Testimony of

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PANPHA

Timothy W. Coughlin, President and CEO
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Pennsylvania Assisted Living Association (PALA)

on

Proposed Assisted Living Regulation
Regulation ID #14-514 (#2712)

before the

House Aging and Older Adult Services Committee

in

Harrisburg, PA

September 18, 2008

Chairman Mundy, Chairman Hennessey and members of the Committee: We appreciate the opportunity to appear before you today to discuss the proposed Assisting Living Licensure Regulations required under Act 2007-56 published in the Pennsylvania Bulletin on August 9, 2008.

My name is Dr. Stuart Shapiro, and I am president and CEO of the Pennsylvania Health Care Association/Center for Assisted Living Management. PHCA is a statewide advocacy organization for the commonwealth's elderly and disabled residents and their care providers. With me today are Wm. Russell McDade, vice president at PANPHA, a statewide association representing nonprofit senior service providers, and Timothy W. Coughlin, president and CEO of LifeServices Management Corporation, representing the Pennsylvania Assisted Living Association (PALA) , the statewide association representing assisted living providers, personal care home providers, and the residents who call them home. I should note, too, that Mr. Coughlin is himself an owner and operator of five assisted living communities here in Pennsylvania and three in Ohio.

After more than a decade of discussion and debate, the Pennsylvania Legislature passed landmark Assisted Living Legislation in the summer of 2007. Act 56, signed by Governor Rendell on July 25, 2007, created the framework for a system of licensure and regulation that has the potential to provide consumers an important housing and services alternative along the continuum of long term living.

Russ and I were personally involved in discussions with many members of the legislature as this legislation was being developed, and we, on behalf of our members and PALA, want to thank Chairman Mundy, Chairman Hennessey, and Committee members, especially Katharine Watson and Mauree Gingrich, for their effort over the years. Likewise we want to thank Senators Vance and Erikson. Each of you, and your staffs, deserve credit for this landmark legislation.

As you recognize, PHCA, PANPHA, and PALA strongly and enthusiastically endorsed this Assisted Living Legislation.

Studies by AARP and others have clearly demonstrated that Pennsylvanians want this new option along the continuum of long-term care. In addition to providing a needed level of housing and services, assisted living also has the potential to

stretch the Commonwealth dollar further if care for lower acuity individuals can be safely and effectively delivered in an assisted living facility rather than in a nursing home.

Act 56 directed the Department of Public Welfare to adopt regulations establishing licensing standards as well as numerous other provisions. Our three associations were part of a short-term "working group" convened by DPW during which many important issues concerning these regulations were discussed among providers, consumers, advocates, and government agencies. Unfortunately, this endeavor, as designed, was of very limited duration and did not allow for consensus to be built by the represented constituencies around most of critical issues. Thus, significant, reality-based provider concerns were not addressed in the regulations as published.

Because our Associations, and our members, believe deeply in the value of assisted living, we collectively have been working tirelessly to see this program implemented in a manner that will encourage this sector to develop to serve a senior population which is projected to grow rapidly, and desires a wide variety of care and services in the future.

Nearly 70 percent of Pennsylvanians turning 65 this year eventually will require some form of long-term care. Right now, 2 million of our 12 million residents are age 65 or older. By 2020, more than 25 percent of our population, or some 3 million Pennsylvanians, will fall into that demographic. That is a 50 percent increase in a little more than a decade. This population data speaks to the need for a set of regulations that provides necessary and appropriate quality oversight of assisted living residences without raising the costs of operating an assisted living residence beyond the level that consumers can bear.

Despite the optimism created by Act 56, and the good intentions on the part of the Department of Public Welfare, we believe that the proposed regulations are likely to raise the cost of assisted living in Pennsylvania so greatly that they will suffocate development of assisted living and ensure that the potential for a vibrant assisted living sector will **not** become a reality in Pennsylvania.

In fact, we believe that the proposed regulations would result in:

1. Few high-quality personal care homes converting to assisted living.

2. Few, if any, new assisted living residences being built.

3. Few, if any, Medicaid-eligible individuals becoming residents in these facilities because the physical plant/space/staffing/licensing fee mandates in the proposed regulations will require charges to the Medicaid program far in excess of what the Commonwealth is likely to pay, or the federal government is likely to approve.

4. Many nursing-home-eligible individuals on Medicaid currently living in personal care homes will be required to shift to nursing homes when they need certain health-care services because of an inadequate supply (number) of assisted living facilities. This will impose unnecessary costs on the Medicaid program and frustrate the intent of Act 56.

5. An undesirable two-tiered system of assisted living may become a living reality in which only the wealthy will be served.

Each of our Association has prepared detailed comments on the proposed regulations, which we believe, in many cases, do not conform to the statute you wrote and passed, and, in certain instances, exceed what we believe was the legislative intent.

This morning, however, the three of us will provide comments on a limited number of overarching issues including:

- Space requirements for living units and other facility related issues.
- Staff and training requirements, including the responsibilities of administrators.
- Licensing fees.

- Dual licensure of personal care homes and assisted living facilities.
- Policies related to informed consent agreements, transfers and discharges, and excludable conditions.

Tim will review the space and staffing issues, Russ will then discuss licensure issues, and I will discuss informed consent agreements, transfers and discharges, and excludable conditions. Russ will then present a few concluding comments.

Tim Coughlin, President & CEO, Life Services Management Corp.

As to space requirements for resident living units, we certainly support the need for assisted living residences to offer each resident a comfortable, home-like, space that provides them the degree of privacy they desire and the independence to live their life in the manner they choose. Act 56 requires that each living unit contain a private bathroom, living and bedroom space, kitchen capacity, which may mean electrical outlets to have small appliances, closets, and adequate space for storage and a door with a lock. However, when that element of the act is translated into proposed regulation minimums of 250 square feet for new construction, excluding bathroom and closets, and 175 square feet for existing residences, we will have created what most service providers characterize to us as the single greatest barrier to convert to Pennsylvania assisted living licensure and the single greatest barrier to expand assisted living through new construction.

Part of DPW's stakeholders' process included the review of "best practice" activities across the country, remembering that most states in America are years ahead of the Commonwealth in creating, regulating, and expanding the assisted living industry. Consistent with that process, we have provided you an exhibit of a national map that reflects "best practice," minimum-square-footage licensure requirements of assisted living units on a state-by-state basis. One can readily see on this display that the most common, minimum-square-footage requirement for a living unit is 100 square feet or less.

Over 70% of the states have a minimum requirement of 100 square feet or less and 80% have a requirement of 150 square feet or less. If Pennsylvania establishes 250 square feet on new construction, as the minimum, we will have succeeded in becoming one of only two states in America with that high of a

requirement and we will have created an insurmountable barrier to new construction rather than an attractive opportunity to stimulate growth in assisted living supply.

Our company's construction division, for example, is currently constructing our 68-living-unit prototype today in Ohio. They ran a cost estimate on expanding our living unit models to the Pennsylvania proposed minimums, and it added $1.2 million to our current construction costs of $4.2 million. That action alone would push our company's prices beyond what we believe middle-income older people view themselves as able to afford; we would not build in a state requiring that minimum, and PALA believes most other assisted living providers would decide the same.

Similarly, our Association's 300 members, many anxious to be more appropriately licensed as assisted living providers, tell us that their existing stock will not meet the 175-square-foot minimum requirement, and this includes providers who are nationally recognized in the industry.

The assisted living industry in America offers consumers different choices in the types of residential settings available so that those consumers can have choices about what's best for their quality of life and what's affordable to them. We encourage Pennsylvania to follow the "best practice" standard on this issue by establishing 150 square feet as the minimum for new construction and 125 square feet as the minimum for existing assisted living providers currently licensed as personal care homes. If we establish those requirements, we also will have placed Pennsylvania in the top tier, nationally, as requiring the most living space possible, yet still affordable for all.

There are a number of other more modest, but important, elements to physical requirements in the draft regulations, but, for the sake of time, we have communicated those in our formal comments on the regulations, and we would refer you to them for consideration.

As to staff and training requirements, including the qualifications and responsibilities of administrators, we direct our comments to major obstacles within sections 2800.51 through 2800.69, entitled "Staffing." All of us certainly want to ensure that administrators and direct-care staff are available and

appropriately trained in providing services and care to our residents, and many of the qualification and training requirements proposed properly contribute to that objective.

While we address compliance to that standard, though, we must remember, too, that Act 56 intends us to create the capability that residences are duly licensed as both assisted living residences and personal car homes. Finally, we need to ensure that, while the regulations provide for the appropriate staffing and expertise to provide services and care, so must the regulations consider the need to keep requirements such that the assisted living residence remains as affordable as possible to as many consumers as possible, including Pennsylvania as an eventual purchaser of assisted living services under a Medicaid waiver program.

With those objectives in mind, it is imperative that existing licensed personal care home administrators, direct care staff, and medication administration aides in the existing licensed personal care homes be grandfathered into the assisted living regulations. The dedicated care professionals, currently in these positions throughout the Commonwealth, are some of the best trained and most experienced personnel available to an assisted living industry. Why would we leave them out, particularly when so many of them have advocated for so long for an assisted living option? As a practical matter as well, the responsibilities of an assisted living administrator and its direct care staff are generally the same as a personal care home administrator and personal care home direct-care staff. And, if one of our objectives is to create dual licensing capability, this grandfathering action needs to be taken.

Secondly, the qualification requirements for an administrator, from this point forward, need to recognize capable managers who may not have secondary education credentials, yet have significant operating experience in the service and care of people. Next door in Ohio, for example, where a thriving assisted living industry exists, the qualifications for administrators include post secondary education requirements "or" a minimum of hours of direct operating experience of a senior housing, senior care, or health-care facility.

Finally, the requirement that the administrator, or a designee, with the exact same training as the administrator, be present in the assisted living residence, 24 hours per day, seven days a week is simply unreasonable. The standards for

administrator presence and that of the designee, in the absence of the administrator, that currently exist in the Ch. 2600 regulations, have worked well in personal care homes and need to be replicated here. They effectively work, they are reasonable, and they avoid the addition of unnecessary administrative costs layered into the eventual pricing of assisted living residence services.

While there are other more modest, yet important, issues in this area, for the sake of time, we have communicated those in our formal comments on the regulations, and we would refer others to them for consideration. I thank you for your interest.

Russ McDaid, Vice President/Public Policy, PANPHA

When discussing the proposed regulations with our membership, there are two issues directly related to the licensure of Assisted Living Residences which are always raised. The licensure fee structure proposed in Sec. 2800.11 (c) is always among the first issues raised. The Department's proposal of a $500 licensure fee along with an additional $105 assessment per bed will place a significant burden on providers who may choose to pursue licensure as Assisted Living Residences. During our discussions as Act 56 was being developed and as members of the DPW-convened 'working group' referenced earlier, provider representatives acknowledged that the fee structure currently listed in Ch. 2600 is "dated." As many of you know, it was based on licensure costs that may have been appropriate roughly 20 years ago when the personal care licensure act was passed, but bear little resemblance to the structure today.

At the time, we noted our willingness to discuss reasonable updates to this fee schedule. We do not believe that there is anything *reasonable* about the fees the Department has proposed in this regulation. Based on our research, this licensure fee schedule, which would result in a 100-bed residence paying $11,000 for licensure on an annual basis, would make our licensure fees among the most expensive in the nation. Pennsylvania would be more than twice as expensive as Florida (with a licensure fee of $5,935.00 for a 100-bed facility), and would be five times the cost of licensure in Illinois, Ohio, Texas, and Virginia combined (Illinois being the most expensive of that group at $800.00 for a 100-bed facility). We have provided the Committee members with a chart illustrating the most recently

available data on licensure fees implemented for assisted living in other states for your reference.

We strongly support quality assurance through licensure. The licensure of facilities caring for vulnerable populations is a core function of government, and as such, an activity that should be funded in large part by government dollars. The act acknowledges as much, stating that ". . . Fees received by the Department shall augment the Department's funding for quality assurance and shall be used for the purposes of this article." These fees, which essentially aim to recoup the full cost of regulating assisted living residences in the Commonwealth, go well beyond "augmenting" the costs of licensure and are excessive. Perhaps most importantly, they will either take vital dollars away from resident care or be passed on to privately paying residents. This, of course, forces even those residents perceived as "well off" to spend down into eligibility for other government-funded programs more quickly, increasing the costs to the state for all means tested programs for the population we serve. Neither of these inevitable realities is consistent with the goals of Act 56 related to providing access to assisted living in Pennsylvania and assuring quality care.

We urge that these fees be lowered to a level more consistent with other states when the regulation is published as final. Our proposal for what we believe to be a more appropriate licensure fee structure can be found in our detailed comments.

Another key issue raised by our collective memberships is the Department's complete disregard in the proposed regulations for the potential to have "dually licensed" facilities — meaning, facilities which have some units licensed as personal care and some licensed as assisted living under one roof. We believe that Act 56 clearly and definitively addresses the issue of dual licensure. Section 1021(C) of the Act outlines that that dual licensure was expected, noting that ". . . *all inspections of residences dually licensed as Assisted Living Residences and Personal Care Homes shall be conducted by a team of surveyors comprised of both personal care home and assisted living residence surveyors.*"

We acknowledge that there were a number of areas related to dual licensure which the act left open to interpretation by the Department. Would facilities have the flexibility to designate individual rooms or "suites" of rooms which do

not meet the final regulatory requirements for assisted living as personal care within an assisted living residence? If unwilling to license individual rooms or designated "suites," how would the Department provide for the licensure of a wing as assisted living under the same roof as a personal care home or nursing facility? Both the language included in the act and discussions held as the final language of Act 56 was being negotiated lead us to believe that it was never the intent to require licensure as an assisted living residence to be an "all or nothing" proposition. However, the Department's regulations require precisely that. Either ***EACH AND EVERY*** unit within a location meets the physical plant requirement for licensure as an assisted living residence, or the location may not seek licensure.

In a recent survey of our membership, we found that roughly 40% of our member facilities have some units which would not meet the Department's current square footage requirements addressed by Mr. Coughlin in his comments. Without the ability to "dually license" those locations, many providers who have the capacity to provide access to quality assisted living will be forced to remain licensed personal care homes. This will deny their current and future residents access to many of the benefits that assisted living residences can offer, including the chance to "age in place" until their care needs exceed those that can be provided by an assisted living residence.

Our detailed comments to the Department recommend that the regulations permit providers to license their facilities by door, allowing facilities that have suites or pockets of rooms that will not meet all of the physical plant requirements for assisted living units to license those as personal care rooms. However, our goal here today is not to debate the details — which will be concerning to some. **Rather, we want to note how critical it is that the Department allow some type of reasonable dual licensure of facilities in their final regulation** as we believe was called for in the Act.

Doing so will place no additional strain on the state beyond coordination of the survey dates, as the act dictates that a dually licensed facility shall have its personal care portion surveyed Personal Care Home Surveyors from the Office of Adult Residential Licensure, and its assisted living units surveyed by Assisted Living Residence Surveyors, who we now know will be from the Office of Long-Term Living. The bulk of the responsibility for a successful dual licensure

framework will be with the provider, to coordinate scheduling, to track services and staff, and to comply with the differentiation of the regulations.

We strongly urge the department to follow the act as passed and develop a framework for dual licensure. Failure to do so not only ignores a key statutory provision, but also jeopardizes consumer access to a significant number of facilities throughout the Commonwealth with the capacity to provide quality assisted living care and services.

Stuart Shapiro, M.D., President & CEO, PHCA

I will conclude our points by discussing important and key provisions including informed consent agreements, transfer and discharge policies, and the exceptions process as it relates to excludable conditions. I have been given the assignment among the three of us to discuss these issues, in part, because my professional background allows me to bring a practical clinical perspective to the discussion.

I have always believed that consumer or patient input is an essential component of the doctor/patient relationship. Consumers have the right to make decisions on what treatment they will or will not receive; likewise, health-care providers who deliver care at assisted living residences, as well as the assisted living residence, must also have the ability to determine what they will or will not provide.

The proposed requirements in the department's regulation for each of these sections distorts the statutory requirements of Act 56, which were developed after thoughtful and lengthy discussions and will likely discourage providers from participating in the assisted living program.

The proposed regulations for informed consent, transfer and discharge, and dealing with the exceptions process relating to excludable conditions are cumbersome to implement and, as written, make it difficult for an assisted living facility administrator to effectively manage his or her facility. The proposed regulations severely limit health-care providers, and the facility, from providing clinical services based on their best professional judgment, which likewise may limit their ability to safely and effectively care for the resident While consumer/resident input is necessary and appropriate, final clinical judgment

must be in the hands of health-care professionals. In spite of provisions in the proposed regulation to the contrary, the statute supports this concept.

The proposed regulation imposes the extreme pre-condition on a residence to make a determination that residents or staff are at "imminent risk of substantial harm" before it may initiate actions to address a "dangerous" situation caused by a resident. This standard, which is similar to that used in involuntary commitments for mental health treatment, is so inflexible that it does not allow providers to ensure the personal security and safety of other residents and staff, nor appropriately manage their liability.

While a high threshold properly exists before someone may be subject to involuntary treatment, such a standard is assuredly inappropriate in the context of a residence's having to react promptly and effectively to a "dangerous" situation caused by a resident in terms of either an informed consent agreement or a transfer and discharge.

Our proposed revision provides the residence, which is ultimately responsible and potentially liable for actions occurring in the facility, the operational flexibility to address the presenting problem.

The proposed regulations reversed the clear statutory intent of the legislation as it relates to releasing the residence, "from liability for adverse outcomes resulting from actions consistent with the terms of the informed consent agreement." We have submitted language which reinstates the language and intent of the statute.

In terms of transfer and discharge, the proposed requirements exceed the statutory requirements of Act 56 and similarly will discourage potential entrants from participating in the assisted living program.

The proposed regulations do not include a process for transfer in an emergent and dangerous situation. We have suggested such a provision, and also removed the burdensome regulatory requirements on a residence before a resident may be transferred or discharge. We believe we have simplified the overall process.

In terms of the section relating to exceptions and excludable conditions, we have

proposed revisions that establish a specific process which further ensures the protection of the health and welfare of the resident. This is achieved, in part, by requiring that the process for reviewing and determining exception requests by the Department is made expeditiously by qualified practitioners with experience specific to the population that would reside in assisted living facilities.

As you will see by reviewing each of our written submissions to the Department, we have submitted proposed revisions that outline processes that are equitable for both the resident and the residence and support the belief that resident input is necessary and appropriate in virtually all processes. We believe that we have provided various frameworks that successfully balance the rights of residents, the residence and the residence's obligations to its other residents.

Russ McDaid, Vice President/Public Policy, PANPHA

In closing, we would like to thank the Chairmen and distinguished members of the Committee and legislature for the opportunity to comment. As we hope that you have heard from our collective concerns, there are numerous provisions in the Department's proposed regulation that threaten the very access to quality assisted living that the act was intended to foster. When the Department convened the "working group" on which we sat one year ago, Secretary Richman noted that it was the Department's goal to have these regulations approved and ready for implementation no later than November 30, 2008. **The Department's focus since that initial meeting has been about delivering a final regulation to the IRRC by a "date certain" rather than *making certain* that they have fully analyzed the true impact that this regulation will have on consumers and providers alike.**

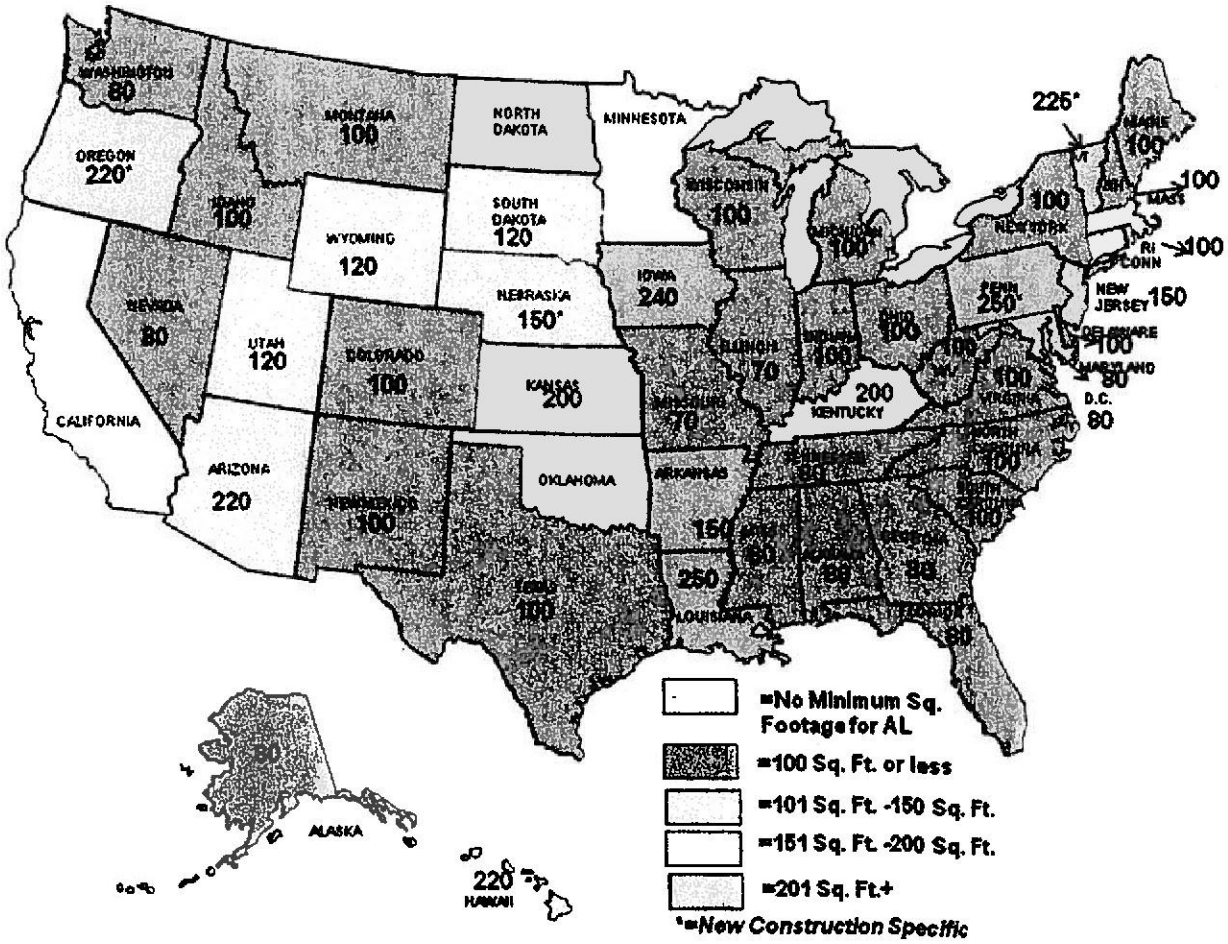
Given the significant interest in these regulations, the fact that they are essentially creating a new level of care, and the extent of comments provided on the many sides of the issue, the timeframe proposed in the Department's recent briefing of legislative staff gives us cause for concern. We do not believe it possible that the Department can complete a thorough, thoughtful review of comments received from interested stakeholders, the IRRC, and the standing committees in the legislature to issue its final regulations by October 20, as the DPW briefing document notes.

This does nothing to change our belief that the Department is more interested in meeting their self-imposed November 30 deadline rather than engaging in a meaningful dialogue on the important issues in this regulation.

This issue is far too important, and the stakes are far too high, to rush this through without a more thorough review of these regulations to ensure that they will not damage access to assisted living in Pennsylvania. We urge your support that the department avoids the urge to merely "get these regulations done," and work with all impacted stakeholders to "get them done right."

Thank you for holding this important hearing. We look forward to your questions and a continued dialogue committed to the development of regulations that will lead to a strong assisted living sector in Pennsylvania.

APPENDIX I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SOUTH DAKOTA
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MISSOURI
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KENTUCKY
CALIFORNIA
ARIZONA
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OKLAHOMA
ARKANSAS
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LOUISIANA
100
ALASKA
80
220
HAWAII
=No Minimum Sq. Footage for AL
=100 Sq. Ft. or less
=101 Sq. Ft. -150 Sq. Ft.
=151 Sq. Ft. -200 Sq. Ft.
=201 Sq. Ft.+
*=New Construction Specific

APPENDIX II

Likely Charges in 2008 Dollars for Newly Constructed Assisted Living Facilities at 150, 200, 250 Square Feet

Respondents	150 Sq. Ft		200 Sq. Ft		250 Sq. Ft	
	Monthly	Daily	Monthly	Daily	Monthly	Daily
A	$3,300	$100	$3,700	$123	$4,400	$146
B	$3,480	$116	$3,840	$128	$4,200	$140
C	$3,150	$105	$3,960	$132	$4,290	$143
D	$4,678	$156	$5,123	$171	$5,568	$186
Average A-D in 2008 dollars	$3,652	$119	$4,156	$139	$4,615	$154
E (in Philadelphia)	$5,250	$175	$5,750	$191	$6,250	$208

Projected Charges in 2010 for Newly Constructed Assisted Living Facilities at 150, 200, 250 Square Feet using 5% Annual Inflation

Respondents	150 Sq. Ft		200 Sq. Ft		250 Sq. Ft	
	Monthly	Daily	Monthly	Daily	Monthly	Daily
Projected Average Charges in 2010 (A-D) at 5% Annual Increase	$4,026	$131	$4,582	$153	$5,087	$170
Projected Charges in Philadelphia (E) for 2010 at 5% Annual Increase	$5,788	$193	$6,339	$211	$6,891	$229

panpha
an association of nonprofit senior services

Attachment A

A 100 Bed facility would pay the following in each state:

Arizona-- $1,350/yr

California-- $1,314/yr

Delaware-- $550/yr

Florida-- $5,935/yr

Illinois-- $800/yr

Indiana-- $700/yr

Massachusetts--$6,350/yr

Michigan-- $627/yr

Minnesota-- $625/yr

New Jersey-- $3,000/yr

New York-- $500+$50 a resident over 400% of poverty, with a maximum cap of $5,000

North Carolina--$1,600/yr

Ohio-- $170/yr

Oregon-- $160/yr w/ Alz Unit

Texas-- $600 for a 2 year license

Virginia-- $140/yr

Washington-- $7,900/yr.

From PANPHA Comment to DPW REG 14-514 ON ASSISTED LIVING
9/15/08

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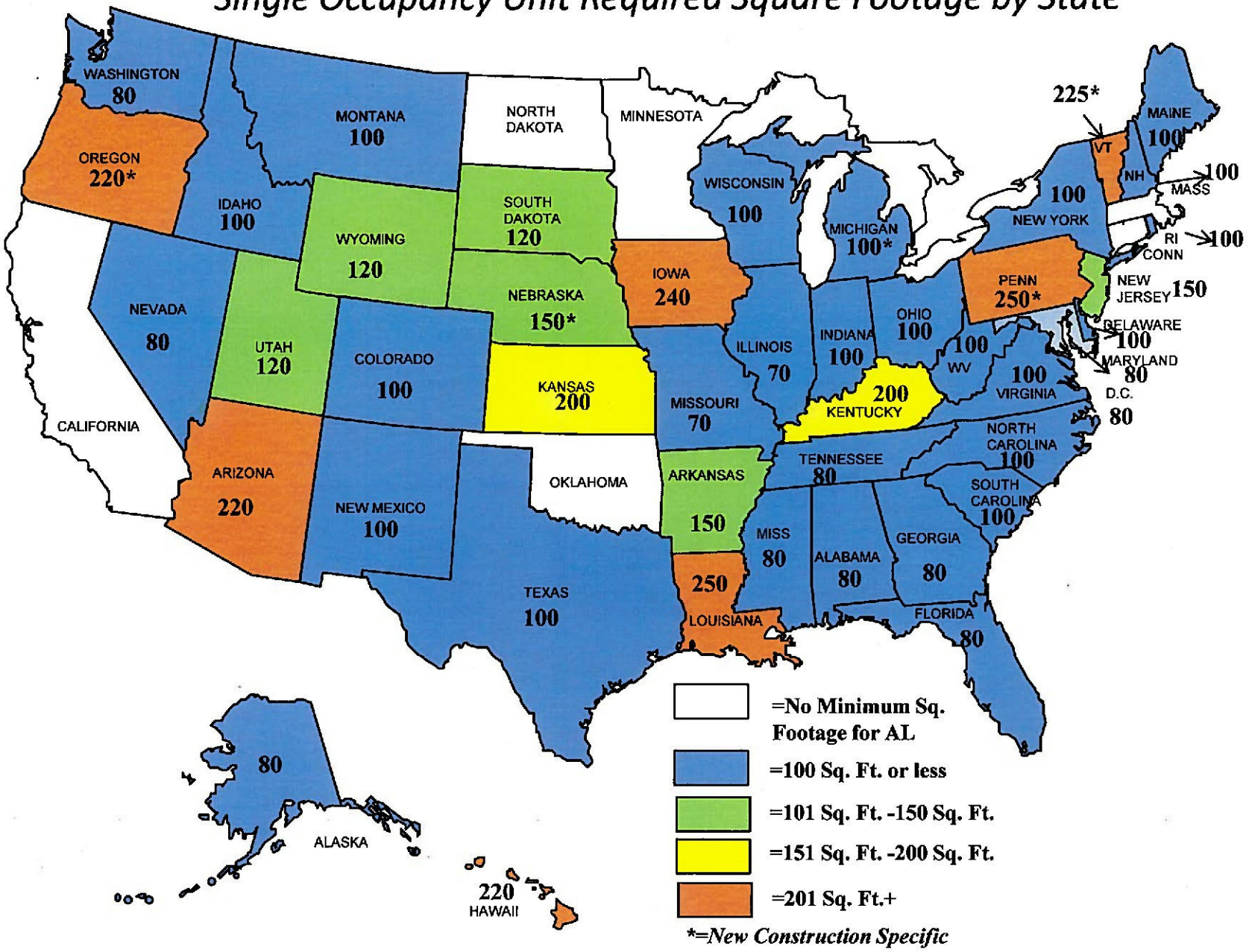
ASSISTED LIVING LICENSURE

Single Occupancy Unit Required Square Footage by State



Source: Assisted Living and CCRC State Regulatory Handbook: 2008. American Senior Housing Assn. & AAHSA and Review of State Regulations