



105 North Front Street, Suite 106, Harrisburg, PA 17101

July 24, 2009

The Honorable John M. Hall
Secretary, Department of Aging
Office of Long-Term Care Living
Bureau of Policy and Strategic Planning
P. O. Box 2675
Harrisburg, PA 17105

RE: Proposed Assisted Living Residence Regulatory Package

Dear Mr. Secretary:

On behalf of the Pennsylvania Assisted Living Association [PALA], please accept these comments regarding the proposed Assisted Living Regulations as provided on June 24th, 2009 for additional consideration prior to the Department's final submission for approval.

As you know, PALA is a state association representing personal care home providers across Pennsylvania as well as assisted living providers in Pennsylvania, currently licensed under personal care home regulations, who anxiously await final regulations that embrace a customary philosophy of service and care known nationally as assisted living.

Our membership represents the interests of more than 11,000 citizens currently residing in personal care homes across the Commonwealth and hundreds of providers those residents call "home".

As a designated member of the legally required workgroup to participate in the creation of these regulations, PALA has been privileged to be a part of the process in developing these regulations and expresses its appreciation to you for being made a part of the process.

Regrettably, PALA needs to express its profound disappointment with so much of the language embodied in this latest draft. We applaud the Department for a number of changes that have moved all of us closer to the creation of a dynamic, quality assisted living industry. However, PALA believes this latest set of draft regulations has yet to materially meet the nature and intent of Act 56.

PALA also believes that the primary reason for the proposed regulations not yet achieving the standard so effectively established for all of us by Act 56 is a result of three fundamental "undercurrents" that continue to compromise this regulatory development process and hinder our ability to collectively capture the statute's intent.

First, the proposed regulations are written from a primary point of view of protecting the health, safety, and welfare of assisted living residents. While PALA shares everyone's point of view that the health, safety and welfare of our residents is of utmost priority, Act 56 requires all of us to think beyond simply a "resident's safety and security at all costs."

PALA believes that Act 56 challenges us to create regulations that are based upon the principle that "Assisted Living Residences help older people care for themselves" rather than "Assisted Living Residences take care of older people."

We believe that the fundamental principle of Act 56, and its subsequent regulations, is that what is important to the consumer, typically an advanced age older adult, is that the assisted living residence needs to be primarily organized around promoting the resident's independence, respecting their privacy, enhancing their dignity, and offering them choice in how to live their life to the greatest extent possible.

Inherent in that philosophical approach is the fundamental fact that, when faced with a choice between "enhancing their quality of life" versus "being kept as safe and secure as possible" older people need to be allowed to make decisions about their service and care that strike a balance between their safety and any inherent measurable risks to themselves. Older people recognized long ago, as have public policy makers since the early days of organizing nursing home public policy, that acting from an exclusive point of view for maximum resident safety and security can have the unintentional consequence of constraining and compromising the resident's quality of life.

The Department needs to make the philosophy of assisted living, as expressed by Act 56, the primary purpose of these regulations while also ensuring that the assisted living residence is a reasonably safe and secure living alternative. Until that philosophy is articulated in the regulations as clearly as it is articulated in Act 56, the Department and other stakeholders, like the professional consumer advocates, will unintentionally harm assisted living residents by unnecessarily compromising their rights, particularly the right to choose how they live their life.

Second, the lawmakers understood when defining Act 56 that older people want to be empowered in defining their service and care, they want choice in different types of assisted living alternatives, they want to be able to establish the residence as their home where they can "age in place", and that each resident's situation can be different and can require judgments to be made on a case by case basis. Hence, the reason the lawmakers included "minimums" in the size and structure of resident living units or exclusionary health conditions that can be waived on a case-by-case basis. However, the Department continues to define all kinds of excessive service standards in the proposed regulations that go far beyond the minimum standards established in Act 56 by the lawmakers. Of particular note is a defined Informed Consent Process intended to bring the residence and the resident together in a process where they mutually define alternatives when the resident has a "quality of life" interest that includes some degree of inherent risk and concludes with a mutual decision as to how best to proceed and resolve the dilemma in the best interest of the resident. That Informed Consent Process is all but destroyed when this latest set of draft regulations suddenly removes the waiver of liability for the provider in its attempt to accommodate the life choice of the resident.

PALA applauds the Department for capturing this principle in a number of provisions related to exclusionary conditions and the ability to seek waivers, but those same principles need to be applied in a number of other areas where the lawmakers have also challenged us to rise to this principle as our standard.

These excessive care and service regulations unintentionally become the new standards that the Department is “deciding for the residents” rather than the minimum standards that the lawmakers intended so that residents, as consumers, “decide for themselves” and have choices between how the private market responds, and whom they choose as their provider.

Third, there appears to be an always present attitude that assisted living providers are somehow absent integrity and can’t be extended the confidence that they care about quality service as much as residents and professional advocates do and therefore need to be regulated as much as possible in order to protect frail and vulnerable older people. With this underlying attitude, stringent regulations have been drafted which compromise the quality of life that more flexible regulations, with the opportunity for waivers on a case-by-case basis, would bring to all of our residents.

For PALA, our disappointment stems from how these three undercurrents fail to advance the interests of our residents and their families and the public at large in assisted living. In fact, PALA contends that while these regulations have been drafted with the best of intentions to protect the safety and welfare of older people, they have unintentionally compromised what the philosophy of assisted living should be. Specific examples of our main concerns include:

- The minimum proposed standards for square feet of resident living units limit the choices as to the styles of apartments for residents, their perceived affordability to cost conscious residents and families, and a lack of available supply of new assisted living residences in rural areas and the myriad of small towns in the Commonwealth
- Unnecessarily heavy clinical standards in a host of areas that result in unnecessary costs thereby compromising affordability for many middle income and moderate income seniors
- Unnecessary costs that burden the Commonwealth’s Medicaid budget as we move closer to a Medicaid waiver for assisted living
- The inability of the resident to negotiate meaningful Informed Consent Agreements with their assisted living provider because the provider is now placed in a position of liability, contrary to the statute, for the decision made by the resident rather than assisting the residence in assuming the risk the resident needs us to willingly assume
- The “institutionalizing” of the assisted living residence environment by requiring clinical professionals to have too strong a leadership role and to set clinical standards which are too strong in managing the residence, its services, and care thereby effectively adding unnecessary expense and an excessive institutional approach to operations. Of particular importance to PALA is the disregard in the regulations for the large number of Personal Care Administrators who will be

forced to totally retrain to become Assisted Living Home Administrators despite their history and experience. As written they are not exempt from the 100hours of training.

Mr. Secretary, we also wish that the debate in regards to these proposed regulations could be over and we could collectively proceed in developing a dynamic and robust assisted living industry here in the Commonwealth. As we have discussed the needs of older people with you, what the principles and system of long-term care generally need to embody for older people, and specifically what assisted living needs to be for our residents, we are always impressed with your personal and professional understanding that what is important to our seniors is their independence, privacy, dignity, and right of choice. Regardless of how their level of frailty would change in an assisted living environment, it is those values that are, and remain, of utmost importance to them.

PALA believes that our regulatory development process has inconsistently applied those values in the design of these regulations. We ask that you accept our comments in the cooperative spirit in which we extend them and we look forward to your leadership in framing these regulations in accordance with the original intent of the lawmakers.

Sincerely,

Mrs. Orla Nugent
President
Board of Directors

Pennsylvania Assisted Living Association (PALA)

COMMENTS ON THE PROPOSED ASSISTED LIVING REGULATIONS

2800.1 Purpose

The primary purpose, as defined by Act 56, is not to create regulations to protect the health, safety, and well-being of assisted living residents, although certainly, all Pennsylvanians support and expect that the licensure and regulation process shall have the result of creating an assisted living industry that includes those outcomes.

Rather, as stated by Act 56, “it is in the best interest of all Pennsylvanians that a system of licensure and regulation be established for assisted living residences in order to assure accountability and a balance of availability between institutional and home-based and community-based long term care for adults who need such care.” Further, the Act states that, “Assisted living residences are a combination of housing and supportive services, **as needed**. They are widely accepted by the general public because they **allow people to age in place, maintain their independence and exercise decision-making and personal choice**. Assisted living is not about “taking care of older people”, but, rather, “helping older people take care of themselves.” Unfortunately, as proposed these regulations do not reflect this intent.

Suggested Language

The purpose of this Chapter is to create a system of licensure and regulation for assisted living residences that:

- (a) **provides residents the opportunity to maintain their independence, exercise decision-making, exercise personal choice, and age in place while receiving the assistance they need in pursuit of these quality of life outcomes; and**
- (b) **ensures accountability and a balance of availability between institutional, home based and community based long-term care for adults who need such care.**

2800.3 Inspections and Licenses

The proposed regulations extend to the Department’s broad authority to inspect assisted living residences at any time, for no required reason, and absent any standard by which to measure the need for an inspection. PALA believes that it is this type of generalized approach to drafting regulations that later leads to “evolving interpretation” or inconsistent application of regulatory standards. PALA encourages the Department to be as clear, concise, and complete as possible in defining all regulatory standards. PALA proposes that the regulations require annual surveys and additional inspections when there is evidence of reliable complaint. Further, Act 56 defines a statutory requirement for the Department to create an option to conduct abbreviated inspections when a residence has established a history of exemplary compliance. In this latest draft version, previous language in regards to this requirement has been omitted and should be

restored as originally written in order to comply with Act 56 and create for the Department options for efficiently managing the costs associated with regulatory activity in the assisted living industry.

Suggested Language

(b) Additional announced or unannounced inspections may be conducted by the Department upon receipt of reliable information suggesting the existence of harmful conditions at the residence or a violation of the regulations.

(c) The Department may conduct an abbreviated annual licensure visit if the assisted living residence has established a history of exemplary compliance.

2800.4 Definitions

Appropriate Assessment Agency. PALA does not understand the need to include the generalized language added to the end of this statement that relates to “individuals in an occupation maintaining contact with adults who are older and adults with disabilities”. Geriatric assessment services and care planning is a sophisticated professional skill that should not be extended to parties so generally described by this language. PALA is open to greater clarification by the Department as to its intent, but until then, PALA recommends striking all language in the proposed definition after the words, “...or another human service agency.”

Basic Cognitive Support Services. This definition includes the term “Specialized communication techniques” which, to PALA, would require licensed professionals such as speech pathologists. This language promotes too strong a service requirement and is well beyond what anyone would reasonably consider as “Basic Services.” Secondly, the technique of “prompting” residents with cognitive needs is commonplace in assisted living and should be inserted as the alternative to a deleted “specialized communication techniques.”

Suggested Language

[(vi) Specialized communication techniques]
(vi) Prompting

CPB - Cognitive, Physical, Behavioral. This acronym is not a common term to the assisted living industry and PALA does not see any need for the definition or the use of the term in the proposed regulatory language.

Suggested Language

[CPB – Cognitive, physical, behavioral]

Common Living Area – First, the word “dining” room is spelled incorrectly in the draft regulations. Secondly, the language says that the Common living area “shall include.....” and includes in the list of requirements the provision of “a swimming area”.

PALA cannot believe it is the intent of the Department to require, as a minimum, “swimming areas” for assisted living residents. PALA believes that “swimming areas” should be deleted as required in Common areas of assisted living residences.

Department. PALA believes, that with the passage of HB1152, or any other number of bills currently pending in the Legislature, that this definition should be written to provide the flexibility for the reorganization of the state agencies involved in licensing and regulating the assisted living industry.

Suggested Language

Department – The Department within the government of the Commonwealth of Pennsylvania legally assigned the responsibility and authority to license assisted living residences and to ensure their accountability to the nature and intent of Act 56.

Discharge. All stakeholders need the Department to provide leadership as to the creation of a robust assisted living industry that embodies the service and care philosophy of assisted living as a residential alternative that promotes the independence, privacy, dignity and choice for residents.

PALA believes words matter when creating a new alternative of long-term care for seniors and others. “How things are described” materially contribute to “how things are viewed” by all involved. **Utilizing “nursing home terms” in the proposed assisted living regulations unintentionally promotes an institutional culture in Pennsylvania’s new assisted living industry.**

PALA does not view or embrace language such as “admissions” and “discharges” that are first, institutional terms, and second, are terms that imply provider exclusivity as to the authority of who is “admitted” to the residence and who is “discharged”. Nursing home residents are “admitted” and “discharged” by the facility. Assisted living residences provide the opportunity for residents to “establish residency” and to “terminate residency”. We encourage the Department to apply the fundamental principle of “resident choice” in its language. Conversely, assisted living residences also “approve residency” and can also “terminate residency”.

Suggested Language

[Discharge] Termination – the termination of an individual’s residency either by the resident or the assisted living residence.

Dual Licensure. Dual licensure is a statutory requirement of Act 56. For only the first time, by this second draft, has the Department now included language governing the statutory requirement of dual licensure. PALA believes that, given dual licensure is a major element of the proposed assisted living industry, the term ought to at least have a fundamental definition.

Suggested Language

Dual Licensure - A building may be licensed as both an assisted living residence and as a personal care home. The owner shall prominently

display both the Assisted Living Residence license and the Personal Care Home license in a public area. The resident living units covered by the Assisted Living Residence or the Personal Care Home license shall be formally designated by the owner and shall meet all regulatory requirements of its respective licensure. The designation of the resident living units can be changed at any time by the owner in order to assist a resident to age in place in a unit established as that resident's home or to relieve the resident from unnecessary costs associated with assisted living licensure by having the resident's living unit designated as a personal care home unit. All inspections of dually licensed buildings shall be conducted by a team of surveyors comprised of both personal care home and assisted living residence surveyors, and coordinated to be at the same date and time so as to provide minimal disruption to the quiet enjoyment of the residents and the residents' delivery of service and care.

Exemplary Compliance. This provision is a statutory requirement of Act 56. The intent of the statute is to provide abbreviated inspections for exemplary providers while focusing the Department's limited resources on the performance of poor providers. Because the Department has allowed these regulations to be developed in a climate of complete distrust of provider integrity, the regulations have moved toward ignoring the minimum requirements of Act 56. PALA believes the definition for this term needs to be restored to the regulations and amended to a less high standard than "deficiency free" inspections for a consecutive three years. The minimum standard should be such that the Residence demonstrated deficiency free performance in all regulatory areas that materially impact upon the health and welfare of the resident. An administrative error that causes a deficiency with an administrative requirement should not cause the Department to be required to perform a subsequent full inspection.

Suggested Language

Exemplary Compliance – Two consecutive years of [deficiency free] inspections which are free of deficiencies that adversely impact the health and welfare of the residents.

Financial Management – Items (i) and (ii) contain contradictory language in regards to the safekeeping or storing of funds as a convenience to the residents not rising to the definition standard of "financial management."

Suggested Language

Financial Management

- (i) **An assisted living service requested or required by the resident in accordance with his support plan [,] which includes taking responsibility for or assisting with paying bills, budgeting, and maintaining accurate records of income and disbursements[,]. [safekeeping funds and making funds available to the resident upon request.]**

- (ii) **The term does not include solely storing funds in a safe place as a convenience for a resident.**

Informed Consent Agreement. PALA believes that the Informed Consent Process, and subsequent Agreement that documents that process, is a critical and basic element to the delivery of assisted living services as evidenced by its common practice within the assisted living industry in most other states in America. The Department has now removed the final component of this definition related to the Agreement serving as evidence that the resident and the residence have conducted an Informed Consent Process. This action is a mystery to PALA in that PALA would suggest that the Informed Consent Agreement is a critical piece of documentation that ensures for the Department that the Informed Consent Process has been appropriately followed consistent with the Resident's expressed preferences as to the delivery of service, the Residence's obligation to meet its duty of care in expressing to the Resident the adverse outcomes of their preference and other options that may satisfy the Resident's preference while minimizing resident risk, and documenting, for the record, both the Resident's CHOICE of how the resident prefers to live their life and the Residence's willingness to honor that choice or not. Item (iii) language is helpful to all parties involved in the Informed Consent Process including the Department that is responsible to regulate that process and PALA recommends it be returned to the definition.

Suggested Language

- (iii) **Documents the resident's choice to accept or refuse a service offered by or at the residence.**

Legal Representative. PALA again encourages the Department to ensure that a legal representative is identified in writing.

Suggested Language

Legal Representative – An individual who holds a power of attorney, a court-appointed guardian or other person authorized to act for the resident in writing.

Specialized cognitive support services. PALA considers this new definition to the regulations as using generalizations and terminology that are first, not ordinary and customary in assisted living environments, second, ambiguous in their meaning, third, open to broad interpretation, and finally, incomplete if one is trying to describe a complete, yet practical, range of cognitive support services for residents with mentation challenges that can succeed in a typical assisted living environment.

Suggested Language

PALA recommends the definition be stricken from the regulation as the Department's responsibility is to draft a set of MINIMUM regulations governing the assisted living industry.

Third Party Provider - PALA supports the Department's definition of Third Party Provider with the exception that PALA assumes the intent of the definition is to apply to

those providers who are directly providing personal care or health care services to the resident.

Suggested Language

Third Party Provider – Any contractor, subcontractor, agents or designated providers under contract with the resident or residence to provide personal care or health care services to the resident.

GENERAL REQUIREMENTS

2800.11(c).

The licensure fees in this section are an extraordinary increase over the fees currently assigned to personal care homes in Pennsylvania and dramatically exceed the licensing fees for assisted living in every other state in America. Act 56 directs the Department to assign licensing fees that “augment” the costs of regulatory oversight for assisted living residences, not to be the primary source of revenue for paying the Commonwealth’s obligations to provide such oversight. If these fees are instituted, providers will be forced to pass the costs on to the consumer. **PALA cannot believe that the Department would intend to financially harm older adults and others relying upon assisted living residences to absorb, in full, the Commonwealth’s cost to regulate assisted living.**

Suggested Language

(c) After the Department determines that a residence meets the requirements for a license, the Department’s issuance or renewal of a license to a residence is contingent upon receipt by the Department of the following fees based on the number of beds in the residence as follows:

(1) A \$5 per bed fee that will remain in effect during fiscal years 2009-2010 and 2010-2011. The bed fee may be adjusted by the Department after FY 2010-2011 at a rate not to exceed the consumer price index.

(2) No Assisted Living Residence shall be required to pay more than \$1000.00 for licensure fee application or renewal application.

2800.11(g) Dual Licensure.

PALA believes that the concept of dual licensure needs to start from a “resident centered” point of view rather than from a point of view of either provider or surveyor convenience. If a personal care home resident opts to become an assisted living resident or an assisted living resident opts to become a personal care home resident, the regulations need to give both the provider and the resident the option to honor the resident’s current living unit, considered the resident’s home, as qualifying for different licensure. While the provider cannot be required to do so, residences should have that option, surveyors should accommodate that flexibility, and potential consumers can

make their CHOICE of provider partially based upon that provider's policies governing this option. To require residents to move from a long-term living unit considered to them as home can be unnecessarily compromising the resident's CHOICE. To experience a loss of functioning to a point that requires a resident to access assisted living services by physically moving to another part of the building can compromise the resident's dignity. The Department should promulgate regulations on dual licensure that don't require the provider to create "distinct parts" for personal care and assisted living, although the provider should have the option to do so and risk the business implications of that decision in the private marketplace. Finally, PALA again encourages the Department to use language that embodies the philosophy of assisted living services and care by avoiding institutional terminology such as "facility".

Suggested Language

(g) Dual Licensure. A licensed residence or home [facility] may submit an application to the Department requesting dual licensure if the licensed residence or home [facility] co-locates both the personal care home living units and the assisted living units in the same building. [and are each located in a distinct part of the building.] If the Department determines that the licensed residence or home meets all of the requirements of this Chapter, the residence or home shall be issued a dual license.

(g)(2) There is a typographical error in the last line of the regulation that requires the Department to remove the words, " for the" and insert the word "forth".

2800.14 Fire Safety Approval.

While PALA shares the Department's concern for the safety and welfare of all assisted living residents, especially in the area of fire safety, repeated approvals, at the discretion of the Department, as evidenced by the language in item (e), can lead to inconsistent application and evolving interpretation, over time.

Suggested Language

(e) Fire Safety approval must be renewed if there are any renovations, new construction or physical plan changes.

2800.16(a)(3) Reportable incidents and conditions.

This regulation governing reportable incidents includes "illness" to the list of reportable incidents. In the largely senior population served in assisted living residences, illnesses of all types are a common occurrence, as is subsequent hospitalization. Submission of a reportable incident report each and every time a resident is hospitalized for an illness creates an unnecessary burden on the Department and the provider, to say nothing about unnecessarily breaching the PRIVACY of the resident which PALA deems as the most important reason for removal of the term.

Suggested Language

(3) an injury [,illness,] or trauma requiring treatment at a hospital or medical facility. This does not include minor injuries such as sprains or minor cuts.

2800.19(a) Waivers.

While the criteria and guidelines surrounding waiver applications appear to be resident-centered and therefore commendable, providers whose applications meet the criteria should obligate the Department to approve them. Thus, PALA recommends changing the word “may” to “shall”.

Suggested Language

(a) A residence may submit a written request for a waiver of a specific requirement contained in this chapter. The waiver request must be on a form prescribed by the Department. The Secretary, or the Secretary’s appointee, shall grant a waiver of a specific requirement of this chapter if the following conditions are met:

(b) PALA recommends striking item (b) from the regulations. There is no need to breach the privacy of the resident by posting waiver requests on the internet for the general public to view. Again, Act 56 requires the Department to promulgate regulations that protect the privacy and enhance the dignity of the resident. Posting private information of residents of this nature breach that intent.

2800.22 Application and Admission.

PALA generally supports the changes made by the Department in regards to the development of resident assessments and resident care plans prior to residency and during the initial 30 days of residency when the resident’s defined care needs can dramatically change. As a practical matter, many residents’ health status improves 30 days post residency because they receive adequate nutrition, hydration, proper medication management, personal care services, and supplemental health services. Conversely, providers can also discover, post initial residency, a number of health care needs that the resident and the resident’s family did not disclose to the residence or the family did not have knowledge existed with the resident because the resident was hiding from family their unmet care needs. The Department, with the language changes outlined in this section related to the conduct of assessments and development of resident support plans, is beginning to capture the realities of the common situation and the manner in which the common situation needs to be managed. PALA agrees that assessments should be done prior to initial residency and no more than 30 days prior to that initial residency. PALA also believes that a preliminary support plan should be in place by the first day of residency and may change in any number of ways dramatically during and by the end of the first 30 days of residency. On that basis, PALA supports the language in this section related to the completion and timeliness of resident assessments and resident support plans. As a final point, however, PALA encourages the Department to use the term “initial residency” rather than “admission” for the reasons noted in our earlier comments.

2800.22 (b 1)(b2) (b3)(c) (d).

PALA believes that all of this new language needs to be eliminated from the proposed regulations because it places undue administrative burdens and requirements upon the residence for no reasonable purpose. As a practical matter, residences demonstrate approval or denial of residency based upon the execution of a resident/residence contract. Residences conduct resident assessments prior to residency and inform the resident as to the residence's ability to meet the prospective resident's service and care needs or their inability to meet those needs. Creating additional documentation and disclosure requirements that can be in direct conflict with a host of other federal regulations or requirements serves no purpose. PALA is not aware of any current or historical problem in the personal care industry where approval of residency and access to care has been denied consumers with no explanation to the consumer as to the reasons for denial of that access.

2800.22 (e3)

PALA opposes the Department's need to review and approve a Resident Handbook. Nowhere in the continuum of care is this type of onerous regulation assigned to a provider. Resident Handbooks can change often at a residence and to create this type of administrative burden on both the Department and licensed residences is unnecessarily burdensome and costly. Again, PALA believes the Department is succumbing to the voices of professional advocates who believe that providers are absent integrity and need to be regulated as heavy handedly as possible because providers can't be trusted to properly serve and care for residents.

Suggested Language

22(e)(3) A copy of the residence rules and resident handbook. [The resident handbook shall be approved by the Department.]

2800.25 (b): Resident – Residence Contract.

There is no equity in the allowance to terminate a resident agreement/contract. As is current practice, an automatic renewal on a month-to-month basis remains the accepted standard. However, there are no grounds to permit a resident to terminate his/her contract with just 14 days notice while requiring a provider to provide 30 days notice of its intent to terminate a contract. Both parties should be held to the same standards.

Suggested Language

The contract shall run month-to-month with automatic renewal unless terminated by the resident with 30 days notice or by the residence with 30 days' notice in accordance with 2800.228 (relating to transfer and termination of residency).

2800.25 (c) (2).

PALA questions the need for a fee schedule of services that are already included in a "basic core package", as provided in section 220, when the consumer will not have the

opportunity to opt out of those services. If the Department intends to require a core package of services, then there is no need for an itemized fee schedule.

Suggested Language

25 (c) (2) [A fee schedule that lists the actual amount of charges for] An enumeration of each of the services that are included in the resident's core package in accordance with 2800.220 (related to service provision.)

2800.26 (b) Quality Management.

The Department proposes the development of a quality management plan to assure compliance with the relevant standard of care yet offers no standards of care through the regulations upon which a quality management plan can be organized. The Department, if requiring this action of residences, needs to delineate the standards of care for proposed assisted living residences in Pennsylvania.

2800.30 Informed Consent Process.

This is a statutory requirement. Regulations containing an informed consent process have been necessary for quite some time. In the spirit of Act 56, the 2800 regulations as constructed provide such safeguards for both residents and providers alike. First, as delineated in (a), an Informed Consent Process is much more than “an Agreement” that “documents a resident choice.”

For the Department to suggest that a process so basic and important to the quality of life for residents is “merely a manner of describing self-directed care” reflects a need for the Department to better understand Informed Consent before drafting regulations for Informed Consent is attempted.

Act 56 demonstrates that the Legislature clearly understands Informed Consent by the Legislature's actions in making Informed Consent a statutory requirement, designing the law in such a manner that the consumer participates in the Informed Consent process, and having the process conclude with a written document that documents the decision and clearly states the resident's decision and the residence's willingness to support that decision. If the residence agrees to the resident's decision, the residence is held harmless from the liability of the resident's decision, although negligence in failing to deliver care consistent with that decision is not waived.

Informed consent is a process occurring all over the country and has been occurring for some time. PALA does not understand why the Department struggles so much in drafting regulations governing this process given the body of knowledge that exists on the process and having immediate access to PALA members who practice the process every day with residents now and who would be eager to share the process with the Department.

PALA believes that this entire section needs rewritten because as it is it is totally ineffective in defining the Informed Consent process.

PALA encourages the Department to participate in a thorough discussion with providers who practice the process every day and then draft proposed regulations accordingly.

2800.30 (c)(1).

The Long-Term Care Ombudsman plays an important role in the advocacy of people residing throughout long-term care continuum. In many instances providers are extremely proactive in calling upon their services for assistance and guidance. Under the circumstance of informed consent agreements, one can see why an ombudsman may be needed. However, notifying an ombudsman for cognitively impaired residents leaves wide open the interpretation of this regulation as numerous residents, even those seemingly lucid, may be diagnosed with varying degrees of dementia. It is recommended that the Department provide further explanation and definition of “cognitively impaired”.

2800.30(j).

Act 56 specifically included safeguards for providers to liability from the execution of informed consent agreements. As written, the language in this regulation does not emulate the language provided in the statute.

Suggested Language

Execution of an informed consent agreement shall release the provider from liability from liability for adverse outcomes resulting from actions consistent with the terms of the informed consent agreement. The agreement shall not constitute a waiver of liability with respect to acts of negligence or tort.

2800.44(h) Complaint Procedures.

PALA does not understand the need for the Department to suddenly add a final line to the section of the regulations intending to protect the resident’s rights to grievance to include a disclaimer that the resident maintains a right to sue the residence. Again, PALA expresses its disappointment that the culture that has surrounded the development of these draft regulations, from the beginning, has been one of total mistrust of providers and viewing providers as absent integrity. PALA requests the Department to show other regulatory language common in other states that places such a strong emphasis of mistrust toward assisted living residences.

**2800.53 Qualifications and Responsibilities of Administrators and
2800.54: Qualifications for Direct Care Staff Persons**

Residents, families and service organizations across both the state and the country are grateful to the dedicated professionals who employ their talents in personal care and assisted living residences. These employees are highly qualified and dedicated to serving their residents and each other consistently day in and day out. They have received hundreds, possibly thousands of hours in both formal classroom and on-the-job training. Administrators, department coordinators and direct care staff alike have demonstrated leadership, competence and compassion in their duties. It is simply unconscionable for

these regulations to be written in a manner that does not provide a method for recognizing the experience of all current personal care home administrators, direct care and medication administration trained staff. It is HIGHLY recommended that all such aforementioned administrators and staff currently working in personal care homes across the Commonwealth be extended the opportunity to now be a part of our new assisted living industry **based upon qualifications that properly recognize their experience and qualify them to participate in the new long term care alternative.**

2800.56: Administrator Staffing.

PALA supports the time requirement of section (a) with the addition of the “designee” assisting the residence in meeting this requirement. Section B, requiring the “same training required for an Administrator”, if applicable on a 24/7 basis, is unnecessary and excessively burdensome and costly.

Suggested Language

(b) The Administrator shall designate a staff person to supervise the residence in the Administrator’s absence. [The designee shall have the same training required for an administrator.] The designee shall have telephone access at all times to an on-call administrator.

2800.63 First Aid, CPR and Obstructed Airway Training.

PALA strongly opposes the proposal of 1:20 ratio CPR/first aid trained staff to residents suggested in this draft. Not only does this impose additional costs with training but also it imposes unnecessary staffing challenges.

Suggested Language

(a) [There shall be sufficient staff] For every 40 residents, there shall be at least one staff person trained in first aid and certified in obstructed airway techniques and CPR present in the residence at all times to meet the needs of the residents.

2800. 64(b) (19) (20)

The language used in these sections is unfamiliar to the Assisted Living environment, therefore PALA suggests changing it or deleting it.

2800.64(g) Administrator Training and Orientation

PALA strongly recommends that Personal Care Home Administrators also be exempt from the 100 hour training course and be required to pass the competency test only.

Suggested Language

A certified personal care home administrator who is employed as an administrator of a Personal Care Home prior to (effective date of

regulations), is exempt from the 100 hour training course, but shall pass a competency test to be developed by the department.

2800.65 (b) (c) Staff Orientation

While PALA supports staff training it does not support the new requirement with these proposed regulations. PALA does not see the necessity in having the Department approve the initial orientation program nor does it see necessary that all direct care workers shall be certified in first aid and CPR before providing direct care to residents. With staffing and training this would prove extremely challenging for providers.

2800 65(f) Staff Orientation

PALA believes that 12 hours of training time is sufficient to cover the required topics and recommends that the Department changes this back from the proposed 18 hours.

2800 65 (f) (3) (xvii) (xix)

PALA believes that there should be a further explanation of what these terms are.

2800.83 (b) and (c) Temperature

PALA believes that while it is important that the Assisted Living Residence regulate its temperature within the residence, it does not see the need however, to have central air conditioning units to do so effectively.

2800.93 Handrails and Railings.

PALA has a concern that requiring all hallways to have handrails will create an institutional rather than the home-like environment intended by Act 56.

2800.94 Landings and Stairs.

Again, PALA is concerned that requiring all stairs to have strips will create a more institutional environment.

2800.96: First Aid Kit.

A mandate to include Automatic Electronic Defibrillation devices [AEDs] in a first aid kit, when such devices are not even mandated in skilled care facilities is another example of an over the top costly and unnecessary regulation. On average, an AED will cost approximately \$2,500. Again using the Department's estimation of 100 providers applying for licensure the first year, the "regulated community" will be taxed with the burden of an additional \$750,000. It is also important to note that an AED is installed in a manner that would make it separate and apart from a first aid kit as its size will not permit it to be part of an actual first aid kit. AEDs are typically stored in a wall-mounted box. **Make the use of AEDs optional only.**

2800.98 Indoor Activity Space.

Regulations mandating increased space for existing providers will almost virtually ensure a relatively limited, if any, participation in the state's new assisted living industry. Construction costs to renovate existing properties such as would be needed to meet the requirement for two rooms available for indoor activities as opposed to the current directive of one room under the personal care home regulations are expensive and extremely cost prohibitive. Requirements of at least 15 square feet per person in these two rooms with an aggregate floor space of 750 square feet have no significant frame of reference and will undoubtedly limit and quite possibly prohibit consumer access to the assisted living market. If the Department seeks compromise on this regulation, it is recommended that a residence's dining room be permitted to count as living space in order to ensure compliance with square feet and resident accommodation requirements.

2800.101(b) (1) and (2): Resident Living Units.

The proposed square foot regulations pertaining to living units of 175 sq ft for existing residences and 250 sq ft for new construction are perhaps the greatest barriers presented in the draft 2800 regulations. They are representative of the Department's failure to include the actual voice of even one senior on the Assisted Living workgroup. In actuality, the size and configuration of a living unit does not readily translate into high quality, resident-centered care predicated on the moral principles of dignity, respect, compassion and aging in place. One would challenge the fact that many if not all people move into assisted living residences due to the need for greater socialization. Seniors are downsizing at this time in their lives. Large homes or apartments are exactly what they are turning away from in order to overcome the loss of a spouse or the challenge of a limited income. Standing by these sq ft mandates will ultimately close the door to assisted living for so many seniors and others in need across the Commonwealth as the construction costs will simply be too prohibitive.

Suggested language

2800.101(b)(1) For new construction of residences after (effective date of regulations), each living unit for a single resident must have at least 150 square feet of floor space measured wall-to-wall, excluding bathrooms and closet space. If two residents share a living unit, there must be an additional 60 square feet in the living unit.

2800.101(b)(2) For residences in existence prior to (effective date of regulations), each living unit must have at least 125 square feet measured wall to wall, excluding bathrooms and closet space. If two residents share a living unit, there must be an additional 60 square feet in the living unit.

2800.101(2)(a): Resident Living Units.

Existing buildings will find it difficult to provide a cooking appliance for all those residents that request one. Regardless, this regulation provides an unsafe environment to the residents of the assisted living residences. The average age of a personal care/assisted living resident is 84 years old. Cooking is no longer a viable option for nearly all of the residents served currently across Pennsylvania. In many instances, the

inability to prepare and cook their own meals leads to their move into a personal care home or assisted living residence. Providing a cooking appliance is not only unsafe it is also contrary to one of the many services already provided in personal care home residences through the provision of 3 well balanced, nutritious meals per day.

2800.101 (2) (B) (iii)

PALA is very concerned that this clause as written would prevent all those residences with country kitchens from meeting the criteria of this requirement. Often, direct care workers utilize the country kitchen of a residence to prepare snacks for residents or indeed to heat up their own lunches in the microwave. Many existing residences do not have access to a stovetop for hot food preparation other than the one in the main kitchen where meals are prepared. Providing this is an additional and unnecessary expense since most residents have no desire to cook when meals are provided.

Suggested language

The residence shall provide access to a sink for dishes [a stovetop for hot food preparation] and a food preparation area in a common area. [A common resident kitchen may not include the kitchen used by the residence staff for the preparation of resident or employee meals, or the storage of goods].

2800.129 (c) Fireplaces.

Chimneys and flues for non wood burning fires do not accumulate flammable substances and therefore do not necessitate an annual service regimen.

Suggested Language

A wood burning fireplace chimney and flue that is used must be serviced annually and written documentation of the servicing shall be kept.

2800.141(a) Resident Medical Evaluation and Health Care.

Many residents and families resist moving into a long-term care residence until an unfortunate event such as an injury, illness or wandering in public forces an immediate call to action. In many cases residents and their designated persons are unaware of the heavy, sometimes burdensome requirements that must be met prior to one's initial residency into an assisted living residence. It is for this reason that it is highly recommended that the required medical evaluation mandated for residency be permitted to be completed for up to 30 days post residency as in the current 2600 regulations. This will permit residents and families to gain safe haven and shelter while still ensuring ample time for regulatory compliance.

2800.142(b) (iii) Assistance with Medical Care and Supplemental Health Care Services.

The right granted to providers in the statute to control what outside providers are permitted to render services to its residents should be strictly adhered to under this

provision. Act 56 states that to the extent prominently disclosed in a written admission agreement, an assisted living residence ‘may require residents to use providers of supplemental healthcare services designated by the assisted living residence’. This provision should be constructed in a manner identical to the intent of the statute; which was to supply protections against having unwanted outside providers on the premises. In many instances, assisted living residences have knowledge of reputable and non-reputable supplemental healthcare providers. Assisted Living residences are more apt to permit only reputable outside providers on their premises to care for their residents. **PALA requests that this sentence is omitted.**

Suggested Language

2800.142(b) (iii) [If the resident has health care coverage for the supplemental health care services, the approval may not be unreasonably withheld.]

2800.171. Transportation.

When transportation is provided for in assisted living regulations, those regulations recognize that there are inherent limitations on what an assisted living residence can do in providing transportation services given the diversity of transportation needs, other sources of transportation help for residents, geographic limitations, coordination limitations, and, cost limitations. The Department’s proposed regulations in this area appear to ignore most all of these realities. The Department, with these proposed regulations, casually imposes upon the residence an open transportation system, required to perform in any number of impractical ways upon the demand of a resident, and holds the residence to unrealistic time/distance/escort requirements that are simply impossible for a residence to meet given the logistics and the costs.

PALA proposes that transportation services be organized around fundamental principles. First, transportation services will be provided on a “scheduled basis”, meaning, specific days and times are defined for the residents as to when transportation services are available. Second, “scheduled transportation services” shall then be provided to “medical appointments” and to “activities scheduled by the residence” in order to establish transportation services for the residents that are important in meeting their health care needs and augmenting their socialization with “outside the residence” activities scheduled by the residence. Third, the residence can establish geographic limitations as to the distance the residence’s transportation services will travel for medical appointments and scheduled social activities.

PALA recommends the Department revise the proposed regulations around these practical realities that are a customary standard in most assisted living residences across America that provide transportation services.

2800.171(d): Transportation.

As previously stated, socialization and maintaining a healthy balance of in-house activity and community-based events is essential to one’s well being. Providers are currently charged with coordinating the medical and social calendars of its residents in Section (a) of this regulation relating to transportation. Mandating an expensive purchase in year one of compliance is extreme. Providers wishing to provide transportation to their

residents in addition to coordinating it should be given upwards of 3 years to purchase an accessible vehicle. This time frame is necessary as it will more than likely take at least 3 years for the regulated community to have collected data related to the cost of operating under the new regulations. In addition, the price of a fully accessible vehicle is upwards of \$60,000. Assuming that even one third of the Department's estimated 100 first year providers opt to purchase this vehicle, the cost to the regulated community will be at least \$1.2 million once all costs, tags, registration and delivery fees are taken into account.

2800.171(d)(1-4) and (e) (1-4): Transportation

PALA believes that it is outrageous for the Department to suggest holding an Assisted Living Residence liable for the time frames outlined in these sections. Metropolitan mass transit systems are not held to these requirements, and it is unreasonable to insist that an assisted Living Residence must be. PALA suggests that both these sections are deleted.

2800.202(4): Prohibitions.

Never at any time should a resident be subjected to any harm, abuse or restraint, including chemical restraints. Clarification however on this provision as it relates to pro re nata [PRN] medication orders is required before the regulations can be passed. Often ordered to alleviate an acute episodic event, PRN orders have proven to be essential to the care of residents experiencing extreme symptoms of anxiety. Strict documentation regarding their directed use and subsequent administration must be enforced.

2800.220(b) (4) and (5): Service Provision.

The clear intent of Act 56 was to create a consumer driven and consumer focused long term care option for seniors that promoted the concept of aging in place. The mandated "Core Services" states that a residence must, at a minimum, provide.... assistance with activities of daily living (ADLs) (4) and assistance with self-administration of medication or medication administration (5). This mandate is completely and utterly contrary to the intent of the law in that these services, if rendered as a core service package, prohibits the provider's ability to charge separately for these services. Giving care to a highly frail senior with multiple physical limitations and severe incontinence can take up to an hour. Administering medications to a resident with severe dementia can take up to a half an hour. In today's shrinking labor pool, providers should be seeking the most qualified and talented individuals to serve their residents. As such, covering the cost of these extensive labor costs is essential to not only quality of care but also preservation of the concept of aging in place. Bundling services at a higher rate does not translate into effective pricing for the consumer, but rather, having available an effective, personalized assessment process ensures each resident access to the services they and they alone, require.

2800.220 (b) (11) Service Provision.

PALA believes that the items and services that should be included in the core package are those that will be utilized by most residents. PALA therefore suggests the removal of "basic cognitive support services" as many residents do not require these services.

2800.220 (c) (1) (iii) (v) Service Provision.

PALA needs the terms ‘household items’ and ‘unanticipated ADLs’ defined.

2800.220 (c)(2) Service Provision – Enhanced Core Package.

PALA suggests that rather than have residents buy items or services which they do not need that they should buy them on an as per needed basis.

2800.220(c)(7): Service Provision – Escort Service.

This provision implies that the residence is responsible for escorting each resident on their medical appointments. As written, as a practical matter, it is simply not feasible for a residence to perform to such a mandate. Pulling one or more staff persons “off the floor” to escort residents on medical appointments leaves the home vulnerable from a staffing perspective in case of overall care and service and potential emergency situations.

2800.224. Initial Assessment and Preliminary Support Plan. 2800.225 Additional Assessments.

PALA commends the Department for the extensive revisions proposed in this section’s draft regulations that reflect a much stronger understanding of the assessment/care management process that should occur in an assisted living residence.

PALA agrees that, unless certain emergency situations exist, assisted living residences ought to have initial assessments and initial support plans in place beginning with the first day of residency.

The Department has drafted regulations that have embraced those realities.

The Department has also acknowledged that geriatric assessment/care planning is an evolving professional service and the Department, by not mandating government forms or prior approval of assessment/care planning instruments, has created a regulatory climate that will help the Pa. assisted living industry advance this technology.

PALA continues to encourage the Department to refine the regulations governing assessment/care planning by recognizing a couple of additional fundamental principles.

First, the national assisted living industry recognizes that “resident assessments” is too general a term and most residences and associated state regulations draw a distinction between “function assessments”, that is, measuring the level of functioning of a resident across a spectrum of ADL’s and IADL’s and “health assessments” that assess a resident’s medical/health status.

Second, the national assisted living industry and state regulatory requirements recognize that different residence care professionals can perform “functional assessments” and “health assessments.”

The Department need only look at it own staffing requirements for Area Agencies on Aging in the area of the Options Program to understand the staffing requirements on assessment/care planning for assisted living residences.

Non-clinical personnel, properly trained, are most capable of performing “functional assessments” for prospective residents and residents. Caseworkers, absent clinical licensure, conduct functional assessments every day across the area agency on aging network. PALA encourages the Department to draft the staffing requirements to acknowledge that practical approach in completing functional assessments in assisted living residences by eliminating the utilization of expensive, clinically oriented nursing personnel in participating in the completion and/or review of functional assessments.

2800.227. Development of the Final Support Plan.

PALA supports the requirements of this section of the regulations with the exception of (c) requiring a reassessment, at a minimum, of “quarterly.” While a residence should be required to reassess a resident whenever there is an observed change in the resident’s functional or health status, and, at some regular intervals to better ensure that there are no unmet care needs slowly evolving with the resident, a minimum of quarterly is too unnecessary a minimum standard. PALA encourages the minimum requirement to be one of whenever there is an observed change in the resident’s health status, or, semi-annually.

2800.228. Transfer and Discharge.

PALA encourages the Department to avoid institutional terms like “transfer” and “discharge” but, rather, refer to this section as “Termination of Residency”.

(b) (2). PALA recommends that the line “The residence may not transfer or discharge a resident if the resident or his designated person arranges for the needed services.” This line is contradictory to the following line that properly expresses that continued residence for the resident, based upon the provision of supplemental health services, is a mutual decision that the resident and the residence make together.

Suggested Language

(d) The date and reason for the termination of residency, and the destination of the resident, if known, shall be recorded in the resident record.[and tracked in a transfer and discharge tracking chart that the residence shall maintain and make available to the Department.]

(h) (3). PALA encourages the Department to recognize that a residence needs to have the authority to terminate a resident’s residency should the residence determine that the resident has care needs that cannot be met in the residence. Given the sometimes complex nature of geriatric care services, it is near impossible for a residence to list “every possible scenario” under which a residence believes a resident has a care need that cannot be met. The Department, in these regulations, have included proper consumer protections to ensure that the resident participates in the decision and has others participating at the resident’s request. Terms like Residences can terminate residencies “only” under these circumstances can create inordinate risks for the resident as to their basic health and welfare and cause the residence to breach what the residence considers its “duty of care” to the resident.

Suggested Language

(h)(3) If a residence determines that a resident’s functional level has advanced or declined so that the resident’s needs cannot be met in the residence.

Suggested Language

(c) (4) The Department [may] shall approve the exception request if the following conditions are met:

2800.229 (f):

This is a statutory requirement. Act 56 clearly indicates that the power to request an exception lies with the residence alone. To provide the consumer with the opportunity to request this exception, or even to allow the consumer to demand the residence to apply for the exception on the consumer’s behalf, exceeds the scope and authority of the statute. The paragraph must be stricken.

SPECIAL CARE UNITS

2800.231 (a) (1) (ii).

PALA acknowledges and agrees that residents should not be assigned into a special care unit unless all other options as a living alternative have been examined and the resident and the resident’s family has deemed the special care unit to be the “least restrictive alternative” for the resident. However, this draft regulation inappropriately imposes that requirement upon the provider rather than respecting the CHOICE of the resident as expressed by the resident’s legal representative or designated person. PALA suggests that this requirement be stricken in acknowledgement that consultation has been required with the resident’s family and designated person and there has been involvement of clinicians in the process as well as in consultation with the resident and family.

Suggested Language

2800.231. (a) (1) (ii) [Prior to admission other service options that may be available to a resident shall be considered.]

2800.231 (c) (1) (i).

The proposed regulation requires the residence to obtain a cognitive preadmission screening form to be completed by a physician or a geriatric assessment team “within 72 hours prior to admission to the unit.” This “72 hour window” is unrealistic and unnecessary. Again, PALA is disappointed that this proposed language is written in such a manner that providers are so absent integrity that they would unnecessarily place a resident in a secure unit so aggressively that the Department needs to ensure that the resident absolutely needs a secure unit up to within 72 hours of establishing residency in that unit. PALA accepts the need for a cognitive screening instrument, but suggests that

the screening instrument can be completed concurrently with the Medical Evaluation and on the same, realistic timeframe.

Suggested Language

2800.231 (c)(1)(i):A written cognitive preadmission screening completed in collaboration with a physician or a geriatric assessment team and documented on the Department’s cognitive preadmission screening form shall be completed for each resident within [72 hours] 60 days prior to admission to a special care unit.

2800.231 (f) (1).

The requirement that a resident residing in a special care unit be reassessed quarterly to ensure the continuing need for the special care unit is excessive. Residents living in special care units should be reassessed consistent with the assessment timeframes expressed by PALA earlier in this document. Residents should be reassessed when there is an OBSERVED change in health status and at least semi-annually.

Suggested Language

231. (f) (1) In addition to the requirements in 2800.225 (relating to additional assessments), residents of a special care unit for Alzheimer’s Disease or dementia shall also be assessed semi-annually for the continuing need for the special care unit.

2800.234. Resident Care.

2800.234 (d) (1).

As with 231 (f), quarterly support plan updates are excessive to what is required.

Suggested Language

234. (d) (1) The support plan for a resident of a special care unit for residents with Alzheimer’s Disease or dementia shall be reviewed, and if necessary, revised at least [quarterly] semi-annually and as the resident’s condition changes.

2800.235. Discharge.

The section name conveys institutional care settings and should be changed to “Termination of Residency”.

RESIDENT RECORDS

2800.251 (c) Resident Records.

The language contained in this paragraph presumes that all records will be paper records. PALA encourages that the Department write the regulation to include electronic records and electronic documentation of service delivery.

Suggested Language

251 (c) The residence shall use a standardized method, whether paper or electronic forms, to record information in the resident's record.

2800.251 (e).

PALA is concerned that this draft regulation requires the release of resident records to “family members” “upon request” who well may not have any legal right to those records.

Suggested Language

2800.251 (e): Resident records shall be made available to the resident and the resident's designated person during normal working hours. Resident records shall be made available upon request to the resident and family members, within the scope of applicable state and federal law.

2800.266 (e) Revocation or Renewal of Licenses.

PALA shares the Department's concern that effective enforcement is necessary in a regulatory environment. However, PALA also believes that the enforcement agency should have discretion in the penalties that it may implement with a provider. The language in this section unduly limits the Department's discretion and, accordingly, PALA encourages the Department to revise the language.

Suggested Language

266 (e): If, after three months, the Department does not issue a new license for a residence, the prior license is revoked under section 1086 of the Public Welfare Code (62P.S.1 1087)

- (1) The Department is authorized to issue a revocation or nonrenewal under this section [will be for a minimum of five years.].**
- (2) A residence, which has had a license revoked or not renewed under this section, will not be allowed to operate, staff or hold an interest in a residence which applies for a license for [5 years] a time to be determined by the Department after the revocation or nonrenewal.**

266 (f): If a residence has been found to have Class I violations on two or more separate occasions during a 2 year period without justification, the Department will have the option to revoke or refuse to renew the license of the residence.

**THE END OF PALA COMMENTS ON
PROPOSED ASSISTED LIVING
REGULATIONS DISTRIBUTED ON JUNE
24TH, 2009.**