

Comments of the Independent Regulatory Review Commission



Department of Human Services Regulation #14-543 (IRRC #3364)

Protective Services for Adults

June 21, 2023

We submit for your consideration the following comments on the proposed rulemaking published in the April 22, 2023 *Pennsylvania Bulletin*. Our comments are based on criteria in Section 5.2 of the Regulatory Review Act (RRA) (71 P.S. § 745.5b). Section 5.1(a) of the RRA (71 P.S. § 745.5a(a)) directs the Department of Human Services (Department) to respond to all comments received from us or any other source.

1. Reaching of a consensus.

This proposed regulation is the result of the Department's effort to codify the requirements contained in Act 70 of 2010 (Act 70). The Department states in response to Regulatory Analysis Form (RAF) Question #14 that in order to solicit input from the regulated community, the Department held 23 meetings with community stakeholders beginning in January 2011 and ending in September 2015. The Department states, "The work group advised the Department on many of the novel features of Act 70 related to adults with disabilities and provided varied and diverse perspectives on how the regulation should be crafted." Given the length of time that has passed since the workgroup last met, a member of the regulated community requests that the Department meet again with stakeholders to update itself on any issues of concern. The commenter notes that there have been significant policy changes, such as implementation of the Community HealthChoices program, as well as considerable technological innovations since 2015.

We note that section 2 of the RRA, pertaining to legislative intent, provides the following direction: "To the greatest extent possible, this act is intended to encourage the resolution of objections to a regulation and the reaching of a consensus among the commission, the standing committees, interested parties and the agency." 71 P.S. §745.2(a). In order to resolve concerns raised by commenters and achieve the goals of Act 70 and the RRA, we encourage the Department to engage the regulated community on this rulemaking to reach consensus to the greatest extent possible while finalizing the final-form regulation in a timely manner.

2. Preamble and RAF.

The preamble states that a third-party agency (agency), selected by the Department through a competitive bidding process, began to implement the Adult Protective Services (APS) program

on April 1, 2015. We note that the proposed regulation largely addresses the duties and responsibilities of the agency, such as section 15.12 (relating to administrative functions and responsibilities of agencies) and section 15.41 (relating to reports required to be investigated). However, the Department's response to RAF question #15, which requires the Department to identify those people, businesses, and organizations affected by the regulation, does not identify the agency as an affected entity. Likewise, the Department's response to RAF question #16, which requires the Department to identify the entities required to comply with the regulation, doesn't mention the agency. We ask the Department to amend the final-form preamble and RAF to include the agency in its responses where appropriate. Additionally, we ask the Department to include in the preamble and RAF an explanation of the overall APS program, including the role of the agency and the agency's duties and responsibilities.

3. Protection of the public health, safety, and welfare.

We note that the proposed regulation contains various provisions that establish finite timeframes for compliance, such as 24 or 72 hours, or same or next business day. How will these timeframes be monitored for compliance? Who will ensure that these timeframes are being met? We also note that certain provisions provide for reports to be referred to other service providers. How will the Department ensure that referrals are not lost or overlooked? We ask the Department to explain how the final-form regulation will protect the public health, safety, and welfare related to oversight of timeframes and referrals.

4. Section 15.1. Scope. – Clarity.

Subsection (b) states that the chapter applies to adults in need of protective services, their families, agencies selected to provide protective services for adults in need of protective services, parties who make and investigate reports of a need for protective services for adults, and facilities. We ask the Department to clarify whether the chapter should apply to guardians, as well.

5. Section 15.2. Definitions. – Statutory authority; Protection of the public health, safety, and welfare; Clarity.

Abuse

The definition of the term "abuse" includes the infliction of injury, "unreasonable confinement," intimidation, or punishment with resulting physical harm, pain, or mental anguish. The phrase "unreasonable confinement" is non-regulatory language and does not set a binding norm. A regulation has the full force and effect of law, and this term does not establish a standard that could be predicted by the regulated community. We ask the Department to define what is meant by the phrase "unreasonable confinement" to clarify the final-form regulation.

Employee

The Department has added to the definition of “employee” found in Act 70 the phrase “including employees of affiliated corporate entities.” We ask the Department to provide the statutory authority for amending the definition to include “employees of affiliated corporate entities.”

Informed consent

“Informed consent” is defined as consent based on a “reasonable attempt” to provide information which conveys outcomes of various modes of protective service provisions available under the circumstances. The phrase “reasonable attempt” is non-regulatory language and does not set a binding norm. A regulation has the full force and effect of law, and this phrase does not establish a standard that could be predicted by the regulated community. We ask the Department to clarify what is meant by the phrase “reasonable attempt” in the final-form regulation.

Least restrictive alternative

“Least restrictive alternative” is defined by Act 70 and the Department as “[t]he least intrusive service or environment that can effectively and safely address the adult’s needs and preferences.” A commenter asks for clarity regarding the term “intrusive.” We ask the Department to ensure that the final-form regulation provides a clear standard that can be predicted by the regulated community.

Mandatory reporting

The preamble states that Act 70 was enacted to provide a system to address situations of “abuse, neglect, **abandonment, and exploitation**” of adults 18 years of age or older but under 60 years of age with disabilities. [Emphasis added.] However, the Department’s definition of “mandatory reporting” addresses only suspicion that a person is a victim of abuse or neglect. If Act 70 was enacted to address “abandonment” and “exploitation,” why are these not mandated to be reported along with abuse and neglect? We ask the Department to amend the definition to include “abandonment” and “exploitation,” or to explain how the final regulation protects the public health, safety, and welfare without including “abandonment” and “exploitation” in this definition.

Similarly, we ask the Department to ensure that “abandonment” and “exploitation” are addressed along with abuse and neglect throughout the final regulation, where appropriate.

6. Section 15.3. Waivers. – Protection of the public health, safety, and welfare; Clarity.

Subsection (a) allows a facility to request a waiver of a provision of Chapter 15. Since a waiver could impact protection of the public health, safety, and welfare, we ask the Department to clarify where approved waivers will be available for the public to view.

Also in subsection (a), we ask the Department to change the reference from “Federal and State” to “Federal or State” to clarify that a waiver may be granted under either the Federal or State law.

7. Section 15.11. Administrative functions and responsibilities of the Department. – Protection of the public health, safety, and welfare.

Under this section in paragraph (5), the Department’s responsibilities include “[e]nsuring the agency has access to the incident reporting system for adult protective services.” The preamble related to this section states that the Department is also responsible for providing coordination with child protective and older adult protective services. We ask the Department to amend paragraph (5) to include agency access to the incident reporting system for children and older adult protective services, or to explain how the language in the proposed regulation protects the public health, safety, and welfare.

8. Section 15.23. Receiving reports; general agency responsibility. – Clarity.

Since this section pertains to the responsibility of the agency, we ask the Department to clarify the final-form regulation by moving subsection (c), which addresses the Department’s responsibility to provide toll-free telephone access, to Section 15.11 (relating to administrative functions and responsibilities of the Department).

9. Section 15.26. Screening and referral of reports received. – Protection of the public health, safety, and welfare; Clarity; Implementation procedures.

Clause (b)(4)(i)(B) states that a report is to be qualified as “no need or not eligible for protective services” if the subject of the report is under 18 years of age or 60 years of age or older. The provision requires that reports received for these identified age groups shall be immediately referred by the person who takes the report to either child protective services or older adult protective services. We note that a portion of subparagraph (b)(4)(ii) nearly repeats this same provision: “In the event the caseworker determines the allegations pertain to a person under 18 years of age or 60 years of age or older, the caseworker shall notify child protective services or older adult protective services immediately.” We ask the Department to remove any duplicative provisions and ensure that the final regulation provides clear standards for the regulated community to implement.

We further note that subparagraph (b)(4)(ii) also states that if the caseworker confirms the screening categorization of “no need or not eligible for protective services,” appropriate referrals shall be made to another community service provider within 72 hours of receipt. Should reports that fall under clause (b)(4)(i)(B) be exempt from this provision since they’ve already been referred to either child or older adult protective services? We ask the Department to clarify how these two seemingly conflicting provisions are to be implemented.

Additionally, subparagraph (b)(4)(ii) closes with the following provision: “If the caseworker rejects the categorization, the report shall be placed in the appropriate category and handled accordingly **within 72 hours.**” [Emphasis added.] Most of the quoted language comes from Act

70; however, the Department added the phrase “within 72 hours” in the proposed regulation. We question the 72-hour timeframe given the possibility that the appropriate category for the report could be “priority,” which would require “immediate attention.” We ask the Department to delete the 72-hour timeframe and add a cross-reference to paragraphs (b)(1) and (b)(2) to protect the public health, safety, and welfare. We also ask the Department to clarify that an improperly categorized report shall be placed immediately in the appropriate category.

10. Section 15.41. Reports required to be investigated. – Clarity; Implementation procedures.

Subsection (a) states that the investigation should include “sufficient” collateral information. The term “sufficient” is non-regulatory language and does not set a binding norm. A regulation has the full force and effect of law, and this term does not establish a standard that could be predicted by the regulated community. We ask the Department to clarify how this provision is to be implemented in the final-form regulation by setting a clear standard.

11. Section 15.42. Standards for initiating and conducting investigations. – Clarity; Implementation procedures.

Subparagraph (a)(1)(i) states, in part, that a protective services caseworker shall “make every effort” to ensure the immediate safety of the adult in need of protective services. The phrase “make every effort” is non-regulatory language and does not set a binding norm. A regulation has the full force and effect of law, and this phrase does not establish a standard that could be predicted by the regulated community. We ask the Department to clarify what is meant by the phrase “make every effort” and to explain how this provision is to be implemented in the final-form regulation.

Subsection (b) states, “In the event a conflict of interest arises or is identified as described in Section 15.12 (relating to administrative functions and responsibilities of agencies), the agency shall immediately refer the case for investigation by the Department or for referral to **another agency** for investigation.” [Emphasis added.] We ask the Department to clarify to whom “another agency” refers.

Because this section addresses the standards for initiating and conducting investigations, we question the need for including paragraph (a)(3) and its subparagraphs. The language in these provisions addresses reports categorized as “no need or not eligible for protective services” so there would be no need for an investigation. Further, the language in these provisions is similar to language found in section 15.26(b)(4)(ii). We ask the Department to remove any duplicative provisions to ensure that the final-form regulation is clear for the regulated community.

12. Section 15.43. Resolution of unsubstantiated reports. – Protection of the public health, safety, and welfare.

Subsection (b) requires that an unsubstantiated report and all information obtained in investigating the unsubstantiated report shall be maintained for a period of one year. A commenter notes that there could be multiple reports involving an adult that are designated as

unsubstantiated, but that over time may be indicative of a pattern that would not be noticed if reports are maintained only for one year. We ask the Department to amend the final-form regulation to provide for a longer period of retention of unsubstantiated reports, or to explain how a retention period of one year protects the public health, safety, and welfare.

13. Section 15.44. Resolution of substantiated reports. – Protection of the public health, safety, and welfare; Need.

Under subsection (b), an adult in need of protective services may refuse the assessment. We ask the Department to amend the final-form regulation to require documentation of the refusal of the assessment for the protection of the public health, safety, and welfare of all parties involved.

We note that section 15.43 addresses the timeframe for maintenance of unsubstantiated reports. Should this section contain a requirement for maintenance of substantiated reports? We ask the Department to amend the final-form regulation to include a requirement for maintenance of substantiated reports or to explain why such a provision is not needed.

14. Section 15.45. State-licensed and State-operated facilities. – Clarity; Implementation procedures.

This section addresses requirements for both State-operated and State-licensed facilities. We note that subsection (a) is entitled “General,” but states that it applies only to State-licensed facilities. The regulated community would not expect a “general” section to apply only to certain facilities. We ask the Department to clarify in the final-form regulation which provisions apply generally and which apply only to specific types of facilities.

Paragraph (c)(1) states, “The agency shall initiate the investigation by referring the report to **the appropriate administrative or program office** for investigation under its patient rights program.” [Emphasis added.] We ask the Department to clarify to whom “the appropriate administrative or program office” refers.

Paragraph (c)(2) requires an agency to “closely monitor” an investigation referred under paragraph (c)(1) to determine that the investigation is effectively implemented and that remedies have been implemented to correct the situation which led to the making of the report. The phrase “closely monitor” is non-regulatory language and does not set a binding norm. A regulation has the full force and effect of law, and this phrase does not establish a standard that could be predicted by the regulated community. We ask the Department to clarify what is meant by the phrase “closely monitor” and to explain how this provision is to be implemented in the final-form regulation.

15. Section 15.71. Involuntary intervention by emergency court order. – Protection of the public health, safety, and welfare; Clarity.

Section (c) states, “When the agency petitions the court for emergency involuntary intervention, the agency shall inform the adult of the right to be represented by legal counsel at all stages of

the proceedings.” We ask the Department to clarify in the final-form regulation that the legal counsel is *pro bono*.

Subparagraph (c)(1)(ii) states, “If the agency has no knowledge of a legal counsel who represents the adult in need of protective services, the agency shall inform the adult or the adult’s legal representative about other legal services that they may be able to access.” We ask the Department to require written notification to be signed by the adult in need of protective services for the protection of the public health, safety, and welfare of all parties involved.

16. Section 15.72. Petition. – Protection of the public health, safety, and welfare.

Commenters raise concerns about personal identifiable information pertaining to an adult in need of protective services being a part of the public record. In order to protect the public health, safety, and welfare, we ask the Department to amend the final-form regulation to ensure that the requirements safeguard the identifiable information of an adult who is the subject of a petition.

17. Section 15.75. Non-restrictive setting. – Protection of the public health, safety, and welfare.

This section states, “In those cases, in which an adult in need of protective services must be relocated, the agency shall request the court to order the adult in need of protective services to be relocated to the most integrated setting and the least restrictive alternative that ensures the health and safety of the adult in need of protective services.” A commenter raises concerns about the rights of the adult in need of protective services who is being relocated. We ask the Department to amend the final-form regulation to require the agency to demonstrate to the court that less-restrictive settings were considered and to justify why those settings could not ensure the health and safety of the adult in need of protective services, or to explain how the proposed language protects the public health, safety, and welfare.

18. Section 15.81. Rights of adults reported to need protective services. – Protection of the public health, safety, and welfare; Clarity.

A commenter advocates for including additional rights in this section, such as requiring the least restrictive setting appropriate for the adult’s needs, requiring that an institutional setting be the last resort after all other options have been considered, and requiring that if an institutional placement is the only option, that it be temporary. We ask the Department to address these concerns by amending the final-form regulation accordingly, or to explain how the final-form regulation protects the public health, safety, and welfare.

Paragraph (5) states, “An adult in need of protective services has the right to refuse protective services or withdraw consent for protective services, except as provided under a court order or as requested by a legal guardian.” A commenter notes that there are different types and scopes of guardianship, so a “legal guardian” may not have authority over whether to refuse or withdraw an adult from protective services. We ask the Department to clarify this provision to ensure that the type of guardian referenced has authority related to such decisions.

19. Section 15.92. Assessment. – Protection of the public health, safety, and welfare; Clarity.

Subsection (b) states that the agency, “to the extent feasible,” shall make face-to-face contact with the adult reported to need protective services to evaluate and document information such as personal appearance, physical environment, and nutrition. Because these types of information require face-to-face contact to ascertain, we ask the Department to explain under what circumstances it would be acceptable not to make face-to-face contact. We also ask the Department to clarify how the agency would protect the health, safety, and welfare of an adult reported to be in need of protective services under these circumstances.

20. Section 15.93. Service plan. – Protection of the public health, safety, and welfare; Clarity.

This section addresses service plans for the adult in need of protective services. Subsection (d) lists the specific services which may be used to implement the plan. As proposed, the list appears to be exhaustive. If the list is meant to be inclusive but not to be limiting, we ask the Department to clarify the final-form regulation. Also, a commenter requests that the list include home- and community-based Medicaid waiver services that the adult is eligible for or for which the adult may be eligible. We ask the Department to amend this provision to include these services or to explain how not including them protects the public health, safety, and welfare.

21. Section 15.102. Maintenance of case records. – Protection of the public health, safety, and welfare; Clarity.

Subsection (d) addresses unsubstantiated reports similar to section 15.43 (relating to resolution of unsubstantiated reports). For example, both paragraph (d)(1) and section 15.43(b) reference maintaining records for one year. We ask the Department to clarify the final-form regulation by ensuring that these two sections are not duplicative or conflicting. If this section addresses maintenance of unsubstantiated records in the final-form regulation, we ask the Department to amend the final-form regulation to provide for a longer period of retention of unsubstantiated reports, or to explain how a retention period of one year protects the public health, safety, and welfare.

22. Section 15.105. Limited access to records and disclosure of information. – Clarity; Need.

Paragraph (1) states, “A subpoena shall not be a court order for purposes of this section.” We ask the Department to explain the need for exempting a subpoena from this provision.

23. Section 15.121. Protective services staff qualifications. – Protection of the public health, safety, and welfare; Need.

This section addresses protective services staff training and qualifications requirements. Are protective services staff required to have criminal history background checks? We ask the Department to amend the final-form regulation to include this requirement to protect the public

health, safety, and welfare of adults in need of protective services, or to explain why this requirement is not needed.

24. Section 15.122. Protective services staff training curriculum. – Protection of the public health, safety, and welfare.

This section addresses the topics to be covered for training for protective services staff. Commenters offer various suggestions such as:

- Expanding the list to include Pennsylvania’s guardianship statute, as well as less restrictive alternatives to guardianship, including powers of attorney, health care representatives, representative payees, and supported decision-making;
- Amending paragraph (1) to include specific examples of “other laws” such as the Protection from Abuse Act, the Protection from Sexual Violence and Intimidation Act, and the Neglect of Care-Dependent Persons Act; and
- Addressing training on the dignity of risk.

We ask the Department to amend the final regulation to include these topics and clarifications, or to explain how not addressing them protects the public health, safety, and welfare.

25. Section 15.136. Restrictions on employees. – Protection of the public health, safety, and welfare; Clarity; Implementation procedures.

Subsection (a) describes the requirement to either suspend or implement a plan of supervision for an employee alleged to have committed abuse. Given that the employee is **alleged** rather than **convicted** of committing abuse and cannot work until a plan is in place, and given the challenges that providers face in hiring and retaining staff, we ask the Department to amend the final-form regulation to clarify implementation by providing a timeframe for evaluating and approving the plan. Further, to protect the public health, safety, and welfare, we ask the Department to amend this provision to require that the plan of supervision must be documented.

Subsection (b) requires that the supervision for an employee of a home health care agency who has been alleged to have committed abuse must include “periodic,” random direct observation and evaluation of the employee and the recipients. The term “periodic” is non-regulatory language and does not set a binding norm. A regulation has the full force and effect of law, and this term does not establish a standard that could be predicted by the regulated community. We ask the Department to clarify how this provision is to be implemented in the final-form regulation by setting a clear standard.

26. Section 15.151. Notice of adverse action. – Protection of the public health, safety, and welfare.

Under paragraph (b)(2), if an informal complaint is to be made, it must be filed within 30 days following the receipt of the written notice of adverse action. Under paragraph (b)(3), a request for assistance in filing the informal complaint shall be made by the adult or the adult’s legal representative within 30 days of receiving the notice. We ask the Department to protect the public health, safety, and welfare by lengthening the timeframe in paragraph (b)(2) so that an

adult who requests assistance under paragraph (b)(3) near the end of the 30 days has sufficient time to file an informal complaint.

27. Section 15.153. Formal hearings. – Clarity; Implementation procedures.

Under subsection (a), an adult or the legal representative may request a formal hearing with the Department’s Bureau of Hearings and Appeals if the adult or the legal representative does not accept the resolution to the informal complaint. Will the Department provide an opportunity for the adult to request assistance as in section 15.151? If so, we ask the Department to amend the final-form regulation to clarify that assistance will be provided if requested and to explain how the provision will be implemented, including reasonable timeframes that address the concern raised in the previous comment.

28. Clarity regarding the term “agency.”

As stated in comment #2, the proposed regulation largely addresses the duties and responsibilities of the “agency,” which is defined as “a local contracted provider...” We note that the preamble and proposed regulation refer not only to **the agency**, but also to **an agency**, which is confusing for the regulated community because it implies that there is or can be more than one agency. The following are further examples of the lack of clarity around the term “agency.”

- The Department states in the preamble that “Commonwealth agencies are also affected by this proposed rulemaking because they are notified when an adult reported to need protective services is a recipient of one of their programs or is living in a facility that **the agency** licenses or regulates.” [Emphasis added.] This language indicates that “the agency” is responsible for licensing or regulating facilities.
- The definition of “mandatory reporting” and the requirement in section 15.131(a)(1) are inconsistent. “Mandatory reporting” is defined as the requirement that an employee or an administrator who has reasonable cause to suspect that a recipient is a victim of abuse or neglect shall immediately make an oral report to **an agency**. [Emphasis added.] Section 15.131(a)(1) states that administrators or employees, who have reasonable cause to suspect that a recipient is a victim of abuse or neglect, are required to immediately make an oral report to the Statewide hotline for adult protective services or to **the agency**. [Emphasis added.] The language defining “mandatory reporting” indicates that there are multiple agencies to whom an oral report can be made, while the language in Section 15.131 indicates that there is one agency to whom oral reports are to be made.
- Section 15.12(b) states, “**An agency** shall refer a report to the Department for investigation by **another agency** or the Department...” [Emphasis added.]
- Section 15.45(b)(2) states, “When an investigation is concurrently investigated by **the agency** and a **State agency** that has jurisdiction over a State-licensed facility, this investigation may suffice for **the agency** investigation...” [Emphasis added.]

We ask the Department to clarify the final-form regulation by using the defined term, “the agency,” and clearly differentiating between “the agency” and other Commonwealth agencies.