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Daniel Fellin, Esq.
Chief Counsel
PA Dept. Drug and Alcohol Programs
VIA EMAIL

Re: Recovery Housing Licensure Regulations

Dear Dan:

Please see attached list of suggested language changes I would suggest reviewing as part of the regulatory revisions. These comments are general and are by no means comprehensive. Please feel free to call me should you wish to discuss further.


Sincerely,

A handwritten signature in black ink, consisting of a series of loops and curves, representing the name Nancy Marcus Newman.

Nancy Marcus Newman, Esq.

cc: Sec. Jennifer Smith
Laura Conrad

MEMORANDUM

TO: Daniel Fellin, Esq., Chief Counsel
FROM: Nancy Marcus Newman, Esq. 
RE: Recovery Housing Licensing Regulations (the “Regs”)
DATE: May 3, 2021

A. General Issues

1. Discriminatory as Applied. Sober living operators in other states have successfully argued violations of the Fair Housing Act (FHA) and Americans with Disabilities Act (ADA) resulting from laws that required sober living homes to abide by strict, burdensome and prohibitively expensive requirements, like mandates to have staff on premises 24 hours a day or fire codes that would require exorbitant housing repairs to satisfy. These types of rules and regulations are often held to be invalid as applied because they prevent people in recovery from obtaining the housing they needed to deal with their disability and have the effect of harming a class of individuals protected by federal and state laws.
2. Facially Discriminatory. The Regulatory framework as drafted is “Discriminatory on its face” and singles out a protected class.
 - The burden is on the Department to justify how it benefits the disabled, and **commentary** from experts have shown that in fact the requirements are not beneficial to this target population when taken in the larger context.

- The Regs are in many respects more burdensome than current regulations for State licensed homes for residents with mental health or intellectual disabilities. Should be reviewed and compared. There is no increased fire hazard simply by virtue of the fact that residents are in recovery from SUD. See CHAPTER 6400. COMMUNITY HOMES FOR INDIVIDUALS WITH AN INTELLECTUAL DISABILITY OR AUTISM.
 - ie. § 6400.271. Semi-independent living abilities. Exception.
 - ie. § 6400.14. Fire safety. Occupancy permit is required based upon and listing *the appropriate type of occupancy*. Any language setting forth specific regulatory requirements give rise to misinterpretation by Municipal Zoning Authorities as to the *residential* nature of the housing.
 - ie. PHYSICAL SITE, FIRE SAFETY, etc. Regs. § 6400.81. Individual bedrooms.
 - (2) A clean, comfortable mattress and solid foundation.
- Regs requirements are unduly burdensome and parts of § 709.151 even go beyond CHPT 6400). *This is NOT a treatment facility and residents in no way have impaired functioning. It is a residence that is NOT providing treatment, but rather that is a functional family equivalent.* Examples include but are not limited to fire retardant mattress (§ 709.151(d)(1)(i)), pillow and bedding appropriate for the temperature in the facility. (§ 709.151(d)(1)(ii)), 60 square feet of floor space per resident measured wall to wall (§ 709.151(d)(1)(iv)), etc.

3. Exemption for houses certified in accordance with Nationally Recognized Standards

A Mandatory Licensure (which de facto this is, see below) for disabled people living together and access to housing of their choice is always going to reek of discrimination. A broad solution to all language concerns would be to provide a specific exemption from the regulations for organizations with a formal affiliate relationship with a national standard seeking body (NARR Affiliate). The Department should provide a specific exemption for PARR Certified Homes or Chartered Oxford Houses and treat those exempt houses at parity with licensed houses for referrals and funding. Alternative language would allow a licensing exemption for housing that meets standards of a certifying body designated by DDAP. Certifying bodies can

then be overseen by the Department. *Note: This alternative oversight through certification rather than licensure is specifically provided for in the enabling legislation.*

Additional suggested language for Certification Exemption:

- DDAP must Designate in-state entity within 60 days of approval of the Regs.
- Matters involving substandard operators, patient brokering and insurance fraud shall be enforced by PA Attorney General and through enforcement of Criminal and Civil Laws.
- Houses must at a minimum meets all local Codes.
- Example. PA has already adopted this logic for certification of Addiction Counselors and for credentialing non licensed mental health providers in the State. PA recognizes PA Certification Board (PCB) that has a relationship with IC&RC. That system can be paralleled here. ie. PARR determines who is certified, and the State oversees PARR.

4. Licensing Policy is not Justified. The proffered justifications for Licensure do not hold weight when a less burdensome Statewide Certification Process is in place:

- DDAP provides little support to establish that the regulations benefit persons in recovery from SUD by protecting their safety. DDAP's only evidence regarding safety concerns are statistics of overdose deaths and a few "bad operators. Serious questions exist on the merits as to whether the regulatory burdens are justified by safety concerns. In fact, "rogue" housing operators will not avail themselves of licensure and will continue to operate unencumbered by the proposed requirements.
- The other asserted justification for the licensure of Recovery Housing is that it will provide higher quality housing for persons in recovery from SUD. The comments received in response to the regulations, submitted by Members of the Task Force themselves have raised serious questions whether residents of recovery housing will be advantaged by licensure. First, there is a system for Certification already in place, administered by PARR. Second, the onerous burdens imposed by the regulations will impose financial burdens on current and future recovery houses that will simply necessitate their ceasing operations. This will leave the most vulnerable citizens without housing.
- Finally, Pennsylvania justifies the regulations claiming that the new standards will render Pennsylvania recovery housing more desirable and will secure a competitive advantage to lure residents from other states. This is questionable if in fact the regulations only apply to housing receiving in-state funding and referrals. It seems that a parallel population from another state would similarly be referred and funded through their state systems and would therefore not be referred out of state to Pennsylvania. There is no "attracting" residents from state run systems elsewhere to PA's state funded system. Evidence that the intent here is to regulate beyond state funded housing.

5. Specific Requirements:

Strict, burdensome and prohibitively expensive requirements have been identified by my colleagues Fred Way and Bill Stauffer, who represent the rights of people in Recovery. These types of rules and regulations are often held to be invalid as applied because they prevent people in recovery from obtaining the housing they needed to deal with their disability and have the effect of harming a class of individuals protected by federal and state laws.

RECOVERY HOUSE LICENSING CHECKLIST:

- Incorporation and legal documentation (unduly burdensome, and a corporate entity is not required to operate a recovery house).
- Proof of zoning approval (impracticable, if zoning special exception is disputed it will prohibit operations)

B. Problematic Language.

1. FORMS.

Utilization of language that refers to **health care** or a **treatment** level of care is confusing and will allow for misinterpretation by Municipal Zoning Authorities and mistaken identification/labeling of houses as “**treatment facilities**” or “**group homes**” rather than **allowable federally protected residential housing of individuals** in residential zones. It seems that the Forms and language were not carefully edited to recognize that treatment provider information is not applicable to recovery housing process.

- “Treatment” Language:
Remove all language and references to “Patient”/“Inpatient”/“Treatment”/“Facility”. ie. Recovery Houses should NOT be listed under definition of *inpatient nonhospital activity* (§ 701.1). Treatment regulatory language including all reference to “inpatient”, “outpatient” or ANY kind of “patient” should be removed. Residents are private individuals, they are NOT patients. *There is no treatment provider involved here. There are no “patients”*. While it may be the Department’s intention to “captures the breadth of residential facilities that DDAP will be licensing, from residential treatment to community housing” in one fell swoop, the commingling of these two very different types of housing

– community versus residential treatment – will cause confusion and unintentional overlap in zoning disputes and “NIMBY” cases and increase the likelihood of discriminatory exclusion of recovery housing from residential neighborhoods.

Ownership and Business Management Form: Delete Treatment references and language

- reference to health care experience
- reference to Narcotic Treatment Program and Medical Director
- P5 reference to facilities/NTPs owned, P6 State or federal agency action
- P9 Recovery Houses do not accept Medicaid/medicare
- P10 house is not not a “care” provider

Facility Characteristics are for Treatment, not relevant here

Section II: License Activity: Treatment Type, Length, Client to Counselor ratio all treatment

2. REGULATIONS

(inappropriate “Treatment language” to be changed to non-treatment recovery based)

- Revise “inpatient”, “nonhospital facility”
- 704.3 awake staff 24 hours a day required? This is onerous
- 704.12 “Counselor” inappropriate to RH and client/staff ratios should be exempt. “Client” inappropriate. Written Petition is burdensome
- Fiscal audit unduly burdensome
- P9 (c) overreaching to require CPR, first aid, STD training with Department approved curriculum for all employees (maintenance staff?) and “volunteers” which would possibly include everyone bringing an AA or NA meeting to the house. Who is a volunteer? This is a house not a hospital.
- P11 “Admission” criteria and Requirements for “completion of residency”. This is an awkward editing of treatment language. This is a resident of a house, there is no “Criteria for ending residency,” and it can be ongoing.
- P12 (ii) there is no “lease agreement”.