

**INDEPENDENT REGULATORY REVIEW COMMISSION  
PUBLIC MEETING MINUTES**

10:00 A.M.

Thursday, October 18, 2018  
14<sup>th</sup> Floor Conference Room  
333 Market Street

**I. CALL OF THE MEETING**

The October 18, 2018 public meeting of the Independent Regulatory Review Commission (Commission) was called to order by Chairman Bedwick at 10:07 a.m. in the 14<sup>th</sup> Floor Conference Room, 333 Market Street, Harrisburg, PA.

Commissioners Present:      George D. Bedwick, Chairman  
   John F. Mizner, Esq., Vice Chairman  
   Dennis A. Watson, Esq.

Telephone:                      W. Russell Faber  
   Murray Ufberg, Esq., until 11:28 a.m.

**II. APPROVAL OF THE SEPTEMBER 13, 2018 PUBLIC MEETING MINUTES**

Chairman Bedwick asked for a motion for approval of the September 13, 2018 public meeting minutes, as submitted. Vice Chairman Mizner made the motion and Commissioner Watson seconded, and the motion passed 5-0.

**III. NEW BUSINESS**

**A.      DEEMED APPROVED**

**1. No. 3184 Department of Conservation and Natural Resources #7B-8:  
Conservation of Pennsylvania Native Wild Plants**

**B.      ACTION ITEMS**

**1. No. 3160 Department of Human Services #14-540: Home and Community-  
Based Supports and Licensing**

Michelle Elliott, Regulatory Analyst, explained the regulation governs the programmatic, operational and fiscal aspects of the following: home and community-based services (HCBS) provided through the 1915(c) waiver programs; Medicaid State plan HCBS for individuals with an intellectual disability or autism, including targeted support management, and services funded exclusively by grants to counties under the Mental Health and Intellectual Disability Act of 1966 or Article XIV-B of the Human Services Code, commonly referred to as base-funding.

Kristen Ahrens, Acting Deputy Secretary, Office of Developmental Program (ODP), Department of Human Services (DHS), was present to answer any questions.

Ms. Ahrens explained that for 30 years ODP has embraced the concept of “Everyday Lives” for individuals with disabilities. She explained that the regulatory package is not short of controversy because it governs an incredible scope of services for those with intellectual disabilities. These services include finding a job, intensive interdisciplinary services, and respite care. Ms. Ahrens stated the regulations seek to provide the same protections across all settings ODP provides. The future of the system is shown through more than 70 percent of those receiving services live at home, Ms. Ahrens said.

Ms. Ahrens further explained the regulation establishes health and safety and basic rights protection, establishes a quality of standards for providers, helps set clear fiscal rules, and provides for resource accountability. Given the significant impact of the regulations, DHS did establish very extensive stakeholder investment by pulling together a workgroup of more than 60 separate stakeholders, Ms. Ahrens said. She stated DHS additionally did advance notice of the rulemaking for the fiscal section and received more comments. Ms. Ahrens extended her appreciation for those that participated in the workgroup and the stakeholders.

Ms. Ahrens highlighted some key provisions in the regulation. She said one provision is a reserved capacity which strengthens rights protections. Ms. Ahrens added the regulations have a relief from longstanding barriers to those receiving services in home. The regulations also provide a children section which establishes and interprets the rights of children. In terms of inclusion, the regulation establishes a maximum size of four individuals for homes and 25 people at any day facility, Ms. Ahrens said. She stated the regulation also for the first time requires a provision for family involvement. Ms. Ahrens added there is also incident management as the regulations extend certified investigation beyond the current regulation.

Vice Chairman Mizner asked what the consequence is for someone out of compliance. Ms. Ahrens explained there is a corrective action plan with the provider and if the staff is not qualified it depends if it was a one-time instance or a trend.

Ms. Ahrens explained the regulation also provides simplification and streamlining. The regulations distinguish what is needed for a claim and service or quality standards. Providers will not have to close existing facilities but new facilities will have a size limit. Ms. Ahrens said for the fiscal section DHS will update the data a minimum of every three years for the fee schedule. Ms. Ahrens noted how the rates are determined will be made public.

Commissioner Faber asked for the reasoning behind eliminated emergency room (ER) reporting. Ms. Ahrens explained that in looking at the category of ER visits, 56 percent of those are when a doctor’s office is closed and individuals need to be checked for a cold. She said it is a burden for providers to submit and DHS to review. Ms. Ahrens noted the important information is if an individual is treated beyond first aide.

Chairman Bedwick questioned how DHS then picks up the other 44 percent of reports. Ms. Ahrens stated the system has a secondary category of reporting that is more helpful in providing that information.

Commissioner Faber requested more information on the switch from monthly reporting to quarterly reporting. Ms. Ahrens responded that for all services they have to substantiate the claim so there are some notes. She said she hears often months of time were not enough to see progress so the period was extended to quarterly.

Commissioner Faber asked if DHS believes legal guardianship should precede the regulation. Ms. Ahrens explained that in the style guide in terms of regulation legal guardianship is implied.

Vice Chairman Mizner commented there were 439 commentators throughout the process and there was a lot of public participation.

Richard Edley, President and CEO, Rehabilitation and Community Providers Association (RCPA), explained RCPA is in support of the regulation. He said since May 2014, the process has been detailed and transparent. Mr. Edley said they made 270 written comments and 136 comments were specifically addressed and amended into the regulations. He stated it is about compromise and he is pleased with the changes. Mr. Edley added it is not about making it easier for the providers but about decreasing the load and cost so services are not taken away from individuals. Though there were some things he would have liked to have seen, this is about compromise, and there is clarity and protections in the regulations, Mr. Edley said. He stated not everything has to be addressed through regulation and things can be addressed by creating a meaningful process.

Nancy Murray, President, The Arc of Pittsburgh, commented that she is a proud parent of adult children with intellectual disabilities. Ms. Murray discussed that she sat on the workgroup that made decisions over the last four years, assuring that all stakeholder groups were represented and their perspectives were thoughtfully and respectfully considered. She said that one issue discussed to great length is the rate increases to the services governed by these regulations. Ms. Murray noted that direct support professionals care for Pennsylvania's most vulnerable citizens, doing things like personal care, bathing individuals, cleaning and shopping. She explained that ODP is required to update fee schedule rates at least once every three years. Ms. Murray added that stakeholders agree that rate increases are needed to attract, hire and train new talent to fulfill these positions. She expressed that the regulations successfully address a lot of important issues regarding individuals with intellectual disabilities and their families. Ms. Murray asked for the Commission to approve the regulations without delay.

Vice Chairman Mizner asked about those she referred to that are not receiving services. Ms. Murray responded that they are on a waiting list to receive services, but the funds are currently not there for them.

William Harriger, CEO, Verland, noted his facility has a staff of about 600 people with 400 being direct service providers (DSPs) and 100 being middle managers. He stated 80 percent

of every dollar goes to the salary of DSPs. Mr. Harriger had concerns that Section 571 does not go into enough detail to lock in a procedure for the rate setting process. He commented that he has seen five deputy secretaries come through DHS and this is something that should be codified in the regulation. Mr. Harriger noted his facility is understaffed by 20 percent every day. He agreed there does have to be compromise but does not believe there should be room for compromise regarding Section 571. Mr. Harriger commented the three-year data reset is a disaster if providers go three years without inflation rates they will have difficulty catching up.

Chairman Bedwick asked if Mr. Harriger is opposed to the regulation. Mr. Harriger replied yes.

Maureen Cronin, Executive Director, The Arc of Pennsylvania, exclaimed that nothing she says should be misconstrued that The Arc is not aware of the many health challenges in Pennsylvania. Ms. Cronin said that they cannot live with the existing regulations, and more harm will come if new regulations are not finalized. She discussed several topic areas that The Arc is most supportive of, including the support of children and ensuring that family members can be on the boards of their local chapters. Ms. Cronin expressed the importance of funding for family information and engagement, adding that her organization looks forward to being part of continued stakeholder engagement.

Maureen Westcott, Executive Director, The Arc Lancaster Lebanon, explained she was in the workgroup as a family member. She said she spent three years going to the workgroup to review many versions of the regulation. Ms. Westcott said the regulations are not perfect but the issues can be addressed in other areas besides regulations. She commented it would be wrong to go back three years and start all over as she does not believe they will get to a better place or better group of regulations.

Marian Frattarola-Saulino, Co-Founder and Executive Director, Values Into Action, commented that the message is getting across that it is important to replace the existing regulation and include the honest dialogue and voices of so many self-advocates who have been a part of the workgroup. Ms. Frattarola-Saulino added that her organization is in full support of the proposed regulations and asked for the Commission to immediately approve them.

Will Stennet, Director of Public Policy, Wesley Family Services Pennsylvania, commented that he has had the privilege of being part of the stakeholder workgroup reviewing sections line by line and word by word. He said ODP was open to feedback and engaged with stakeholders during the process. The proposed regulation is a vast improvement over Chapter 51 regulations and many of them were restrictive and constricted providers' ability to provide services in an effective way, Mr. Stennet said. He noted one area that was not able to be introduced was the cost of living adjustment but he does not believe the regulation should not be approved because of that. Mr. Stennet added he will continue to advocate for an annual rate adjustment or review.

(Commissioner Ufberg had to leave the meeting early and commented that DHS's presentation was exceptional.)

Lisa Tesler, Director, Vision for Equality, expressed that her organization participated in the stakeholder group and has tried to represent the perspective of families of individuals with intellectual disabilities. Ms. Tesler added that 73 percent of individuals with intellectual disabilities live with and are cared for by families. She discussed that they have serious problems with the current regulations as they are now. Ms. Tesler issued concern about reports that have detailed failures and issues in group homes in regard to neglect, abuse and injuries. She overviewed that individuals with intellectual disabilities are much more likely to be a victim of abuse, adding that the system has failed to address countless safety and health concerns for many individuals. Ms. Tesler expressed that people who complain of abuse are often threatened of losing the critical care they need altogether. She said that they have addressed concerns to the Deputy Secretary regarding some of the provisions in the proposed regulations, adding that they hope a continued workgroup will improve regulations moving forward. Ms. Tesler concluded that they are in support of these proposed and improved regulations, but noted that they still have many concerns with them.

Vice Chairman Mizner asked if they addressed their concerns with the current Deputy Secretary. Ms. Tesler responded that they have met with her three times and she has been receptive of the concerns being raised. She added that there is a cultural problem and a power dynamic where families are afraid to complain when their loved ones are not receiving proper care because they do not want to lose their care altogether.

Carol Costello, member, Roxborough Parent Support Groups, discussed her daughter's significant health issues, noting that she serves as her guardian in a lot of ways. Ms. Costello expressed fears about the absence of ER reporting because issues that may seem like smaller problems should still be reported to look into why they needed to go to the hospital to begin with. Ms. Costello said that if they bring up concerns, she fears that they will be told her daughter will no longer receive any care in the future. She commented that her daughter has been injured before when she was involved in the community, noting that she knows she cannot take care of her daughter forever. Ms. Costello explained that families want to know that agencies are giving the appropriate respect to individuals with intellectual disabilities. She issued concern that many facilities outsource staff and do not have regular people who know the individual needs of each person being taken care of. Ms. Costello concluded that everybody should not need to have guardianship to be able to speak on behalf of a loved one with an intellectual disability. Ms. Costello said that there are some good things in the proposed regulations.

Chairman Bedwick asked who investigates an initial complaint that a family makes. Ms. Costello added that the care provider conducts their own initial investigation.

Ruth Landsman, parent and advocate, noted she appreciates the efforts made by DHS to include a large group of stakeholders but feels that the changes are heavily weighted in unburdening the providers. She commented the providers are concerned with rates and the incident management system, but a provider's burdens are the families' loved ones. Ms. Landsman acknowledged the improvement but said it does not go far enough. She stated if data from ER visits are eliminated disaster can occur as that information can provide valuable information when reviewed. Ms. Landsman added DHS should be focused on proper reporting

rather than eliminating a major category. She said there must be retraining, accountability, oversight, and sanctions when necessary. Ms. Landsman explained after the Blossom situation the Commonwealth of Pennsylvania issued a bulleting that residential program CEOs must have at least five years of experience but the training requirements for those CEOs are minimal.

Dan Eisenhauer, President, Pennsylvania Association of County Administrators, Mental Health and Developmental Services, testified that these regulations are a culmination of an extensive process, which had four representatives from his organization. Mr. Eisenhauer commented that he believes the final recommendations are both fair and balanced, adding that they strengthen services for individuals. He recommended approving the regulations and hopes to work with DHS moving forward to address additional changes.

Chairman Bedwick asked how they receive notices for investigations. Mr. Eisenhauer answered that they share an incident reporting system and each of them has assigned roles in the incident management system.

Lori McFarland, Board Secretary, Self Advocates United as 1, said that she was also a part of the workgroup, noting that she also receives intellectual disabilities services from a waiver. Ms. McFarland asked why people do not give individuals like her the respect they deserve, adding that she does know that families and providers care for her safety and well-being. She expressed that nobody believed she was capable of making decisions for herself until she got involved with Self Advocates United as 1, adding that she now does her own shopping and even goes to the gym. Ms. McFarland reiterated that people like her want to be aware of their choices in order to make their own decisions, noting that they do not want other people deciding things for them. She expressed that the proposed regulations are not perfect, but are much better than what is currently in place. Ms. McFarland said that Self Advocates United as 1 fully supports the proposed regulation.

Shirley Walker, President and CEO, PA Advocacy and Resources for Autism and Intellectual Disability (PAR), testified that they do not have appropriate relief to pay the workforce more, which is necessary. Ms. Walker said that PAR is supporting these regulations because they have gone through an extensive public comment process, but she has serious concerns regarding the unnecessary ambiguity and vagueness in parts of the regulations. She discussed a report that requires states to increase direct support wages for workers and questioned if the vagueness will allow interpretation to prevent this from happening in the manner it should. Ms. Walker said she is hopeful that the regulations are interpreted in the best possible way to best address concerns regarding wages.

Ned Whitehead, PA Waiting List Campaign, said there is concern that some changes in the new regulation limit families' and individuals' rights. He said some families see regulations as contradicting the Everyday Lives guidelines. Mr. Whitehead noted there are five guidelines that are in contradiction: effective communication; self-direction and self-control; promote health, wellness and safety for every individual and family; develop and support qualified staff; and community participation. He said the regulation restricts family members who are the eyes and ears of individuals. Mr. Whitehead commented the PA Waiting List Campaign feels the regulation does not adequately provide protection of the loved ones they represent.

Vice Chairman Mizner asked if he participated in the workgroup. Mr. Whitehead replied yes.

Kaye Lenkner, Self Advocates United as 1, gave examples of board members who were abused and neglected. She explained these members do not want their family members acting on their behalf. Ms. Lenkner said people are concerned about having control over their lives.

Ms. Ahrens explained the provision regarding rights about individuals designating who can help them make decisions honors the many people ODP serves. She said providers are in a difficult situation in relation to this because they must figure out how to support the individual with decision making.

Vice Chairman Mizner asked how DHS foresees making adjustments to ensure there are sufficient resources to have quality providers. Ms. Ahrens replied the regulation provides a minimum of three years to look at the data and DHS compares the types of services. She said 80 percent of providers' costs are the wages of DSPs. Vice Chairman Mizner said the process DHS went through is to be commended. He said he hopes DHS does not wait three years to review the data as that will leave providers far behind.

Commissioner Watson inquired if the workforce shortage is common throughout the health care industry. Ms. Ahrens responded she cannot speculate on other areas of the system but there is incredible competition with the unemployment rate at 3.9 percent and companies like Walmart and Amazon increasing wages. Commissioner Watson said the Commission received a letter from the previous deputy secretary saying that this regulation was a bipartisan effort because it started in the Corbett administration and continued into the Wolf administration. Ms. Ahrens said a change in administration did not impact the development of the process.

Chairman Bedwick questioned if DHS is willing to include some type of process where the three years for data review becomes the maximum and providers can petition to review before the three years. Ms. Ahrens said she can take that suggestion back to DHS. Chairman Bedwick inquired if there is a way for DHS to check that the providers are involving families. Ms. Ahrens replied DHS has a quality assessment and improvement monitoring system and they have a good sense of what areas to focus on in monitoring. She said they also provide exploratory questions to give providers a signal of what DHS will be looking at.

Chairman Bedwick asked for clarification on training. Ms. Ahrens explained that since 1991 DHS has required 24 hours of training on an annual basis. She said the regulation extends that training to anyone employed by providers who may have contact with the individuals. In the final regulation, the requirement for annual training plans was eliminated because DHS received 100 comments saying it was unnecessary, Ms. Ahrens said. Chairman Bedwick asked if there is a way to follow up on the training. Ms. Ahrens said yes and DHS looks at it very carefully.

Chairman Bedwick noted he is still unclear on how DHS will pick up the 44 percent of reports if they eliminate ER visits. Ms. Ahrens responded that providers report incidents anyway and this is just a matter of how it is categorized. She said it is about trying to refine the process.

Ms. Ahrens added it is not the case that DHS cannot keep up with incident management but rather there are more sophisticated ways of knowing what needs to be looked at. She noted every incident is reviewed and there are certified investigators that work for counties, support organizations, and ODP.

Commissioner Watson commented that he found today's testimony to be the most compelling he has heard since he has been serving. He thanked everyone who spoke. Commissioner Watson stated the regulation has been four years in planning and the fact that there is a consensus that this is better than the current regulation shows it is a good regulation.

Commissioner Watson made a motion for approval. Vice Chairman Mizner seconded, and the motion passed 5-0, with Commissioner Ufberg voting by proxy.

## **2. No. 3183 Department of Revenue #15-459: Withholding of Tax**

Corinne Brandt, Regulatory Analyst, stated the regulation reduces the threshold for the electronic transmission requirement for the annual reconciliation statement from 250 to 10 or more withholding statements to improve efficiency.

Radee Skipworth, Deputy Secretary for Taxation, and John Brenner, Deputy Chief Counsel, Department of Revenue (Department), were present to answer any questions.

Mr. Skipworth explained that employers who submit 200 or more W2 forms are required to do so electronically. He said submitting electronically cuts down on the processing time and reduces the risk of filing errors. Mr. Skipworth noted the regulation changes the threshold to 10 or more to align with the Department's other electronic initiatives. He noted the regulation is part of a larger modernization effort of the Department.

Commissioner Faber asked if those filing fewer than 10 reports can use forms of delivery service other than first class mail as stated in the regulation. Mr. Skipworth said yes. Commissioner Faber inquired if that will be indicated in the instructions. Mr. Skipworth stated it can be added to the communication strategy. Commissioner Faber commented the Department may want to include references to the penalties as they are not indicated in the regulation.

Vice Chairman Mizner inquired what this will cost the person providing the information. Mr. Skipworth explained business owners can enter information through the Department's portal so it will cost them nothing unless they choose to outsource.

Chairman Bedwick commented the Department may want to indicate that people with fewer than 10 employees can still file electronically. He asked if there is a waiver or a process religious groups who object to using electronic equipment can go through so they are not penalized. Mr. Skipworth explained there is a waiver where the group explains the rationale and the Department determines if it is reasonable.

Commissioner Faber made a motion for approval. Vice Chairman Mizner seconded, and the motion passed 5-0, with Commissioner Ufberg voting by proxy.

### **3. No. 3215 Environmental Quality Board #7-549: Electronic Submission of Air Quality General Plan Approval and General Operating Permit Applications**

Ms. Brandt explained the regulation adds electronic submittal as another option for the delivery of applications for the use of applicable air quality general plan approvals and general operating permits.

Robert Reiley, Acting Director, Bureau of Regulatory Counsel, Department of Environmental Protection (DEP), was present for questions.

Chairman Bedwick made a motion for approval. Vice Chairman Mizner seconded, and the motion passed 5-0, with Commissioner Ufberg voting by proxy.

### **4. No. 3199 Environmental Quality Board #7-530: Administration of the Storage Tank and Spill Prevention Program**

Scott Schalles, Regulatory Analyst, explained the regulation strengthens the requirements for operation and maintenance of underground storage tanks and clarifies or corrects other provisions in Chapter 245. Mr. Schalles said Merck, Sharp & Dohme Corporation (MERCK) submitted comments on the final form regulation asking for disapproval of the rulemaking.

Kris Shiffer, Storage Tank Program Manager, and Robert Schena, Assistant Counsel, Bureau of Regulatory Counsel, DEP, were present to answer any questions.

Commissioner Faber inquired if the forms submitted electronically include any direct entry of information into the system. Mr. Shiffer said that it is via email to the Central Office that then inputs the information into the system. Commissioner Faber asked if DEP is developing standardized forms. Mr. Shiffer explained the forms are being revised to include the new rulemaking requirements. Commissioner Faber asked what format the forms are in. Mr. Shiffer stated they are in PDF or Word and information can be input directly.

Commissioner Faber said there were comments provided on issues with electronic signatures from owners and asked how that was resolved. Mr. Shiffer said the certified individual has the owner sign and then the document is scanned in. He said they are working with IT staff to develop software for electronic submission. Commissioner Faber inquired if containment areas are inspected on a regular basis. Mr. Shiffer stated for those larger than 21,000 gallons there is monthly maintenance inspections and 72-hour checks for emergency containment areas. Commissioner Faber asked if the issue of immediate threat of containment issues brought up by MERCK was addressed. Mr. Schena explained that the Environmental Hearing Board ruled on a narrow legal issue of the definition of release and reportable release. He said under current regulation there is no definition or regulatory provision clarifying what immediate threat means so the new definition provides a quantitative test so there is no ambiguity.

Chairman Bedwick questioned if a spill into containment and a release are being defined as identical. Mr. Schena replied the quantitative test is to imply release in environment but the definition shall include spill in containment. He said the definition does not limit DEP's ability to provide clarity. Chairman Bedwick asked how many of these types of spills occur. Mr. Shiffer responded under current regulation 25 gallons of gasoline into an emergency containment area must be reported to DEP. Chairman Bedwick asked if the reporting requirement is the same under the new regulation. Mr. Shiffer said yes.

Vice Chairman Mizner commented it is wise to give tank owners direction and the owners would view the amount that causes a problem different than that of a neighbor.

Commissioner Faber made a motion for approval. Vice Chairman Mizner seconded, and the motion passed 5-0, with Commissioner Ufberg voting by proxy.

#### **IV. OTHER BUSINESS**

##### **Approval of Vouchers**

Commissioner Faber made motions to approve vouchers and expenses for the period August 17, 2018 through September 13, 2018. Vice Chairman Mizner seconded, and the motions passed 4-0.

#### **V. DATE AND PLACE OF SUBSEQUENT MEETING**

Chairman Bedwick announced the next public meeting is scheduled for Thursday, November 15, 2018, at 10:00 a.m. in the 14<sup>th</sup> Floor Conference Room, 333 Market Street, Harrisburg.

#### **VI. EXECUTIVE SESSION ANNOUNCEMENTS**

Chairman Bedwick announced that no executive session would be held.

#### **VII. ADJOURNMENT**

Chairman Bedwick announced the meeting adjourned at 1:50 p.m.