

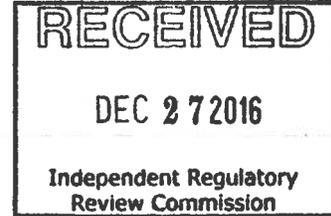
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#14-540- (210)

**Kroh, Karen**

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**From:** Mochon, Julie  
**Sent:** Tuesday, December 20, 2016 2:37 PM  
**To:** Kroh, Karen  
**Subject:** FW: Regulation No. 14-540  
**Attachments:** Ch 6100 REVISED.docx; ATT00001.htm



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**From:** Tim Pawol [<mailto:twpawol@verizon.net>]  
**Sent:** Tuesday, December 20, 2016 2:27 PM  
**To:** Mochon, Julie <[jmochon@pa.gov](mailto:jmochon@pa.gov)>  
**Subject:** Regulation No. 14-540

Attached please find my comments regarding the proposed regulations

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 Review Commission

TO: [Illegible]  
 FROM: [Illegible]  
 SUBJECT: [Illegible]

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# Pawol-Comments Template

## Chapter 6100

**Citation:** 6100.1. Purpose (a)

**Discussion:** The purpose of the proposed regulations is to assist in implementing the MH/ID Act of 1966 which has not had substantive changes since its adoption. The proposed regulations cannot attempt to expand beyond the statute,

**Recommendation:** Each proposed regulation should be referenced to the corresponding section of the statute.

**Citation:** 6100.2. Applicability

**Discussion:**

**Recommendation:** The terms “Funded equity”, “recoup”, “fixed asset” and “refresh” should be defined and determined whether they should be included in the definition section.

**Citation:** 6100.3. Definitions

**Discussion:** There are a number of phrases that are contained in the proposed regulations that do not appear in the proposed definitions. One example is the phrase “funded equity” contained in proposed 6100.663 which states that “funded equity” “As used in this subsection...” Since the Department proposes to use this phrase to “recoup” the value of property over the liability on the property, the definition is critical. The term “recoup” also does not appear in the definition subsection. A second issue with definitions is that the proposed definition defines “Fixed asset” as excluding real estate but the proposed subsection 6100.663 treats administration buildings which are clearly real estate as fixed assets. The term “Geographic costs” is used several times including 6100.571c7 yet no definition is included. In the Department’s current waiver application for HCBS, the Department chose not to request a waiver of statewideness, According to 4© of the waiver application, Geographic limitations can only be granted if a waiver to statewideness has been requested and granted. “Refresh” is not included in the proposed definitions yet it appears in 6100.571. Since the documents to be refreshed will determine fee schedule rates, it will directly impact the funds used to provide supports to individuals. Will “refresh” mean a readjustment of the fee schedule based on specific indices and if so, those indices should be specified. Simply adjusting all fees based on a standard adjustment will continue the historical inequities cited by CMS.

**Recommendation:** The right to appeal by the individual, the provider and other parties with standing is not limited to chapter 41 and the proposed section should only state that the individual, the provider and other parties with standing shall have the right to appeal.

**Citation:** 6100.41. Appeals

**Discussion:** The proposed regulation states that appeals shall be made in accordance with Chapter 41 but the Departments HCBS waiver application indicates that the individual must file with the agency that made the determination being questioned. Appendix F-1. The subsection does not address other bases of appeal such as the Administrative Agency Law nor is it clear whether Chapter 41 covers individuals and providers.

**Citation:** 6100.52. Rights team

**Discussion:** The feasibility to have a rights team for all individuals served is not realistic. Having a team get together every three months will not be successful we have difficulty getting a meeting for the restrictive procedures which is every 6 months. Restraints are currently reviewed by the county and OPD through the EIM process this should be adequate.

**Recommendation: Develop one rights team for all individuals. Review all incidents every 6 months and make recommendations. Rely on The Behavior Supports Person to analyze the behavior and develop solutions. They can inform team of any findings and recommendations.**

**Citation: 6100.82. HCBS documentation**

**Discussion: Two very important rights which are included in the waiver application have not been included in the proposed regulations. The individual has a free choice of any willing and qualified provider. The second important right which is in Appendix B-2 is that the state does not apply an individual cost limit**

**Recommendation: Include the individual's right of choice of provider and that no individual cost limit applies in Pennsylvania.**

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**Citation: 6100.221. Development of the PSP**

**Discussion: This section refers to an individual's service implementation plan but there is no definition of the service implementation plan. Also the support coordinator or targeted support manager is responsible for developing the PSP which is required before the individual can receive reimbursed support. The AE is responsible for ensuring that service plans are complete and accurate before approving service plans and authorizing services. (Waiver application) The provider identified in the PSP is required to implement, including revisions. (6100.224) The design of the PSP supports and services unfortunately makes the provider responsible for the provision of supports but the provider can only be reimbursed when the AE has the services approved and authorized. The provider is punished if the AE fails to act. The sanctions should be imposed on the AE if liability occurs.**

**Recommendation: Include a definition of Service Implementation plan and state that sanctions should be authorized against the AE when the AE actions or inactions cause liability.**

**Citation: 6100.341. Use of a positive intervention**

**Discussion: Support. Good change of title from “Safe Behavior Management”**

**Recommendation: Support**

**Citation: 6100.343. Prohibition of restraints**

**Discussion: Title can be misleading to appear that no restraints are allowed, ever**

**Recommendation: Change title to “Prohibition of certain types of restraints.”**

**Citation: 6100.344. Permitted interventions**

**Discussion: (6) nonemergency basis or for 15 minutes in a 2 hour period. People have different definitions on nonemergency basis. Restraints should only be utilized in an emergency basis. The 15 minutes in a 2 hour period does not coincide with the 6400 regulations which is 30 minutes in a 2 hour period. However, the system should be looked at to support our individuals who are in crisis. The allotted time frames are not realistic. Once someone who has been restrained for 15 minutes and are not calm what is our recourse. Sure we can call law enforcement and risk our individual be tazed and taken to the local hospital. Once at the hospital they will be evaluated and a bed search will begin. The individual will remain in the ER for at least 24 hours or**

longer until a bed is found across the state which at times has been 6 hours away from all of their support team. This regulation will also prevent providers from serving difficult people. In my opinion, this regulations leads to providers not reporting restraints.

**Recommendation: When an individual is in crisis develop an individualized approach to help get though the crisis. Sending people with IDD to Psychiatric Hospitals are not productive and leads to a whole host of problems. Allow the team to work through the crisis with the person. Develop an individualized time for restraints based upon the person past history and have it approved through rights committee. Most crisis do not last more than 24 hours. This will enable the team who knows the individual best to support them through the crisis not strangers in a hospital.**

**Citation: 6100.444. Lease or ownership**

**Discussion: In the Department’s waiver application for HCBS it states the Requirements for Provider-owned or Controlled Home and Community Based Residential Settings. The Federal Requirements are stated as 42CFR441.301©(4)(vi)(A) For provider units owned, rented or occupied by an individual receiving services, there must be a legally enforceable document particularly dealing with eviction. Proposed section 6100.55 requires the provider to retain the residential habilitation for some unspecified period of time. Section 6100.345 provides that the individuals personal funds or property may not be used as payment for damages unless the individual consents. One of the stated purposes of these sections is to have services in the same manner as anyone in the community. The current proposed regulation create an artificial landlord/ tenanr process.**

**Recommendation: Proposed section 6100.444 should be deleted.**

**Citation: 6100.481. Department rates and classifications**

**Discussion:** There is a major inconsistency in determining what must occur regarding public review and comment versus merely providing notice of the Departments action. Proposed 6100.571(d) provides the Department will publish as a notice in the Pennsylvania Bulletin the factors used to establish the rates and the fee schedule rates for public review and comment. 6100.645 states that prior to the effective date of the rates, the Department will publish as a notice in the Pennsylvania Bulletin the cost-based rate setting methodology. 6100.711(e) provides that the Department will publish as a notice in the Pennsylvania Bulletin a notice of the factors used to establish the rates for public review and comment. 6100.481(b) states that the Department will establish a fee per unit as a Department established fee by publishing a notice in the Pennsylvania Bulletin. Proposed 6100.481(b) makes no provision for public review and comment. Subsection (a)(6) proposes a method established in accordance with a Federally-approved waiver, including a Federally-approved waiver amendment. This appears to be an attempt to disregard the requirements of adoption of regulations.

**Recommendation:** All actions by the Commonwealth should require public notice, review and comment. Subsection (a)(6) should be deleted.

**Citation 6100.483 Title of a residential building**

**Discussion:** This subsection has several concerns. The proposed language deals only with debt-free residential building, and does not state how non debt free properties will be treated. The property cannot be treated as a fixed asset since the definition of fixed asset specifically excludes real estate. Traditionally stating the title would remain with provider would be sufficient but proposed section 6100.663 states that the Department can recoup “funded equity” after the title has remained with the enrolled provider.

**Recommendation:** The Department has no claim to property purchased by the provider and the proposed subsection must be amended to reflect ownership by the provider.

**Citation: 6100.487. Loss or damage to property**

**Discussion:**

**Recommendation:**

**Citation:** 6100.571. Fee schedule rates

**Discussion:** The proposed subsection provides that the fee schedule will “refresh” the market based approach based on current data and independent data sources at least every 3 years. This does not supply sufficient information to determine what, if any increase will be made. The subsection should state that “refresh” is replaced with “a reputable cost of living index”. The proposed language includes the term “geographic costs” but the term is not defined. Clear definitions are necessary to determine whether the proposal violates statutes dealing with class of counties. It should be noted that in the waiver proposal the Commonwealth chose not to request statewideness (Application for a 1915© Home and Community-Based Service Waiver section 4(©) According to the section, geographic limitation are only available if a waiver from statewideness is granted. Since the Commonwealth did not request a waiver from statewideness, geographic limitations cannot be granted,

**Recommendation:** Refresh should be replaced with a reputable cost of living index and geographic costs should be deleted.

**Discussion:**

**Citation:** 6100.661. Fixed assets

**Discussion:** As previously noted, the definition of “fixed assets” in proposed section 6100.3 specifically excludes real estate but 6100,661 includes real estate as a fixed asset.

**Recommendation: The sections should be consistent.**

**Citation: 6100.663. Fixed assets of administrative buildings**

**Discussion:** There are a number of concerns with this subsection. The title of the subsection is fixed assets of administrative buildings but the definition of fixed assets specifically excludes real estate. The proposed subsection states that if an administrative building was acquired prior to June 30, 2009 that has an outstanding original loan term of 15 years or more is an allowable expense. The proposed language does not explain the significance of the June 30, 2009 nor does it explain how administrative buildings purchased after June 30, 2009 or without a 15 year loan are to be treated. Subsection e states that donated property cannot claim a depreciation allowance which is counter productive. By obtaining property by donation, the Department reduces the cost to the entire system. The proposed language instructs the provider to use a depreciation methodology relating to fixed assets even though the definition of “fixed asset” excludes real estate. The language of (f) contains two terms that are not included 6100.3 (definitions) Recoup and “funded equity” are not defined but are an attempt to have a “taking” of real and personal assets of the provider. Property, administrative and residential are usually purchased with a mix of private, county, state and federal funds. It appears that the Commonwealth is attempting to “recoup” funds which transferred to the provider without any written document preserving a right to recoupment.

**Recommendation: Since the MH/ID Act of 1966 has not had any substantive amendments since its passage, there is no basis for substantive changes by regulations. The entire section 6100.663 should be discarded.**

**Recommendation:**

**Citation:** 6100.711. Fee for the ineligible portion of residential habilitation

**Discussion:** There are several concerns with this subsection. As previously documented for section 6100.571, geographic limitations can only occur if the state was given a waiver from statewideness and Pennsylvania has stated in it's waiver application that it is not requesting a waiver of statewideness. As previously documented in subsection 6100.571, there is no definition of "refresh". As previously included in comments to 6100.571, there is no definition of refresh. If the purpose of "refresh" is to have an adjustment of fees, then the section should make reference to a reputable cost of living index

**Recommendation:** Delete geographic costs and refresh. Replace refresh with a reputable cost of living index.

**Citation:** 6100.741. Sanctions

**Discussion:**

**Recommendation:**

**Citation:** 6100.742. Array of sanctions

**Discussion:** If these are not licensing regulations, the language should not be so focused on corrective action.

**Recommendation:** Change title to "Remediation."

cc: Nancy Thaler, Deputy Secretary, Department of Human Services, ODP

[Redacted]

6100.711 Fee for the fee for up to 12 residential placements

Discussion: There are several concerns with this provision. As previously mentioned for section 6100.711, geographic limitations can only occur if the state has given a waiver from statehood and Pennsylvania has stated in the waiver application that it is not requesting a waiver of statehood. As previously mentioned in section 6100.711 there is no definition of "retail". As previously included in comments to 6100.711 there is no definition of "retail". The purpose of "retail" is to have an adjustment of time that the individual makes between a regular cost of living index

Discussion: Details geographic costs and retail. Factors to be considered include cost of living index

6100.711 Fee for up to 12 residential placements

Discussion: Fee for up to 12 residential placements

6100.711 Fee for up to 12 residential placements

Recommendation: Change title to "Retail".