

**INDEPENDENT REGULATORY REVIEW COMMISSION  
DISAPPROVAL ORDER**

Commissioners Voting:

Public Meeting Held July 15, 2021

George D. Bedwick, Chairman  
John F. Mizner, Esq., Vice Chairman  
John J. Soroko, Esq.  
Murray Ufberg, Esq., dissenting  
Dennis A. Watson, Esq.

Order Issued August 24, 2021  
Regulation No. 74-4 (#3294)  
Department of Drug and Alcohol Programs  
Standards for Drug and Alcohol Recovery  
House Licensure

On June 14, 2021, the Independent Regulatory Review Commission (Commission) received this regulation from the Department of Drug and Alcohol Programs (Department). This rulemaking amends 28 Pa. Code §§ 701.1, 701.11, and 701.12 and adds 28 Pa. Code Chapter 717. Notice of proposed rulemaking was omitted for this regulation; it will become effective upon publication in the *Pennsylvania Bulletin*, with the exception of 28 Pa. Code § 717.14 that shall take effect 180 days after publication in the *Pennsylvania Bulletin*.

Section 2313-A of the act of December 19, 2017 (P.L. 1187, No. 59) (Act 59) directs the Department to “promulgate final-omitted regulations for the licensure or certification of drug and alcohol recovery houses that receive funds or referrals from the department, or a Federal, State or other county agency, to ensure that a drug and alcohol recovery house provides a safe environment for residents.” 71 P.S. § 613.13. This final-omitted regulation adopts requirements for drug and alcohol recovery houses (DARH) in Chapter 717 (relating to standards for drug and alcohol recovery house licensure) as follows: General provisions; Exceptions; Licensure; Fines; Financial auditing; Staff and volunteers; Residents; Physical plant standards; Safety and emergency procedures; Unusual incident reporting; and Complaint management.

The final-omitted regulatory package was first submitted to this Commission on March 1, 2021, and withdrawn and resubmitted on March 15, 2021 to include additional forms. In response to public comments submitted on the earlier versions of the rulemaking, the Department withdrew the regulation on April 9, 2021 to review and address commentators’ concerns. The Department submitted a revised final-omitted regulatory package on June 14, 2021.

After a review of the final-omitted regulation, consideration of the comments from the regulated community, the public, and the discussion at our July 15, 2021 public meeting, we find that the rulemaking is not in the public interest because it does not meet the following criteria: statutory authority; possible conflict with statute; consistency with the intent of the General Assembly; economic and fiscal impacts of the regulation; protection of the public health, safety and welfare; clarity and lack of ambiguity; reasonableness; implementation procedures and timetable for compliance; and compliance with the provisions of the Regulatory Review Act. 71 P.S. § 745.5b(a) and (b)(1) – (3) and (6).

*Implementation procedures and timetable for compliance; Protection of the public health, safety and welfare; Clarity and lack of ambiguity; Economic and fiscal impacts; Compliance with provisions of the Regulatory Review Act*

Our main concern is that there are numerous provisions where the regulatory language in the regulation and/or the description in the Preamble do not provide the regulated community with sufficient information or direction to ensure compliance with the DARH standards. The rulemaking establishes two levels of licensure: full and provisional. The regulatory language for the provisional licensure process and its accompanying fee structure is less clear than those provisions for initial licensure and license renewal.

The Department notes that six commentators asked for a definition of “provisional license.” It responded that the provisional licensure process is described in the regulation under Section 717.8 (relating to provisional licensure). We concur with commentators that the regulation would be made clear if “provisional license” were defined. We also suggest that along with defining “provisional license,” the term “full licensure” and the definition of “license” be revised to include both levels.

Based on the nature of the comments received, the rulemaking should be rewritten so that the regulated community fully understands the fee structure for applying for licensure, including the issuance of a provisional license and extensions. The Preamble and the regulation should address the following questions: whether a provisional licensure fee is assessed each time it is extended under Section 717.8; and whether a fee is assessed when a “regular” (full) license is issued under Section 717.8(d)? A clearly stated fee schedule is essential information that every licensee and applicant should understand as they navigate the licensure process.

The Preamble explains that license renewal is on an annual basis, but Section 717.6 (relating to application) does not state the length of time of the initial license and it is also unspecified whether the renewal of a license is to occur on the date of issuance or calendar year (Section 717.6(b)).

Under Section 717.9 (relating to restriction on license), Subsection (a) states that licensure applies to the named DARH and the designated premises and is nontransferable. Subsection (b) provides for notification of change of ownership, name, location, maximum capacity, and the closing of the DARH. Failure to notify the Department leads to automatic expiration under Subsection (c). What is the purpose of Subsection (a) if the license is transferable with notification? If the license is specific and not transferable, how does the license not automatically expire if the DARH is moved to a different place? If saying that the license is transferable is a misstatement, what is the process to approve a transfer?

The final-omitted rulemaking does not address the visitation and inspection process. Section 717.10 (relating to right to enter and inspect) authorizes a representative of the Department to enter, visit, and inspect a DARH that is licensed or applying for a license. Section 717.11(a) (relating to notification of deficiencies) provides that a Department representative will leave forms with the applicant or licensee “to address areas of noncompliance with regulations.” This notification process is not explained in the Preamble.

*Protection of the public health, safety and welfare; Clarity and lack of ambiguity; Reasonableness; Implementation procedures and timetable for compliance*

The Department states that it neither wants to create confusion nor give the impression that DARHs are treatment facilities. Earlier versions of this regulation, which were subsequently withdrawn, amended Chapter 709 (relating to standards for licensure of freestanding treatment facilities) to include the DARH regulation. To alleviate commentators' concerns that placement of these standards in Chapter 709 could lead to discriminatory zoning, the Department moved the DARH standards out of Chapter 709 and into their own Chapter 717.

The Department also includes DARHs in Sections 701.11 and 701.12 (relating to exceptions to this part; and revocation of exceptions) which adds them to the lists of entities that may seek regulatory exceptions and may have regulatory exceptions revoked. We asked the Department why these exceptions are necessary when exceptions are included in Chapter 717. Does this not add another layer of exceptions to already existing exceptions? To expect licensees and applicants to comprehend how these provisions intersect and are to be applied is not reasonable. According to the Department, these updates to Chapter 701 were necessary because the chapter applies to the entire part, including Chapter 717. We disagree and believe that this approach actually detracts from the Department's stated goal of eliminating confusion or creating the misperception that DARHs are treatment facilities.

The Department explains in the Preamble that in order to maintain consistency in its internal processes for the handling of licensure, inspections, and approvals of all the entities it regulates, it adopts a regulatory structure for DARH licensure that is akin to the structure for licensure of freestanding drug and alcohol treatment facilities. This approach, while it may provide uniformity in how the Department operates, has not entirely eliminated the regulated community's confusion or concerns. The regulated community acknowledges the Department's efforts to eliminate misperceptions. But certain terms and phrases that are typically affiliated with medical treatment facilities such as "discharge" (Section 717.20(c)), "intake and admission" (Section 717.22) and a reference to "maximum capacity" (Section 717.9(b)(4)) remain in Chapter 717.

The Department states that it has developed these regulations to ensure that DARHs provide individuals with substance abuse disorders with a safe environment that promotes recovery. However, the lack of clarity as it pertains to implementation procedures and timetables for compliance of key provisions is a concern to this Commission. A regulation is not in the public interest if members of the regulated community or public cannot discern, based upon their reading of the regulation, what a term means, how a procedure is to be implemented or the timeline for compliance.

*Clarity and lack of ambiguity; Protection of the public health, safety and welfare*

Section 717.28(2) (relating to resident requirements) includes the term "illicit drugs." We asked the Department at the public meeting what the term encompasses. The Department's response was that the term has, in the absence of a specific definition, its common understanding,

which would be a drug that the person uses or possesses unlawfully. Regulations have the full force and effect of law and establish a binding norm that is applicable to all that fall under its jurisdiction. Therefore, regulations must be clear and unambiguous. If residents are being evicted for use of an illicit drug, could they make a claim that the term is too vague and did not realize that the provision had been violated? We believe so. The regulated community is entitled to guidance, as are residents who are not only paying rent, but are also challenged by substance abuse disorders. The term “illicit drugs” is also used in Sections 717.17(b)(5) and 717.31(a)(2) (relating to personnel management; and unusual incidents). The Department should define this term and not rely on its common understanding to enforce residency and licensure requirements.

*Protection of the public health, safety and welfare; Implementation procedures and timetable for compliance; Clarity and lack of ambiguity*

Section 2315-A of Act 59 requires the Department to create and maintain a registry on its publicly accessible website of all licensed or certified DARHs within the Commonwealth, which must be updated annually by the Department. 71 P.S. § 613.15. In order to receive and maintain licensure or certification, a DARH must be in compliance with all Federal, State, and local laws, including, but not limited to, the Americans with Disabilities Act of 1990 (Public Law 101-336, 104 Stat. 327), as required under Section 2318-A of Act 59. 71 P.S. § 613.18. Further, failure to comply or remain in compliance shall result in loss of licensure or certification and **removal from the registry**. [Emphasis added].

In the Preamble to final-omitted rulemaking, the Department addresses questions raised by commentators regarding whether the application fees would be assessed per house or per organization if the entity operates more than one DARH. Knowing that an organization may have multiple DARHs operating under a common name and that some premises may be licensed and others not, we asked the Department at the public meeting if there was any consideration given to requiring unique names for licensed and unlicensed houses. Our concern is that the public may be misled when it visits the Department’s website registry. The Department indicated that no consideration was given to requiring different names because it would cause administrative burdens to DARHs, such as registering fictitious names. However, the Department explains that the registry on the website will include the address of the DARH and each location will have its own specific and unique license. The Preamble states that to avoid confusion about which houses may accept public funding and referrals, it will include street address locations in the registry. The rulemaking does not specifically address how the registry will be managed. Act 59 requires DARHs to be removed from the registry for failure to comply or remain in compliance. Will those DARHs that are operating with a provisional license have their own designation on the registry? We reiterate our concern that the public, upon visiting the Department’s website, should be able to easily determine which DARHs are licensed from those that are not.

*Implementation procedures and timetable for compliance; Reasonableness; Protection of the public health, safety and welfare*

Section 717.31 requires licensees to develop and implement written policies and procedures to respond to unusual incidents. Subsection (a)(8) requires a licensee to respond to an outbreak of a contagious disease requiring Centers for Disease Control and Prevention notification. What diseases will be required to be reported? We asked at the public meeting whether the Department gave consideration to including the diseases reportable to the Pennsylvania Department of Health. It stated that even though the Pennsylvania Department of Health is not listed, it does not excuse anyone who is required to report to the Department under the Disease Prevention and Control Law of 1955. 35 P.S. §§ 521.1 – 521.21. How would a licensee learn of this requirement if it is not part of the standards for licensure of DARHs? How is this approach reasonable?

*Economic and fiscal impacts of the regulation; Protection of the public health, safety and welfare*

The economic or fiscal impacts of the regulation, including the nature of the required reports, forms or other paperwork and the estimated cost of their preparation by the regulated community, have not been fully addressed in this rulemaking. The Department acknowledged in Regulatory Analysis Form (RAF) Question #19 the costs associated with implementing the physical plant and equipment standards required by Section 717.29 (relating to physical plant standards) and fire safety requirements in Section 717.30 (relating to safety and emergency procedures). However, the Department did not provide cost estimates for a DARH to meet these provisions in order to obtain licensure. The response to RAF Question #23 did not provide an accurate cost estimate for implementation of the regulation. The Department needs to accurately account for the fiscal impact of the regulation.

The Preamble states that the most frequent comment the Department received was the overall cost to comply with the standards. The Department explains in the RAF that it is likely costs associated with licensure will be passed on to residents, possibly resulting in a higher monthly fee than unlicensed recovery houses. As expressed by a public commentator, higher fees may lead to residents seeking less expensive housing that does not provide as stringent or structured environment. A regulation that places burdensome fiscal requirements on the regulated community is not protective of the public health, safety and welfare.

*Statutory authority; Economic and fiscal impacts of the regulation*

Section 717.16 (relating to fiscal management) requires a DARH to obtain the services of an independent certified public accountant for a financial audit of operations every two years, under generally accepted accounting principles. The Department estimates the biennial cost of this requirement to be \$10,000 per DARH. As addressed by public comments, this provision places significant direct costs upon the private sector. We note that this provision was revised from the first submission, which required a yearly audit, to extend the timeframe to every two years in an effort to lessen the fiscal impact. However, this may not lead to any significant savings, as the scope of review is not decreased.

Further, the Department does not appear to have the statutory authority to require a DARH to audit its operations. Section 2313-A(2) of Act 59 requires “[p]olicies and procedures

for **management** of all funds received and expended by the drug and alcohol recovery house in accordance with **standard accounting practices**, including funds received from or managed on behalf of residents of the drug and alcohol recovery house.” [Emphasis added.] The statutory requirement addresses the practices a DARH utilizes to manage funds. It does not appear to go so far as to require a DARH to pay for an audit to determine if financial statements are in conformity with generally accepted accounting principles.

*Possible conflict with statute; Consistency with the intent of the General Assembly*

The act of June 30, 2021 (P.L. 186, No. 35), known as Justin’s Law, requires a DARH to develop policies and procedures regarding notification of a designated emergency contact at least once, as consented to by the resident, when the resident self-discharges, or leaves and fails to return as expected. This notification shall occur immediately and in no event later than 12 hours following either circumstance. An exception is provided for residents who have revoked consent to notify and does not apply when a DARH has knowledge of or reason to know of allegations of domestic abuse perpetrated upon the resident by the emergency contact. While recognizing that Justin’s Law was signed into law after the Department delivered the regulation, we ask if the regulation is sufficient to meet the new statutory requirements. For instance, Justin’s Law includes requirements for revocation of consent for making an emergency contact, which is not addressed in Sections 717.22 and 717.27 (relating to intake and admission; and notification to family member or emergency contact). Justin’s Law also refers to a resident self-discharging while the regulation appears to place the authority to end residency solely with a DARH. Lastly, Justin’s Law requires a DARH to notify an emergency contact when a resident fails to return as expected. The regulation does not include provisions addressing how a DARH will document a resident’s schedule and monitor when a resident leaves and returns.

*Consistency with the intent of the General Assembly*

We find that the delay in submitting the regulation did not meet the legislative intent of utilizing the final-omitted rulemaking process, which provides for an abbreviated procedure to implement a regulation. The General Assembly recognized the urgency and importance in licensing DARHs so that individuals who are working to maintain sobriety have access to facilities that will maximize their chances for success. These regulations do not provide licensees with sufficient guidance in establishing and maintaining DARHs in order to achieve the intent of Act 59.

We have determined this regulation is consistent with the statutory authority of the Department (71 P.S. § 613.13) and the intention of the General Assembly. However, after considering all other criteria of the Regulatory Review Act discussed above, we find promulgation of this regulation is not in the public interest.

**BY ORDER OF THE COMMISSION:**

This regulation is disapproved.



*George D. Bedwick*  
George D. Bedwick, Chairman