This language is non-regulatory because it does not establish a binding norm. We recommend that it be deleted from the final-form regulation.

*Subsection (c)*

This subsection allows for an expedited review for a bed request for “good cause” as determined by the Department. A commentator has asked what criteria will be used to determine if an expedited review is appropriate. We believe the regulated community would benefit from knowing what criteria will be used to determine “good cause” and ask the Department to include the criteria in the final-form regulation.

*Subsection (d)*

The publication of and public comment period for bed requests is addressed by this subsection. Subsections (d)(1), (d)(2) and (d)(3) state that certain information will be posted online by the Department. Will the information be posted to the Department’s website or on a different website? This should be clarified in the final-form regulation

In addition, a commentator has suggested that any comments submitted during the comment period be made available to the public. Has the Department considered posting comments it receives on its website?

**5. Section 1187.174. Information and data relevant to bed requests. – Need.**

This section lists other information the Department may consider when reviewing applications for bed requests. A commentator has questioned why

the Department would consider data relating to the availability of home and community based services and data relating to admissions and discharges at Medical Assistance (MA) nursing facilities in the primary service area identified in the bed request. What is the need for this data in evaluating a bed request?

**6. Section 1187.175. Criteria for the approval of bed transfer requests. – Policy decision of such a substantial nature that it requires legislative review; Need; Reasonableness; Clarity.**

*Subsection (a)*

A commentator is concerned that the criteria included in this section would limit a provider's ability to make changes to a facility in response to consumer demand. Another commentator believes that the criterion found under Subsection (a)(7), which states, "Approval of the bed transfer request will not result in increased costs to the MA program" will benefit Pennsylvania's Medicaid budget, but no MA consumers. While we understand and appreciate the budgetary constraints facing the Department, we ask for further explanation of how this set of criteria benefits MA consumers.

*Subsection (b)*

This subsections lists two conditions that could lead to the denial of a bed transfer request even if the criteria specified in Subsection (a) are met. The condition found in Subsection (b)(1) states: "Approval of the request would negatively affect the Department's goal to rebalance the Commonwealth's publicly-funded long-term living system to create a fuller array of service options for MA recipients." We question if this goal is a policy decision of such a substantial nature that it requires legislative review and ask the Department to point to specific statutory language that would support this goal. We also ask the Department to explain what criteria will be used to make this determination. We note that similar language can be found in § 1187.176, pertaining to criteria for the approval of closed-campus CCRC bed requests and § 1187.177, pertaining to criteria for the approval of bed requests other than bed transfer requests for closed-campus CCRC bed requests.

**7. Section 1187.176. Criteria for the approval of closed-campus CCRC bed requests. – Need; Reasonableness.**

This section establishes criteria for the approval of closed-campus CCRC bed requests. We have two concerns. First, what is the need for separate criteria for CCRC bed requests compared to non-CCRC bed requests? This should be explained in the Preamble to the final-form regulation.

Second, Subsection (a)(4) requires the ratio of CCRC's independent living units to its nursing facility beds to be "equal to or less than 17 independent living

units to 1 nursing facility bed.” We ask the Department to explain the basis for this ratio.

**8. Section 1187.177. Criteria for the approval of bed requests other than bed transfer requests or closed-campus CCRC bed requests. – Statutory authority; Need; Reasonableness; Implementation procedures.**

We have concerns with three subsections. First, a commentator believes that Subsection (a)(3)(ii) places an unreasonable burden on nursing facilities because it will impose an artificial application of a mandated percentage of MA residents. What is the need for this criterion?

Second, Subsection (a)(3)(iv) states the following: “The legal entity will employ welfare or MA recipients in its subject facility.” We have the following questions about this provision.

- What is the Department’s specific statutory authority for this provision?
- How will it be implemented?
- Would part-time employment satisfy this requirement?
- What would happen if the legal entity cannot find a qualified candidate to employ?
- Can this provision be waived, and if so, under what circumstances?
- How will it be enforced and what are the penalties for not being in compliance?

Third, we ask the Department to explain how it determined that the numeric percentages relating to average annual occupancy rates found in Subsections (b)(1) and (2) are appropriate and reasonable.



### Facsimile Cover Sheet



Phone: (717) 783-5419  
Fax #: (717) 783-2664  
irrc@irrc.state.pa.us

**INDEPENDENT REGULATORY REVIEW COMMISSION**  
333 MARKET STREET, 14<sup>TH</sup> FLOOR, HARRISBURG, PA 17101

**To:** Ruth D. O'Brien, Senior Assistant Counsel  
Jennifer Whare, Assistant Counsel  
Lisa Benedetto, Secretary to Ms. O'Brien  
Stephanie Schubert

**Agency:** Department of Public Welfare  
**Phone:** 3-2201; 3-2800; 3-2201; 7-4063  
**Fax:** 2-0717  
**Date:** 1/5/11  
**Pages:** 5

Comments: We are submitting the Independent Regulatory Review Commission's comments on the Department of Public Welfare's regulation #14-524 (IRRC #2880). Upon receipt, please sign below and return to me immediately at our fax number 783-2664. We have sent the original through interdepartmental mail. You should expect delivery in a few days. Thank you.

Accepted by: Cathy Heim Date: 1-05-2011