



DISABILITY RIGHTS PENNSYLVANIA

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VIA EMAIL

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RE: Adult Protective Services Proposed Regulations, Regulation No. 14-543

Disability Rights Pennsylvania (DRP) is the organization designated by the Commonwealth under federal law to protect the rights of and advocate for Pennsylvanians with disabilities. We are pleased to be given the opportunity to comment on the draft regulations for Adult Protective Services. These regulations have been long overdue and are critical to proper implementation and oversight of the Adult Protective Services system in Pennsylvania. Our comments are below.

Statement of Principles

There are several important policies underlying the APS Act that should be better reflected in the regulations. DRP proposes changes in several other parts concerning these policies, but we also recommend that the regulations include a statement that specifically details these core principles:

Dignity of risk: The APS Act embodies this concept, providing that adults generally have the right to make choices regarding their lifestyles, relationships, bodies, and health, even when those choices present risks to themselves or their property. While the decisions of adults with disabilities can be overridden in the protective service process, the circumstances for doing so are narrow and protective services staff should use extreme caution in deciding to override the right of an adult with disabilities to make their own decisions.

Least restrictive alternatives and guardianship: The APS Act's recognition that protective services, if needed, should be provided using the least restrictive alternative, forecloses the APS agency from pursuing appointment of a guardian for an adult in need of protective services if (1) the adult is able to make their own decisions (even if those decisions may present risks), or (2) there are any other effective less restrictive guardianship alternatives (including, for instance, powers of attorney, health care representatives, and representative payees). If there are no less restrictive alternatives to guardianship for an adult who is unable to make their own decisions, the APS agency must ensure that any guardianship petition seeks a guardianship that is limited both in time and subject matter so that it only addresses the issues that gave rise to the adult's need for protective services.

Least restrictive alternatives and institutionalization: The APS Act's recognition that protective services, if needed, should be provided using the least restrictive alternative necessarily counsels against institutionalization of adults except as the last resort. The APS agency must explore all possibilities and consult with DHS staff before they pursue institutional options. Moreover, APS agency staff may not authorize a guardianship petition for the purpose of having a guardian authorize institutional placement of an adult.

§ 15.2: Definitions: We offer the following suggestions for definitions.

Abuse: The definition for abuse lacks specificity and leaves too much open for interpretation. First, it is unclear what constitutes "unreasonable confinement." Second, we believe the definition must include acts that are reckless in addition to "willful deprivation." We believe any act or failure to act performed knowingly, recklessly, or

intentionally and that will cause, or may cause in the future should it continue, psychological or physical harm to an individual should fall within the definition of abuse.

Desertion: We believe this definition should encompass behavior that is reckless in addition to that which is “willful.”

Exploitation: The definition provided for “exploitation” is also problematic and must more clearly include financial exploitation. We are aware of many exploitative guardianships, wherein guardians of the estate use their decision-making power to mismanage their ward’s finances for the guardian’s own personal gain. The definition must be rewritten so that it is inclusive of situations where an individual is subject to misuse of their income and resources.

Informed Consent: This definition should be updated to ensure that individuals who are receiving protective services are provided effective communication. As drafted, “a reasonable attempt to provide information” is unclear and subjective and will result in unequal application of obtaining consent. We suggest that the definition be updated to reflect the requirements of the Americans with Disabilities Act to ensure effective communication. Using this standard will provide guidance and examples of how to ensure communication access to obtain consent for individuals involved in the protective services system.

§ 15.3: Waivers: As drafted, the Department will permit waivers of these regulations so long as they do not jeopardize health or safety. However, it does not include any guidance or examples of what circumstances a waiver would be permissible. Examples should be included so that the public understands situations in which parts of the regulations could be waived.

In addition, we suggest that the Department must grant approval in writing and that the waiver requests be publicly posted on the Department website so that the public understands entities that have waivers and there is transparency in which regulations are being waived.

§§ 15.11- 15.12: Program Administration: Since most of the work required to be performed by the APS Act will be undertaken by one or more agencies under contract with DHS, it is important that the regulations

address the possibility that the work will be transitioned to one or more new agencies. The regulations should ensure that there will be continuity so that investigations and services are not disrupted and/or delayed.

Additionally, services available through DHS – including, but not limited to, Medicaid home and community-based waiver programs – may be critical for adults in need of protective services to remain safely in their own homes and communities. It is therefore vital that the APS agency has access to the resources it needs to both understand what services are available and to secure timely access to those services. As such, the APS regulations should include a directive that DHS must identify point persons within its Office of Developmental Programs, Office of Long-Term Living, Office of Mental Health and Substance Abuse Services, and Office of Medical Assistance Programs who the APS agency can contact and will be available to promptly assist the agency to identify and secure services for an adult in need of protective services, including expediting such services when necessary.

§ 15.23: Receiving Reports: General Agency Responsibility: DRP recommends revising §15.23(c) to make clear that the Department has an obligation to provide effective communication to people who are deaf or hard of hearing so that they can make reports using services other than TTY and voice relay. DHS should also ensure that these regulations are updated as new forms of assistive technology become available to the extent any are specifically referenced.

§ 15.26: Screening and Referrals of Reports: Under Section 15.26(b)(4)(i)(B), reports to APS can be deemed “no need or not eligible for protective services” if it involves an individual under 18 or older than 59. Sections 15.26(b)(4)(ii) and 15.42(a)(3)(ii) provide that caseworkers have until the next business day to review “no need/not eligible” reports and, if the report involves a person outside the age limits of APS, the caseworker should “immediately” send it to, as relevant, the child protective services agency or older adult protective services agency. The problem is that if the substance of the report is such that it would be deemed a “priority” if it involved a person falling within the age parameters of APS, an investigation may be delayed by several days because it may not be referred to the appropriate agency until the “next business day” after the report. It should be straightforward to determine the age of the alleged victim. As such, we recommend that if the report reveals that the age of the alleged victim is

under 18 or over 59 the agency should refer it immediately upon receipt to, respectively, the child protective services agency or older adult protective services agency.

§ 15.42: Standards for Initiating and Conducting Investigations:

§ 15.42(a)(1): As drafted, the standard is for caseworkers to “make every effort” to ensure the immediate safety of an individual in need of protective services, which is problematic. This is a subjective standard which will be interpreted differently by region and individual. The “make every effort” should be removed and the requirement should be that the caseworker must ensure the immediate safety of individuals in need of protective services. If that change is not made, it undermines protective services for individuals.

§ 15.42(3)(b): DRP recommends clarifying the conflict-of-interest policy in §15.42(3)(b). As written, the initial agency has discretion whether to refer the report to the Department or another agency, which permits the conflicted agency to have input into what agency ultimately conducts the investigation. To avoid this, DRP recommends that all reports involving a conflict of interest be referred to the Department.

§ 15.42(3)(e): In §15.42(3)(e) the Department recognizes that agencies may not be able to conduct satisfactory investigations and authorizes the Department to take over an investigation. DRP suggests that the Department define the circumstances in which the Department will intervene and provide agencies with clarity about what an “acceptable protective services investigation is.”

§ 15.44(b) Resolution of substantiated reports: If an individual wishes to refuse an assessment to determine whether they are in need of protective services, agency staff should be required to note this refusal in the record by having the individual sign a document affirming their refusal.

§ 15.45: Investigations of Reports Involving State-Licensed and State-Operated Facilities: Section 15.45 outlines the interplay between APS investigations of reports and investigations by state agencies when the report involves people who receive care in state-operated and state-licensed facilities. There are several concerns:

- The section is confusing because subsection (a), titled “general” only refers to adults receiving care in state-licensed (not state-operated) facilities. But then subsection (b) relates to state-licensed facilities while subsection (c) relates only to state-operated facilities. So, it is not clear why there is a “general” subsection if it only relates to state-licensed facilities. We recommend incorporating subsections (a) and (b) into one designated subsection related to state-licensed facilities to avoid confusion about which provisions apply to which facilities.
- Section 15.45(a)(1)-(2) provides that the APS agency maintains its responsibility to investigate and provide protective services to adults in state-licensed facilities, even when another entity has jurisdiction to investigate. But Section 15.45(b)(2) provides that when another state agency is investigating the allegation, the state agency’s investigation “may suffice” for the APS investigation and also that the APS agency shall coordinate its investigative activities and findings with the state agency’s and is responsible to accept the “final investigation and determination” The responsibilities of the APS agency and state licensing agency are simply unclear. While it would be preferable to avoid duplication, it is ultimately the APS agency that has the duty to investigate these incidents and it should not be permitted to defer to another agency’s investigation.
- Section 15.45(c) seemingly allows the APS agency to completely foist its responsibilities to investigate allegations in state-operated facilities to the state agency that runs the facility. We recommend that the APS agency conduct investigations involving state-operated facilities to ensure an independent and timely investigation and, if necessary, timely access to protective services.

§ 15.46 and §15.73: APS Staff Accompanying Police: Sections 15.46(e) and 15.73 provide that forcible entry may be made following a court order by a police officer and that the officer “may be accompanied by a representative of the agency.” We recommend that an APS agency representative accompany police during such entries unless the police determine that the APS staff may be at risk. The presumption should be that APS staff will be present.

§ 15.71(c)(1): Involuntary Intervention by Emergency Court Order: Legal Representation Notification: DRP suggests requiring the agency notify adults that they have the right to counsel appointed at public expense. The wording of the regulation does not make clear that counsel will be provided to the adult *pro bono* even though Section 15.71(2) makes this clear. To ensure that individuals know that they can obtain counsel without cost, it must be included in the legal representation notification. DRP also suggests requiring that adults be informed of this right in writing and requiring that any waivers of this right be made in writing with informed consent.

§ 15.72: Petition: DRP suggests that agencies be required to file documents under seal or take steps to assure that personal identifiable information pertaining to adults is not part of the public record. Requiring that the adult's name, age, address, and status be part of the petition places adults at risk of identity theft or violence.

§ 15.75 Non-restrictive setting: To the extent the agency may request that an adult in need of protective services be relocated to a long-term care facility, it should be required to make a showing to the court that other, less restrictive alternative settings were considered and explain why those settings could not ensure the health and safety of the individual. Individuals should not be placed in a long-term care facility by APS when their needs could have been met in the community, were they provided with appropriate services and supports. APS should therefore be required to explain and justify why a more restrictive setting is needed.

§ 15.81: Individual Rights: Section 15.81(4) provides that the APS statute and regulations do not limit a person's right to request a protection from abuse order. We recommend that this statement be more open-ended as there are other potential protection orders that might be applicable. We suggest the subsection state: "Nothing in this chapter limits the rights of an adult in need of protective services to file a petition with a court of competent jurisdiction requesting a protective order, including, but not limited to, an order pursuant to the Pennsylvania Protection from Abuse Act or the Pennsylvania Protection from Sexual Violence and Intimidation Act."

Section 15.81(5) provides that an adult in need of protective services can refuse such services or withdraw consent except pursuant to a court order

“or as requested by a legal guardian.” Since there are different types and scopes of guardianship, a legal guardian may not have authority over whether to refuse or withdraw an adult from protective services. We thus recommend that the reference to a guardian be clarified to ensure that the guardian’s authority extends to such decisions (e.g., “or as requested by a court-appointed plenary guardian of the person with authority or court-appointed limited guardian of the person whose authority explicitly encompasses the right to make decisions to consent to protective services.”)

We suggest adding the following provisions to Section 15.81:

- An adult in need of protective services has the right to receive protective services in the least restrictive setting appropriate to their needs. An adult in need of protective services should not be placed in an institutional setting, including a nursing facility, unless the APS agency has explored all other possible options and services and consulted with DHS. If institutionalization is the only option, it should be presumed to be a temporary placement and the APS agency may not close the APS case while the adult remains in an institutional setting, to ensure the adult’s institutional placement is appropriate and temporary.
- Guardianship restricts an individual’s autonomy. The APS agency should not authorize a guardianship petition for an adult in need of protective services when either: (1) the adult has capacity to make their own decisions, or (2) the adult lacks capacity to make their own decisions but there are less restrictive alternatives to guardianship that can be used for decision-making. If there are no less restrictive alternatives to guardianship for an adult who lacks decision-making capacity, the APS agency may only seek a guardianship that is limited in scope and time to address the adult’s need for protective services.
- An adult has the right to dignity of risk, *i.e.*, the right to make their own choices even if those choices present risks to themselves or their property. As such, they have the right to refuse to cooperate with an investigation, to authorize release of their records, and/or to receive protective services. The APS agency may override such refusal only in the narrow circumstances authorized by the APS Act.

§15.92: Assessment: Section 15.92(b) lists the items to be included in the assessment. Since the purpose is to assess whether the adult needs protective services, we suggest that the assessment include a review of what, if any, services the adult receives or is eligible to receive. This should include identifying any medical insurance the adult has (including Medicaid) and any government-funded services they are authorized or could be authorized to receive (including, but not limited to, Medicaid-funded home and community-based waiver programs).

The agency should be required to make face-to-face contact with the individual reported to need protective services. There are few, if any, circumstances in which APS could complete a thorough and complete investigation without conducting an in-person meeting with the individual.

§15.93: Service Plan: Section 15.93(d) includes interventions that may be used to implement the service plan. It seems that this is intended to be an exhaustive list rather than a non-exhaustive list. If this is not intended to be exhaustive, we recommend clarifying that by amending Section 15.93(d) to say: “Specific services which may be used to implement the service plan including, but are not limited to, the following:”.

We also recommend making the following changes to the listed interventions:

- The list mentions “public or private entitlements or resources” and “attendant care.” First, these terms are vague. Second, the term “personal assistance services” is usually used these days in lieu of “attendant care.” Second, and more broadly, we suggest that the service plan include consideration of the range of government-funded home and community-based services that may or should be available to the adult. This could include Medicaid-funded home and community-based services (including, but not limited to, respite care, personal assistance services, in-home nursing, assistive technology, remote monitoring); Act 150 Program services; and LIFE Program services.
- The list should include other types of services funded through insurance (including, if applicable, Medicaid).

- The list mentions “guardianship services.” DRP recommends that DHS modify this language to note that such guardianship services can be used only if: (1) the adult lacks capacity to make their own decisions, and (2) there are no less restrictive alternatives to guardianship that can be used for decision-making. The language should further note that, even in those circumstances, the APS agency may only authorize pursuit of a guardianship order that is limited both in scope and time, so it only addresses the need for protective services.

Section 15.93(f) states that the service plan “shall describe the plan to transition the adult to long-term supports and services, if needed.” This is vague. Long-term supports and services can be institutional or community-based. We ask that this be modified to clarify that this means community-based long-term services and supports and that the service plan should not include institutionalization except as a last resort after all less restrictive options have been explored and DHS has been consulted. Moreover, the subsection should make clear that, if the adult is not currently receiving community-based long-term services and supports and desires such supports, the agency will take steps to assist them to apply for such services and to secure such services if they are deemed eligible.

§15.105: Limited Access to Records and Disclosure of Information:

The regulations should make clear that the state’s Protection & Advocacy agency must have access to records pursuant to its federal access authority. This same change should be made to §15.137.

§15.122: Training of Protective Services Staff: Subsection (1), relating to training regarding the APS Act, also references training on “other laws related to abuse, neglect, exploitation and abandonment.” We suggest adding some specific examples for training on related laws, including the Protection from Abuse Act, the Protection from Sexual Violence and Intimidation Act, the Neglect of Care-Dependent Persons Act, and emergency guardianship under Pennsylvania’s guardianship statute.

Subsection (19), relating to “the service delivery system in the Commonwealth for persons with disabilities,” should specifically reference home and community-based services, including the various Medicaid Waivers, the Act 150 Program, and the LIFE Program, and should explain that such services should be utilized to avoid institutionalization.

This section should include training on Pennsylvania’s guardianship statute as well as less restrictive alternatives to guardianship, including health care representatives and representative payees. This training should aim to ensure that APS agency staff understand that guardianship is rarely, if ever, the least restrictive alternative and can only be used when no other options are available for an adult who is unable to make their own decisions and, even then, it must be limited in time and scope.

Section 15.122 should include a provision to ensure that protective services staff receive training about the “dignity of risk” and other policies underlying the APS Act.

General Comments: The Report of Need form included in the regulation package is problematic because it does not include emotional abuse as an option. The definition of abuse included in Section 15.2 definitions, includes emotional abuse but it is not included in the Report of Need. Emotional or psychological abuse should be an option so that needs in this area can be tracked and individuals can be supported. Creating an option to select emotional abuse would be helpful in data collection and understanding of how many people with disabilities undergo this type of abuse, rather than this category being lost within an “other” grouping of abuse.

We thank you for your consideration of our comments. Please contact Jennifer Garman, Director of Government Affairs at 717-236-8110 with questions.

Sincerely,

Peri Jude Radecic
Chief Executive Officer