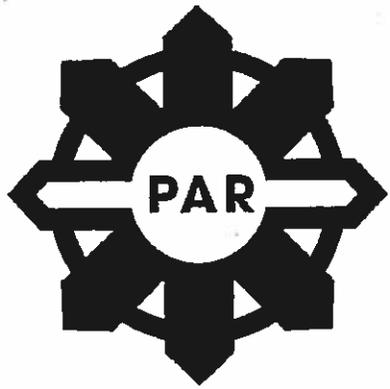


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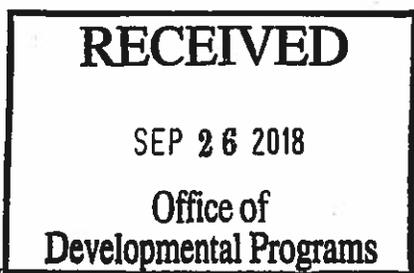


Pennsylvania Advocacy and Resources  
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September 26, 2018

Kristin Ahrens  
Acting Deputy Secretary  
Office of Developmental Programs  
625 Forster Street  
Harrisburg, PA 17105



Re: Regulation #14-540 Home and Community Based Supports and Licensing

Dear Kristin:

Thank you for meeting with the PAR Board of Directors last week to discuss PAR's questions regarding ODP's Final Form regulations. PAR is the statewide association dedicated to ensuring that Pennsylvanians with Intellectual Disability or Autism (ID/A) have access to supports and services that are essential to meet their needs. As you are aware, our provider members employ tens of thousands of Direct Support Professionals (DSPs) who work every day across the Commonwealth in a variety of venues, including the homes of people with disabilities as well as out of home residential and non-residential services.

To enable PAR to support Regulation #14-540 Home and Community Based Supports and Licensing before the Independent Regulatory Review Commission (IRRC), we request essential clarifications of certain regulations as well as commitments related to the Department's future implementation of the regulations. Recognizing that these regulations represent the most significant set of changes the system has seen in decades, and that they will govern the day-to-day provision of care and services to persons with an intellectual disability or autism at an annual expenditure of over \$3 billion in state and federal funds, we seek the following commitments:

1. Agreement prior to the October 18, 2018 IRRC meeting on clarifications regarding: 6100.571(a) relating to the data update; 6100.571(c) relating to the market-based approach for rate setting; and 6100.468(d) relating to lifesharing included in the attachments to this letter.
2. Agreement that ODP will establish an ongoing stakeholder process post-approval of the regulations to ensure that the desired outcomes of the regulations are achieved and to avoid or address unintended negative outcomes.

We appreciate the efforts of DHS and ODP for the lengthy and engaged public process regarding proposed rulemaking. We are pleased that a number of PAR's recommendations were included by ODP in the Department's Final Form Chapter 6100, 6400, 6500, 2380 and 2390 regulations. We believe that many of the areas in which there is consensus among the state, provider, consumer, family and advocacy communities will promote improved outcomes and are consistent with the U.S. Department of Health and Human Services, Centers for Medicare and Medicaid Services, Home and Community Based Services Community Settings Rule.

Regulatory improvements include specific regulatory clarifications that promote alignment across the regulations that govern intellectual disability and autism services. Those alignments include consensus on: community integration; rights of the individual; restrictive procedures; prohibited procedures; incident investigation; and individual needs.

We share a common goal of providing Everyday Living opportunities such as housing, employment and safety to the Commonwealth's citizens with intellectual disability and autism. But, without predictable setting of provider payment rates that reasonably align the costs that must be incurred to meet the needs of consumers with the fees established by ODP, service providers will be challenged to continually deliver the quality that is required by the Department to meet the documented needs of people with ID/A.

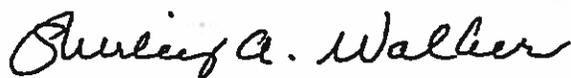
In our review of and discussions with our membership (and ODP) about the final form regulations, we have noted critically important regulatory provisions that are vague, ambiguous or both. We identify those provisions in the attachment. **Providers, people with ID/A, their families and other stakeholders need and are entitled to clarity, transparency and consistency regarding service expectation and payment rates. We have and are requesting DHS and ODP to address those regulations of concern by way of pre-adoption regulatory interpretation so as to avoid post adoption uncertainty, more debate, and ensuing turmoil.**

We believe that the interest of the Commonwealth and all stakeholders will be best served if the Department, honoring its partnership with providers, self-advocates, families and others, **continues to engage stakeholders in a clear, transparent and on-going consensus-building process to implement these regulations. Further, as these massive regulatory changes are implemented, the Department acknowledges the responsibility to amend them and to provide technical guidance promptly to achieve the intended purposes.**

PAR Members, as well as other ID/A stakeholders, are fully aware of the significance and infrequency of major regulatory changes as addressed in the pending matter before the IRRC. We formally request a commitment from the Department to put in place an implementation process that is inclusive of all stakeholders in addressing Regulation #14-540 Home and Community Based Supports and Licensing.

**In that spirit, PAR will work in collaboration with the Department to provide support and engagement in pursuit of our common goal of Everyday Lives for people with intellectual disability and autism.**

Sincerely,



Shirley Walker  
President and CEO

CC:  
Secretary Teresa Miller  
Department of Human Services  
PO Box 2675  
Harrisburg, PA 17105-2675

## Attachment

### (1) 6100.571 (a) Fee Schedule Rates

This general section explains that the Department “will establish fee schedule rates, based on the factors in subsection (b), using a market-based approach so that payments are consistent with efficiency, economy and quality of care and sufficient to enlist enough providers so that services are available to at least the extent that such services are available to the general population in the geographic area.”

The regulations do not explain what a “market based approach” means in the context of rate setting. PAR requests that the Department explain how it intends to use a “market based approach” in its rate setting.

The regulation accurately tracks federal statute in its reference to the statutory command that provider payments must be “sufficient to enlist enough providers so that services are available to at least the extent that such services are available to the general population in the geographic area.” That directive has no practical meaning with respect to payments for ID/A services as there is no comparison to equivalent services rendered to the “general population.” There is no population of ID/A consumers outside of the Medicaid Program.

We request that the Department affirm that its “rate setting methodology” incorporates the express directive from the U.S. Court of Appeals for the Third Circuit that provider payments must be “sufficient to meet recipients’ needs.” Pennsylvania Pharmacists Association v. Houstoun, 283 F. 3d 531, 538 (3d C.R. 2003).

### (2) 6100.571 (b) Rate Setting Factors

1. Given the Department’s commitment that it will utilize a “market based approach” in calculating fee schedule rates, PAR asserts that, correspondingly, the Department apply a nationally recognized healthcare inflation index to the fee schedule rates on an annual basis in those fiscal years when there is no rebase of the cost data.
2. The final form regulations, as presented, impose an unreasoned rate freeze in each fiscal year between the promised rebase of the cost data and presumed setting of new fees. Thus, the Department will be challenged to meet its statutory duty to establish payment rates that are sufficient for providers to meet consumers’ needs on an ongoing basis if it does not reasonably account for the impact of rising costs that providers incur each year and particularly under a single payer system. The Department’s decision to not include annual indexing in the regulations that would enable an annual adjustment to rates to account for inflation during the fiscal years between rebasing rates places the Commonwealth in the position of establishing annual rates on the basis of budgetary considerations to drive the rates which is not permissible under federal law.
3. The absence of a market-based index, applied on an annual basis, has the potential to erode services by over \$100 million annually, causing harm to the individuals served and the people who support them.

**(3) 3-Year Database Update: 6100.571 (c)** The Department will update the data used in subsection (b) at least every three years. *(Final Notice before the IRRC)*

1. PAR requests that the Department clarify in plain terms its position regarding when and how the Department will update the market-based data it relies on to set fee schedule rates post Fiscal Year 2017-2018. Specifically, given that the data base was not updated in FY16/17, FY17/18, nor in FY18/19, when does the Department propose to next update the rate setting data? And, will the Department utilize a nationally recognized healthcare-related inflation index to bring cost data forward in its calculations as PAR has repeatedly recommended?
2. PAR again raises its concern that updating the data and resetting fee schedule rates "at least every three years" will create a potential financial burden for the Commonwealth if, in fact, the update and resetting of rates occurs every third year rather than more frequently. Consumers' needs and costs to meet those needs will consistently increase every year. Requiring a large appropriation every third year may prove most problematic for the Commonwealth and providers. It would make more sense to accommodate the changes in the market (increased consumer needs and provider costs) with an annual adjustment, which is more manageable for budgetary planning for both the state and ID/A programs and enables providers to be more successful at recruiting and retaining necessary staff.

**(4) 6100.468(d)** The medication administration course in § 6100.462(b)(2) and subsection (a) will be a modified course for life sharers and service locations that are not licensed by the Department.

1. PAR is concerned that the requirement for a "modified" medication administration training course for life sharers is not included in the Chapter 6500 Life Sharing Homes licensing regulations. Without a clear interpretation, this could mean that a provider under the Chapter 6500 licensing regulations could receive a deficiency for using the modified medication administration training course.
2. Also of concern is that life sharers are required to take a medication administration training course as it is important to maintain the life sharing providers relationship without any confusion as to their status as independent contractors. The level of training specificity and the fact that it would be the presumed employer providing the training needs to be avoided if life sharing continues as an efficient, community-based model. Clear expectations are established by the IRS and DOL which providers must explicitly follow to maintain differences between independent contractors and employees and these regulations may contribute to confusion (e.g. Pendleton v. JEVS).

PAR requests that the Department include stakeholder involvement in the development and/or selection of the modified medication administration course so that actual users have the ability to determine if the proposed course will lead to improved life sharer recruitment and retention and overall improved outcomes. Thereafter, ODP would publish and solicit public comments on its proposed "modified" medication administration training course. Upon review and after consideration of public comments, ODP would publish a final version of the training course along with its responses to the public comments.