

PROPOSED RULEMAKING

DEPARTMENT OF HEALTH

[28 PA. CODE CH. 4]

Head Injury Program

The Department of Health (Department) proposes to amend Part I (relating to general health) by adding Chapter 4 (relating to head injury program). Proposed Chapter 4 would set forth the rules and regulations governing the administration of the Head Injury Program (HIP), and describe the types of services available under the program. The regulations being proposed would also define the eligibility criteria that must be met by applicants for services and the scope of services available to eligible applicants. In addition, the proposed regulations would provide for an appeal mechanism which may be utilized by an applicant or client of HIP. The proposed chapter is to read as set forth in Annex A.

A. Purpose of the Proposed Regulations

1. Statutory Background

In 1985, the General Assembly passed legislation which created a Statewide emergency medical services system. This legislation known as the Emergency Medical Services Act (act) (35 P. S. §§ 6921—6938), provided for an Emergency Medical Services Operating Fund to be funded by a \$10 fine to be levied on all moving traffic violations. The act further directed that 25% of the fund be allocated to a Catastrophic Medical and Rehabilitation Fund (Fund) for victims of trauma injuries to purchase medical, rehabilitative and attendant care services when all alternative financial resources were exhausted. The Department developed a program for victims of head trauma based on this Legislative directive, and labeled the program the "Head Injury Program."

In 1988, the General Assembly amended the act by the act of October 21, 1988 (P. L. 1055, No. 121). This amendment modified the type of traffic violations for which a \$10 fine would be assessed and authorized the Department to prioritize, by regulation, the distribution of funds by classification of traumatic injury.

2. Interim Guidelines

Following the enactment of the act, the Department recognized that the size of the Fund would be insufficient to meet the needs of all victims of trauma in this Commonwealth. The Department, persuaded by Legislative debate, traumatic brain injury victims and advocacy organizations, decided to restrict access to the Fund solely to victims of traumatic head injury. It used the Fund to pay only for services which were directly related to the needs of persons due to traumatic head injury. On March 5, 1988, the Department formally announced how it intended to administer the Fund by distributing interim policies it had developed.

The interim policies announced that the Department intended to administer the Fund to pay for services provided to victims of traumatic head injury, and described the manner in which it intended HIP to operate. These policies, however, were not intended to preclude development of a program through further analysis based on actual experiences the Department and agencies in other states encountered in allocating limited resources to serve people who have sustained traumatic injuries. To this end, the Department began plans to replace the interim policies with program regulations.

The Department appointed a Citizens Advisory Committee (Committee) to review the interim policies and advise the Department on the development of program regulations. This Committee was composed of consumers of services associated with traumatic injuries, and representatives from the rehabilitation field. The proposed regulations are a product of the Committee's recommendations to the Department, the Department's experience in administering the Fund and the Department's assessment of what program services best serve the Legislative intent consistent with current fiscal constraints.

B. Summary of the Proposed Regulations

The proposed regulations adopt some of the limitations and restrictions that had been incorporated in the interim guidelines, such as restricting eligibility to individuals who sustained traumatic brain injuries on or after July 3, 1985, the effective date of the act. A brief description of the proposals follows.

Section 4.1. Scope and purpose.

This proposed section would describe the chapter's scope and purpose.

Section 4.2. Definitions.

This proposed section would define key phrases that would appear in the regulations, such as "alternative financial resources," "exhausted" and "traumatic brain injury."

Section 4.3. HIP services and objectives.

This proposed section, along with § 4.1 (relating to scope and purpose), would broadly explain the manner in which HIP is to be run and it would clarify how and for whom the program is to operate.

Section 4.4. Eligibility for services.

This proposed section would set forth eligibility criteria for applicants to HIP, as well as criteria for specific HIP services. HIP eligibility criteria for an applicant would be as follows: (1) sustained a traumatic brain injury on or after July 3, 1985; (2) have been a resident in this Commonwealth for 90 days at the time of the injury and at the time of application to HIP and have the intent to maintain a permanent home in this Commonwealth for the indefinite future; (3) have exhausted all alternative financial resources to pay for services covered by HIP; and (4) have reached 21 years of age.

It is proposed that the Fund be used to pay only for services to individuals who are 21 years of age and older, as individuals under 21 years of age are currently eligible to receive coverage for appropriate services from Medical Assistance and the Department of Education.

In addition to these criteria, specific conditions and impairments are listed in the proposed regulations which would exclude an otherwise-eligible applicant because those conditions would impede an individual's participation in or benefiting from services HIP provides. The proposed regulations provide that the Department would deem a client ineligible if that client lacks the potential to benefit and to live more independently as a result of the services sought. This determination would be based upon the recommendation of the client's case manager and other neuropsychological evaluations. The Department has exercised its discretion under section 14(e) of the act (35 P. S. § 6934) by developing a program which attempts to prioritize funds for those persons who have the ability

to progress in rehabilitation. It is the Department's position that the limited moneys available to it through the Fund should be used to rehabilitate as many individuals as possible given its limited resources, rather than to maintain a static number of persons with traumatic head injuries past the point where progress in rehabilitation can be made by those persons.

This proposed section would also exclude from HIP an applicant who fails to complete an assignment agreement with the Department, assigning the Department rights of future or expected monetary awards, accruing to the applicant due to the applicant's traumatic brain injury, to cover the cost of HIP services provided. This language would permit the Department to recoup any improperly spent funds, and to obtain some reimbursement for funds spent on clients who might have initially had no alternative resources, but who have become eligible for those resources during the course of services. Recouping these moneys will enable the Department to stretch further the moneys available to it for this program and to provide services to more eligible persons.

Section 4.5. Payment for services.

This proposed section would state that the Department will give written authorization to both the client and provider as to the specific HIP services for which a client is eligible and the maximum funding available to the client for those services. This proposed section would also provide a list of conditions which may trigger termination from HIP. For instance, HIP will pay for services until a client: (1) exhausts the maximum funds available to the client during a benefit year; (2) reaches the maximum duration for HIP services; (3) gains access to alternative financial resources; or (4) undergoes a change affecting the client's clinical condition which affects eligibility or execution of a service plan. Again, the provisions will enable the Department to prioritize need, and to provide services to more individuals.

This proposed section would also make clear that the Department has the right to choose subrogation to obtain payments owed a client. This ability will enable the Department to utilize existing funds for the benefit of more clients.

Section 4.6. Duration of funding.

This proposed section would set forth strict time limitations for HIP funding. No client would receive more than 1 benefit year of rehabilitation. A benefit year would be defined as 12 consecutive months beginning on the date that HIP services are initially purchased for the client. Case management services would be limited to 18 consecutive months. These durational limits would represent a significant departure from past HIP practices. The 1988 policies under which HIP was instituted had no durational limits. Subsequent policies made known to applicants, clients and providers included durational limits of 2 years for rehabilitation services and a maximum of 3 years for case management (also referred to as case coordination). The Department, however, believes that the limitations in these proposed regulations are appropriate based upon the numbers of persons potentially eligible for HIP services during a time when those services are of maximum benefit. The Department also believes that these limitations will protect the fiscal integrity of the Fund and HIP's ability to provide services for as many eligible individuals as possible, during the window of opportunity, for maximum benefit to those individuals.

Data pertaining to treatment of victims of head trauma reflect that the average client completes a postacute

traumatic brain injury rehabilitation program in 1 to 3 years. Thus, the 1-year funding limit is established to coincide with the needs of both existing and new clients while operating within budgetary limitations. This time restriction should ensure that moneys will be available from the Fund so new victims of head trauma will be afforded an opportunity to receive services from which they may benefit.

The proposed regulations also provide that the Department will give prior notification to all clients of HIP of the date that their funding for HIP services will terminate.

Section 4.7. Services eligible for payment.

This proposed section would describe the specific services covered by the categories of services in § 4.3 (relating to HIP services and objectives) and as those categories are defined in § 4.2 (relating to definitions). This proposed section would also emphasize case management as an important service to be provided immediately upon a determination of eligibility for HIP. Case management requirements would emphasize, but not be limited to, the development of a rehabilitation service plan for each eligible client.

Rehabilitation services are designed to be part of the continuum of treatment with the goal of transitioning an individual to independent living in the individual's home or community; transitioning an individual to meaningful activity or vocational training; and transitioning an individual to appropriate living and service arrangements once the client has met the goals established in the rehabilitation service plan.

The case manager is required to have certain qualifications under this proposed section: a minimum of 2 years of experience in traumatic head injury case management; at least a bachelor's degree in nursing, education, social work, psychology or a rehabilitation field; and a knowledge of services and facilities available in the geographic area of practice.

Section 4.8. Rehabilitation service plan.

This proposed section would describe the development of a rehabilitation service plan required for each client, and prescribe the elements which must be part of that plan. A rehabilitation service plan is a document that identifies the specific goals for the client's rehabilitation and the expected time frames for the achievement of each goal. The rehabilitation service plan is of vital importance in charting the client's progress in meeting goals.

Section 4.9. Peer review.

This proposed section would describe the establishment of a peer review committee to conduct a review of services and rehabilitation plans for HIP clients. The members of the HIP Peer Review Committee would be appointed to serve 3-year terms. Members could not serve consecutive terms. The HIP Peer Review Committee would review cases on a quarterly basis and, within 30 days of its review, provide recommendations for all ongoing services. Members of the Committee who would have a conflict of interest if they would participate in the review of a particular case would not be permitted to participate in that review. The Department would notify the Committee of all actions taken on the recommendations of the Committee.

Section 4.10. Appeal procedures.

This proposed section would contain a two-tiered appeal mechanism which protects the interests of both applicants

and clients. The first level would consist of an internal administrative review of certain HIP office decisions. The second would involve a formal hearing procedure for appeals of administrative reviews.

An applicant or client may first appeal HIP office decisions relating to eligibility for HIP services by notifying the Division of Special Health Care Programs (Division) that the client is seeking an appeal with the Department. The Division would conduct the administrative review, and a review of the averments and supporting documentation provided by the applicant or client to refute the determination.

The Division's decision would constitute HIP's final determination, but not necessarily the final decision of the Department. An individual could appeal the Division's final determination to the agency head by seeking a formal administrative hearing. The hearing would be conducted in accordance with 1 Pa. Code Chapters 33 and 35 (relating to documentary filings; and formal proceedings), except where those rules are inconsistent with the regulations. This second mechanism would be available only for appeals of decisions pertaining to eligibility for services.

If a hearing is sought, the agency head would designate an impartial hearing officer to preside at a hearing and to render a decision based exclusively upon the hearing record. The applicant or client or his representative would be required to appear at the hearing unless the hearing officer finds he has good cause not to attend. Failure to do so would result in dismissal of the appeal by the Department with prejudice. Once a decision is made, a participant in the hearing could file a brief with the agency head, in which the participant takes exception to the hearing officer's findings or conclusions. If no brief on exceptions is filed within the time allowed, the hearing officer's decision would become final. When briefs are filed, the agency head would be required to consider the brief on exceptions, review the record along with the hearing officer's decision, and accept or reject that decision. The agency head would be required to issue an adjudication and order.

The Department believes that this procedure offers applicants and clients ample and appropriate opportunities to challenge HIP decisions in which the individuals may have a protected interest. At the same time, this process will not unduly hinder the functioning of HIP.

C. Affected Persons

The proposed regulations will affect individuals who are enrolled or seek enrollment in HIP who: (1) sustained a traumatic brain injury on or after July 3, 1985; (2) have been a resident in this Commonwealth for 90 days (both at the time of the injury and the time of application to HIP), and have the intent to maintain a permanent home in this Commonwealth for the indefinite future; (3) have exhausted all alternative financial resources to pay for services covered by HIP; and (4) have reached the age of 21. They will also affect service providers caring for the individuals.

D. Fiscal Impact

1. Commonwealth

Implementation of the proposed regulations will entail administrative costs associated with contract development, data analysis, fiscal monitoring and other program activities. HIP does currently have similar administrative costs from current program operations. These proposed regulations are intended to channel the bulk of

nonadministrative funding into services for clients who are able to make progress as a result of those services.

2. Political Subdivisions.

There should be no cost to political subdivisions.

3. Private Sector:

HIP requires that providers of residential rehabilitation services are accredited by an appropriate National accrediting body as approved by the Department. Providers of outpatient, day or home and community-based services must be accredited by an appropriate National accrediting body as approved by the Department.

4. General Public

That portion of the general public suffering from traumatic head injuries, and their families, will be affected by the adoption of these proposed regulations. The restructuring of priorities under these proposed regulations will undoubtedly remove funds from some clients currently receiving moneys but who are not making rehabilitative progress with services provided with those moneys. These individuals will be required to find other funding sources for maintenance. The limited funds available for HIP necessitate some realignment of funding, and section 14(e) of the act provides the Department with the discretion to make that realignment.

E. Paperwork Requirements

The Department will require providers to submit periodic patient status reports.

Persons seeking to apply to HIP for themselves or others will be required to complete an application and to provide verifying documentation.

F. Effectiveness/Sunset Date

The proposed regulations will become effective upon publication of final-form regulations in the *Pennsylvania Bulletin*. No sunset date has been assigned. The regulations will be evaluated on an ongoing basis by the Department.

G. Statutory Authority

Under section 14(e) of the act, the Department is expressly authorized to promulgate regulations prioritizing distribution of moneys in the Fund by classification of traumatic injury.

H. Regulatory Review

Under section 5(a) of the Regulatory Review Act (71 P. S. § 745.5(a), on April 27, 1999, the Department submitted a copy of these proposed regulations, to the Independent Regulatory Review Commission (IRRC) and to the Chairpersons of the House Committee on Health and Human Services and the Senate Committee on Public Health and Welfare. In addition to submitting the proposed regulations, the Department has provided IRRC and the Committees with a copy of a detailed Regulatory Analysis Form prepared by the Department in compliance with Executive Order 1996-1, "Regulatory Review and Promulgation." A copy of this material is available to the public upon request.

If IRRC has objections to any portion of the proposed regulations, it will notify the Department by July 8, 1999. The notification shall specify the regulatory review criteria which have not been met by that portion. The Regulatory Review Act specifies detailed procedures for review prior to final publication of the regulations, by the Department, the General Assembly and the Governor of objections raised.

I. Contact Person

Interested persons are invited to submit written comments, suggestions or objections regarding the proposed regulations to Elaine M. Terrell, M.P.H., Director, Head Injury Program, Division of Special Health Care Programs, Room 724, Health and Welfare Building, Harrisburg, PA 17120, (717) 772-4959, within 30 days after publication of this proposed rulemaking in the *Pennsylvania Bulletin*. Persons with a disability who wish to submit comments, suggestions or objections regarding the proposed regulations may do so by using V/TT (717) 783-6514 for speech and/or hearing impaired persons or the Pennsylvania AT&T Relay Service at (800) 654-5984 [TT]. Persons who require an alternative format of this document may contact Elaine Terrell so that necessary arrangements may be made.

ROBERT S. ZIMMERMAN, Jr.,
Acting Secretary

Fiscal Note: 10-129. (1) Emergency Medical Operating Services Fund; (2) Implementing Year 1998-99 is \$34,000; (3) 1st Succeeding Year 1999-00 is Unknown; 2nd Succeeding Year 2000-01 is Unknown; 3rd Succeeding Year 2001-02 is Unknown; 4th Succeeding Year 2002-03 is Unknown; 5th Succeeding Year 2003-04 is Unknown; (4) 1997-98 \$4.000 million; 1996-97 \$3.364 million; 1995-96 \$4.197 million; (7) Catastrophic Medical and Rehabilitation; (8) recommends adoption. Sufficient funds are available in this program's budget to cover the increased administrative cost of these regulations. Future year costs are unknown because they are dependent on the number of appeals that come before the Department.

Annex A

TITLE 28. HEALTH AND SAFETY

PART I. GENERAL HEALTH

CHAPTER 4. HEAD INJURY PROGRAM

Sec.	
4.1.	Scope and purpose.
4.2.	Definitions.
4.3.	HIP services and objectives.
4.4.	Eligibility for services.
4.5.	Payment for services.
4.6.	Duration of funding.
4.7.	Services eligible for payment.
4.8.	Rehabilitation service plan.
4.9.	Peer review.
4.10.	Appeal procedures.

§ 4.1. Scope and purpose.

This chapter establishes standards for the Department to administer the Fund to provide rehabilitation services, facilitated through case management, to persons who incur a traumatic brain injury.

§ 4.2. Definitions.

The following words and terms, when used in this chapter, have the following meanings, unless the context clearly indicates otherwise:

Agency head—The Secretary or a deputy secretary designated by the Secretary.

Alternative financial resources—

(i) Income (including income from assets and public benefits).

(ii) Court awards and insurance settlements.

(iii) Funding from other State or Federal programs including Medicaid, Medicare, Social Security Disability

Insurance (Title II), Supplemental Security Income (Title XVI), veterans' benefits and workers' compensation insurance.

(iv) Other funds or services which are available to the applicant or client by virtue of experiencing a traumatic brain injury.

Applicant—An individual for whom an application for enrollment in HIP is submitted to the Department.

Case management—The planning, coordination and securing of services determined by the Department to be necessary to assist the client in obtaining required services.

Case manager—The individual approved and assigned by HIP to provide case management for a client.

Client—An individual enrolled in HIP.

Day services—Nonresidential services intended to improve the cognitive, behavioral or functional abilities of the client through therapeutic intervention and supervised activities which are provided at a facility on an outpatient basis.

Department—The Department of Health of the Commonwealth.

Division—The organizational unit, within the Department, having responsibility for the administration of the HIP.

Eligibility—Determination by the Department that the applicant or client may receive services.

Exhausted—The point at which alternative financial resources for a HIP funded service required by an applicant or a client have been applied for and been denied or fully utilized.

Fund—The Catastrophic Medical and Rehabilitation Fund.

HIP—Head Injury Program—The traumatic brain injury program of the Department.

HIP Peer Review Committee—A committee, composed of professionals and organizations offering rehabilitation services in this Commonwealth to persons with traumatic brain injury, whose members are appointed by the Department to review rehabilitation plans and services offered to clients and to recommend actions to improve services.

HIP services—Rehabilitation services, facilitated through case management, for which the Department authorizes payment through HIP.

Home facilitation—A formal rehabilitation program which provides a community reentry specialist in the client's home to continue therapy learned by the client and to assist the client in the practice of techniques and strategies for living independently.

Peer review—A review of services and rehabilitation service plans for clients conducted by the HIP Peer Review Committee for the purpose of advising the Department on best practices to be followed in offering services to clients.

Provider—An individual, organization or facility delivering services to clients pursuant to contractual agreement with the Department.

Rehabilitation—Providing to a client who has progressed to a postacute phase of traumatic brain injury, in a coordinated manner, services deemed appropriate to the needs of the client to improve health, welfare and the

realization of the client's maximum physical, social, psychological and vocational potential for useful and productive activity:

(i) These services include case management, neuropsychological evaluation, physical therapy, occupational therapy, speech or language therapy, behavior management and psychological services which may include cognitive remediation.

(ii) These services shall be provided or their provision shall be supervised by a physician or other appropriate health professional who contracts with the Department to provide these services.

Rehabilitation service plan—The written plan, developed by the rehabilitation provider in collaboration with the client and the case manager, which outlines specific goals to be achieved and expected time frames for achievement of each goal. The primary focus of goals shall be progression toward a higher level of functioning to enable transfer of the client to a less restrictive environment.

Secretary—The Secretary of the Department.

Subrogation—The Department's right to seek reimbursement for payments made on behalf of a client from an insurer which may offer coverage to the client or from the proceeds of litigation arising out of the injury which qualified the individual for enrollment in HIP.

Traumatic brain injury—An insult to the brain, not of a degenerative or congenital nature, caused by an external physical force that may produce a diminished or altered state of consciousness, which results in impairment of cognitive abilities or physical functioning or in the disturbance of behavioral or emotional functioning. These impairments may be either temporary or permanent and cause partial or total functional disability or psychosocial maladjustment.

§ 4.3. HIP services and objectives.

(a) The Department will administer the Fund through HIP.

(b) The Department will use the Fund to pay for HIP services to assist clients in meeting the goals established in their rehabilitation service plans.

(c) Subject to the availability of moneys from the Fund, and restrictions in §§ 4.5 and 4.6 (relating to payment for services; and duration of funding), the Department will use the Fund to pay for clients' HIP services which would not otherwise be available to clients with traumatic brain injury who have exhausted alternative financial resources.

(d) Services designated by the Department to be funded through HIP are limited to postacute traumatic brain injury rehabilitation services.

§ 4.4. Eligibility for services.

(a) *Conditions*. Except as otherwise set forth in this section, the Department will deem an applicant eligible for HIP services only if the following are satisfied:

(1) The applicant sustained a traumatic brain injury on or after July 3, 1985.

(2) The applicant has been a resident in this Commonwealth for 90 consecutive days at both the time of injury and the time of application to HIP, and demonstrates the intent to maintain a permanent home in this Commonwealth for the indefinite future.

(3) The applicant exhausted all alternative financial resources to pay for services covered by HIP as determined in accordance with HIP financial eligibility criteria.

(4) The applicant is 21 years of age or older.

(b) *Eligibility*. The Department will deem an applicant eligible for HIP services only if it determines based upon the case manager's recommendation and other neuropsychological evaluations as deemed appropriate by the Department, that the applicant has the potential to benefit from the services and to live more independently as a result of the services.

(c) *Ineligibility due to impairment*. The Department will deem an applicant ineligible for HIP services if the applicant's impairment is the result of one or more of the following conditions:

(1) Cognitive or motor dysfunction related to congenital or hereditary birth defects.

(2) Putative birth trauma or asphyxia neonatorum (hypoxic-ischemic-encephalopathy).

(3) Hypoxic encephalopathy unrelated to traumatic brain injury.

(4) Significant preexisting psychiatric, organic or degenerative brain disorders.

(5) Cerebral vascular accidents.

(6) Spinal cord injuries in the absence of traumatic brain injury.

(d) *Ineligibility due to symptoms*.

(1) The Department will deem an applicant ineligible for HIP services if the applicant's condition manifests one or more of the following symptoms:

(i) Comatose conditions which preclude participation in HIP services.

(ii) Symptoms of suicidal behavior, homicidal behavior, potentially harmful aggression or other behaviors which preclude an individual from participating in HIP services.

(2) An applicant may reapply to HIP at any time the applicant's condition, which makes the applicant ineligible for HIP services, changes, and a new eligibility determination will be made.

(e) *Assignment agreement*. The Department will deem an applicant ineligible if the applicant or legal guardian fails to complete an assignment agreement with the Department which, conditioned upon the applicant's enrollment in HIP, would assign to the Department rights of future or expected court awards, insurance settlements or other proceeds, which are determined by the Department to have accrued to the applicant as a result or by virtue of the applicant's traumatic brain injury, up to the amount expended by the Department for HIP services on behalf of that individual at the time the award is made.

(f) *Notification of eligibility*. The Department will notify an applicant, in writing, of eligibility for HIP services within 30 days from the date of receipt of a complete application.

§ 4.5. Payment for services.

(a) The Department will give written authorization, to the client and to the provider, as to HIP services for which the client is eligible and the maximum available funding and time limits for those services.

(b) The Department will authorize payment for HIP services for clients based on funding availability. Appli-

cants for whom moneys are not available will be placed on a waiting list maintained by HIP so they may be notified when funding becomes available, at which time they may reapply.

(c) The Department will not provide funding through HIP to pay for services to address conditions existing prior to the traumatic brain injury.

(d) The Department will not provide funding through HIP to pay for services available through other publicly funded programs.

(e) The Department will coordinate HIP with other public and private programs, to assist clients to access benefits for which they may be eligible.

(f) The Department will continue to pay for HIP services for a client until one of the following occurs:

(1) The client has reached the goals established in the client's rehabilitation service plan.

(2) The maximum funds available for allocation to the client are exhausted.

(3) The maximum duration for services has been reached in accordance with § 4.6 (relating to duration of funding).

(4) Alternative financial resources or other services become available.

(5) The client's condition deteriorates so that the client is ineligible under § 4.4(b) (relating to eligibility for services), or it is no longer feasible to implement a rehabilitation service plan for the client under § 4.8 (relating to rehabilitation service plan).

(g) The Department may seek reimbursement for payments it makes on behalf of a client from an insurer which may provide coverage to the client or from the proceeds of litigation arising out of the injury which led to eligibility for enrollment in HIP.

§ 4.6. Duration of funding.

(a) The Department will conduct evaluations to determine an applicant's initial eligibility and a client's continuing enrollment in HIP.

(b) The Department will provide funding for rehabilitation services for no more than 12 consecutive months.

(c) The Department will provide funding for case management services for no more than 18 consecutive months (during 12 months of rehabilitation and 6 months of transition out of rehabilitation) from the beginning date of the client's enrollment in HIP.

(d) The Department will notify an applicant of these maximum time limits when it accepts the applicant as a client.

§ 4.7. Services eligible for payment.

The Department will pay for the following services for clients:

(1) *Assessments.* Assessments shall include neuropsychological and functional evaluations as deemed necessary by the Department for determining eligibility for rehabilitation services.

(2) *Rehabilitation service plan.* Development of a rehabilitation service plan for each client as provided for in § 4.8 (relating to rehabilitation service plan).

(3) *Case management services.* HIP will approve the assignment of each client to a case manager who has a minimum of 2 years experience in traumatic brain injury

case management. Case management services include the following activities by the case manager:

(i) Collaborating with the rehabilitation provider, the client and the client's family in the development of the rehabilitation service plan.

(ii) Assisting the client in gaining full access to all services from which the client may benefit and for which the client may be eligible.

(iii) Monitoring the client's progress with respect to the rehabilitation service plan and making modifications as needed.

(iv) Providing up to 6 months of follow-up case management upon a client's completion of rehabilitation.

(4) *Rehabilitation services.* Residential rehabilitation services shall be provided by licensed facilities accredited by an appropriate National accrediting body as approved by the Department. Outpatient, day and home-based rehabilitation services shall be provided by facilities or providers accredited by an appropriate National accrediting body as approved by the Department. Examples of these services include the following:

(i) Helping a client develop behaviors that enable the client to take responsibility for the client's own actions.

(ii) Facilitating a client's successful community integration.

(iii) Assisting the client to accomplish functional outcomes at home and in the community.

(iv) Teaching the client skills to live independently.

(v) Supervising a client living in a home setting through the following:

(A) Home facilitation.

(B) Cognitive remediation.

(C) Life-skills coaching.

(vi) Assisting the client in maintaining independence.

(vii) Providing transitional living services to assist the client with community reentry skills.

§ 4.8. Rehabilitation service plan.

(a) The rehabilitation provider, the case manager, the client and, as appropriate, the client's parent, guardian or representative, shall jointly develop a rehabilitation service plan using forms and procedures provided by HIP. The rehabilitation provider shall submit the rehabilitation service plan to HIP for approval within 30 days after the date the client is enrolled in HIP.

(b) The rehabilitation service plan shall state the specific goals to be achieved and expected time frames for achievement of each goal. The primary focus of goals shall be progression toward a higher level of functioning to enable transfer of the client to a less restrictive environment. The service plan shall also specify the following:

(1) Services determined necessary to attain the agreed-upon goals.

(2) Beginning and ending dates of each service.

(3) The terms and conditions for service delivery.

(4) The specific responsibilities of the client, case manager and service provider relative to implementation of each service.

(5) The extent of financial responsibility of the client, HIP and any third party.

(c) The service plan shall include a procedure and schedule for quarterly review and evaluation of progress towards the specified goals.

(d) Modifications to the service plan shall be made concurrent and consistent with the scheduled evaluation of progress towards the specified goals.

§ 4.9. Peer review.

(a) *Purpose.* The Department will appoint a HIP Peer Review Committee to conduct a review of services and rehabilitation service plans for HIP clients. The HIP Peer Review Committee shall advise the Department on best practices to be followed in offering services to clients.

(b) *Procedures.*

(1) Members of the HIP Peer Review Committee shall be appointed to serve terms of 3 years. Members may not serve consecutive terms.

(2) The HIP Peer Review Committee shall review client progress on a quarterly basis.

(3) Within 30 days after it completes its review, the HIP Peer Review Committee shall provide, in writing, recommendations to the Department for all ongoing services.

(4) A member of the HIP Peer Review Committee may not participate in a review conducted by the Committee which presents a conflict of interest for that member. Examples of conflicts are participating in a review conducted by the Committee for one of the following:

(i) A service provided to a client of that member or that member's employer.

(ii) A person who is in the immediate family of the member.

(5) The Department will notify the HIP Peer Review Committee of any actions taken on the recommendations of the Committee.

§ 4.10. Appeal procedures.

(a) *Administrative review.*

(1) An applicant who is dissatisfied with a HIP eligibility determination may file a request for an administrative review.

(2) The applicant or client shall file a request for an administrative review with the Division within 30 calendar days after the mailing date of the determination. The request shall state the following:

(i) Why the applicant or client disagrees with the HIP determination.

(ii) The relief that the applicant or client seeks. The request shall include specific averments of fact and supporting documentation establishing that the applicant or client has cause for review. The Division will not consider requests which do not include specific averments of fact and supporting documentation.

(3) The Division will review the request for an administrative review and may reconsider HIP's determination. The Division will provide written notice to the applicant or client as to the outcome of the administrative review.

(b) *Administrative hearing.*

(1) The Division will advise the applicant or client of the right to appeal an adverse decision relating to eligibility for HIP services.

(2) The applicant or client may file the appeal with the agency head within 15 days of the mailing of that decision.

(3) If an appeal is filed an administrative hearing will be scheduled. The agency head shall designate an impartial hearing officer to preside at the administrative hearing. The hearing officer shall conduct the administrative hearing in accordance with applicable provisions of 1 Pa. Code Chapter 35, Subchapter E (relating to presiding officers).

(4) Within 10 days of the receipt of the appeal, the Division will forward to the hearing officer the file containing the eligibility determination for that applicant or client. The hearing officer shall, within 5 days of receiving the file from the Division, notify the applicant or client of the following:

(i) The time and place for the hearing.

(ii) The applicant's or client's right to:

(A) Appear in person at the hearing.

(B) Represent himself, or be represented at the hearing by an attorney, relative, friend or another person of the applicant's or client's choice.

(C) Present oral and documentary evidence, witnesses and arguments to support his position.

(D) Request a subpoena from the hearing officer for the production of evidence or appearance of witnesses at the hearing.

(E) Be provided, upon request, with the names of witnesses who will be present at the hearing.

(F) Refute testimony or other evidence, and confront and question adverse witnesses.

(G) Examine prior to and during the hearing, documents and records which are or will be presented to support the Division's decision.

(5) If the applicant or client, or that individual's representative, fails to appear at the scheduled hearing without good cause, as determined by the hearing officer, the appeal shall be dismissed with prejudice.

(6) An applicant or client may withdraw the appeal at any time before a decision is made by the hearing officer. This withdrawal shall be in writing and directed to the hearing officer.

(7) The hearing officer may order an independent medical assessment or professional evaluation of the applicant or client performed by a HIP service provider at HIP's expense.

(8) Following the receipt of evidence and testimony, or in lieu thereof, a stipulation of facts, the hearing officer shall afford the parties the opportunity to submit a written brief.

(9) The hearing officer shall, in writing, by certified mail, notify the applicant or client, or representative of that person, of the hearing officer's decision within 45 days after the record is closed.

(c) *Hearing decisions.*

(1) The hearing officer shall render a decision based exclusively on the hearing record. This decision shall be considered a proposed report as defined in 1 Pa. Code §§ 35.202—35.207

(2) The hearing officer shall submit the hearing record, which shall include a verbatim transcript or recording of testimony, exhibits submitted during the hearing and

papers and requests filed in the proceedings, to the agency head along with the hearing officer's report.

(3) A party to the administrative hearing may appeal the proposed report, within 30 days after being served with it, by filing a brief on exceptions with the agency head. Unless a party files a brief on exceptions within the time allowed, the hearing officer's decision shall become final. If a brief on exceptions is filed, the agency head will review the hearing officer's decision and the record and the agency head will issue an adjudication and order.

(4) The rules in 1 Pa. Code Part II (relating to general rules of administrative practice and procedure) apply to appeal procedures under this chapter except when inconsistent with this chapter.

[Pa.B. Doc. No. 99-818. Filed for public inspection May 21, 1999, 9:00 a.m.]

FISH AND BOAT COMMISSION

[58 PA. CODE CH. 117]

Boat Rental Business

The Fish and Boat Commission (Commission) proposes to amend Chapter 117 (relating to boat rental businesses). The Commission is publishing these amendments as a notice of proposed rulemaking under the authority of 30 Pa.C.S. (relating to the Fish and Boat Code) (code). The proposed amendments relate to livery operators.

A. Effective Date

The proposed amendments, if approved on final rulemaking, will go into effect on January 1, 2000, or upon publication of an order adopting the amendments in the *Pennsylvania Bulletin*, whichever occurs later.

B. Contact Person

For further information on the proposed changes, contact John F. Simmons, Director, Bureau of Boating and Education (717) 657-4538 or Laurie E. Shepler, Assistant Counsel, (717) 657-4546, P. O. Box 67000, Harrisburg, PA 17106-7000. This proposal is available electronically through the Commission's Web site (<http://www.fish.state.pa.us>).

C. Statutory Authority

The proposed amendments are published under the statutory authority of section 5122 of the code (relating to registration, licenses, permits, plates and statistics).

D. Purpose and Background

The proposed amendments are designed to update, modify and improve Commission regulations relating to boat rental businesses. The specific purpose of the proposed amendments is described in more detail under the summary of proposal. Prior to consideration by the Commission, the Commission's Boating Advisory Board reviewed the proposal and recommended that the Commission approve the publication of a notice of proposed rulemaking containing these changes.

E. Summary of Proposal

At its July 1998 meeting, the Commission adopted a regulation that requires operators of personal watercraft to obtain and carry a Boating Safety Education Certifi-

cate when operating their craft. The regulation also authorized and directed staff to prepare guidelines that would provide for the issuance of temporary certificates to operators of rental boats and purchasers of new boats.

Currently, the Commission's regulations require rental businesses to keep records, provide equipment and make a safety presentation prior to a rental. To properly manage the issuance of temporary certificates by liveries, the Commission must identify these businesses and provide an enforceable mechanism to provide terms and conditions for the operators of the liveries. The code authorizes the Commission to promulgate special provisions applicable to operators of boat liveries, and the Commission proposes to exercise this authority by requiring that most active liveries receive an annual livery operator's permit.

The Commission proposes to amend Chapter 117 by replacing it in its entirety to read as set forth in Annex A.

F. Paperwork

The proposed amendments will slightly increase paperwork in that boat liveries will be required to apply for, and the Commission will provide, annual livery operator's permits. The recordkeeping requirements for boat liveries have not changed.

G. Fiscal Impact

The proposed amendments will have a slight fiscal impact on the Commonwealth in that the Commission will incur relatively modest costs associated with printing the livery operator's permits as well as posters and other written educational materials. There are currently only about 100 boat liveries in this Commonwealth. The Commission estimates that its annual printing/postage costs will be less than \$1,000. Educational materials to be supplied to the liveries will cost the Commission an additional \$1,000 per year. The proposed amendments also will have a minimal fiscal impact on the private sector in that livery operators will incur modest costs in applying for the permits. There is, however, no permit fee. The proposed amendments will impose no new costs on political subdivisions or the general public.

H. Public Comments

Interested persons are invited to submit written comments, objections or suggestions about the proposed amendments to the Executive Director, Pennsylvania Fish and Boat Commission, P. O. Box 67000, Harrisburg, PA 17106-7000, within 30 days after publication of this notice in the *Pennsylvania Bulletin*. Comments submitted by facsimile will not be accepted.

Comments also may be submitted electronically at "regulations@fish.state.pa.us." A subject heading of the proposal and a return name and address must be included in each transmission. If an acknowledgment of electronic comments is not received by the sender within 2 working days, the comments should be retransmitted to ensure receipt.

PETER A. COLANGELO,
Executive Director

Fiscal Note: 48A-90.(1) Boat Fund; (2) Implementing Year 1999-00 is \$2,000; (3) 1st Succeeding Year 2000-01 is \$2,000; 2nd Succeeding Year 2001-02 is \$2,000; 3rd Succeeding Year 2002-03 is \$2,000; 4th Succeeding Year 2003-04 is \$2,000; 5th Succeeding Year 2004-05 is \$2,000; (4) Fiscal Year 1998-99 \$n/a; Fiscal Year 1997-98 \$n/a; Fiscal Year 1996-97 \$n/a; (7) General Government Operations; (8) recommends adoption.

Annex A
TITLE 58. RECREATION
PART II. FISH AND BOAT COMMISSION
Subpart C. BOATING
CHAPTER 117. BOAT RENTAL BUSINESSES

Pennsylvania Fish & Boat Commission
 Bureau of Boating and Education
 Post Office Box 67000
 Harrisburg, Pennsylvania 17106-7000

(*Editor's Note:* As part of this proposal, the Commission is proposing to delete the existing text of 58 Pa. Code §§ 117.1—117.5, pages 117-1—117-3, serial numbers (251609)—(251611) and replace it with the following sections.)

- Sec.
 § 117.1. Definitions.
 § 117.2. Special provisions applicable to livery operators.
 § 117.3. Inspections.
 § 117.4. Responsibilities.
 § 117.5. Personal watercraft liveries.
 § 117.6. Prohibited acts.
 § 117.7. Administrative actions.

§ 117.1. Definitions.

The following words and terms, when used in this chapter, have the following meanings, unless the context clearly indicates otherwise:

Boat livery—A commercial enterprise (person, partnership, corporation or other legal entity) that rents or leases rental boats to other persons for use on the waters of this Commonwealth.

Boat rental business—A boat livery.

Boat rental transaction—The exchange of consideration in the form of money, goods or services for the use of a rental boat for a period of time.

Livery operator—The owner or lessee of a boat livery and employes and other persons authorized to act on behalf of the boat livery.

Rental boat—A vessel propelled by oars, paddles, sail or power, rented or leased in this Commonwealth. The term includes canoes, kayaks, inflatable boats, rowboats, sailboats, personal watercraft and other motorboats.

§ 117.2. Special provisions applicable to livery operators.

(a) A boat livery that owns or controls two or more rental boats or that undertakes five or more boat rental transactions for a single rental boat in any 12-month period is required to obtain an annual livery operator's permit from the Commission.

(b) An application for a livery operator's permit shall be made on the forms provided by the Commission. The boat livery shall complete the application and provide the requested information. Information on the application shall include the following:

- (1) The name and address of the boat livery.
- (2) The name of the manager or contact person and a daytime telephone number.
- (3) The hours of rental operation.
- (4) The number and type of boats available for rent.
- (5) The body of water, if applicable.

(c) An application shall be received by the Commission at least 45 days prior to the date on which the applicant plans to commence boat livery operations for the year for which the application is submitted. Applications shall be sent to:

(d) An application for an annual livery operator's permit shall be accompanied by proof that the boat livery is covered by general public liability insurance for both operators of the rental boats and third parties. The minimum amount for the insurance coverage is \$250,000 per episode.

(e) A livery operator's permit shall be posted at a prominent location at the main base of rental operation.

(f) A livery operator's permit shall expire at the end of the calendar year for which it is issued.

§ 117.3. Inspections.

(a) A livery operator shall permit inspection of equipment, facilities and documentation required by this section at any time during normal working hours by a waterways conservation officer or other officer authorized to enforce the code. A livery operator shall retain documentation required by this section for the current and preceding year. The Commission, by notification in writing, may require a livery operator to retain records that are the subject of an unresolved investigation until the conclusion or resolution of the investigation.

(b) A livery operator shall correct deficiencies cited by a waterways conservation officer or other officer authorized to enforce the code within 2 weeks of notification. If the deficiency involves equipment, the equipment may not be used until the deficiency is corrected.

(c) A livery operator shall inspect rental boats on a regular basis, at least annually, and shall maintain rental boats in good repair. A livery operator may not rent or use a rental boat that is not in good repair and serviceable condition. A livery operator shall maintain inspection and maintenance records for all rental boats. The records shall be available for inspection by a waterways conservation officer or other officer authorized to enforce the code.

§ 117.4. Responsibilities.

(a) A livery operator may not permit a rental boat to depart from the boat rental business without the following equipment:

(1) United States Coast Guard approved, wearable personal flotation devices (PFDs) as required by § 97.1 (relating to personal flotation devices). The PFDs shall be of the appropriate size and design for the individual using the device and the type of boating activity.

(2) A sound producing device as required by § 97.3 (relating to sound producing devices).

(3) A fire extinguisher when required by § 97.2 (relating to fire extinguishers).

(4) Lights when required by § 95.3 (relating to lights for boats).

(5) Other equipment required by the code.

(b) A livery operator shall review the laws and regulations governing safe operation of rental boats with persons renting the boats. Persons who produce a boating safety education certificate issued or approved by the Commission under § 91.6 (relating to certificates) are exempt from review. A livery operator also shall provide instruction regarding the safe operation of rental boats to persons renting the boats. The Executive Director or a designee will provide guidance to livery operators on the preparation and presentation of regulation summaries

and instruction based on the type of rental boat, type of water and conditions of rental.

(c) A livery operator shall rent rental boats using a written agreement, specifying the name and address of the lessee, persons in the lessee's party, date and time of departure and expected date and time of return, number of PFDs issued by the boat rental business, identification of the rental boats and additional safety equipment onboard. A livery operator shall preserve this record for the current and preceding year.

(d) A livery operator shall display on all rental boats the name of the boat rental business or the legend RENTAL and the permit number above the waterline for purposes of identification. The designations shall be of at least 3 inch block letters and be of a color contrasting to that of the rental boat.

(e) A livery operator shall rent only rental boats that meet or exceed minimum United States Coast Guard requirements for boats of that type. Rental boats shall be of a design and material suitable for their intended use.

(f) A livery operator shall display on all rental boats a capacity plate as required by Chapter 99 (relating to capacity plates). A livery operator may not rent or use a rental boat in excess of its capacity as set forth by the manufacturer for the total number of passengers, total weight or horsepower recommendations.

(g) A livery operator shall submit a boating accident report for all reportable accidents involving one or more of the rental boats in accordance with Chapter 101 (relating to boating accidents).

§ 117.5. Personal watercraft liveries.

(a) A livery operator that rents personal watercraft shall verify that renters of personal watercraft comply with the applicable requirements in § 109.3 (relating to personal watercraft) and the guidelines on providing education and training issued by the Executive Director. A livery operator that rents personal watercraft also shall verify that renters of personal watercraft either possess a permanent boating safety education certificate or have obtained a temporary boating safety education certificate from the personal watercraft livery.

(b) In applying for a livery operator's permit for a personal watercraft livery, the applicant shall, in addition to providing the information required by § 117.2 (relating to special provisions applicable to livery operators), describe the measures to be taken to oversee the operation of rented personal watercraft by persons who possess only a temporary boating safety education certificate. The measures may include:

(1) Designation of specified area of operation for rented personal watercraft, which operating area shall be marked by buoys or other reasonably prominent features. If the applicant proposes to create a specified operating area for rented personal watercraft, the application shall include a map or chart indicating the proposed location of the designated area.

(2) Provision of qualified observers to directly observe the operation of rented personal watercraft. No more than seven personal watercraft may be under the observation of any observer at any one time. Qualified observers shall be at least 16 years of age and have at least 10 hours of experience operating personal watercraft. In addition, no person may act as an observer under this paragraph who has not successfully completed the requirements for a permanent boating safety education certificate. The certificate shall be in their possession when performing duties under this paragraph.

§ 117.6. Prohibited acts.

(a) It is unlawful for a livery operator required to have a livery operator's permit under § 117.2 (relating to special provisions applicable to livery operators) to rent or offer to rent any boat without a current and valid livery operator's permit or to fail to comply with this chapter.

(b) It is unlawful for a livery operator to fail to comply with the terms and conditions in the livery operator's permit.

(c) It is unlawful for a livery operator to fail to comply with the boat rental inspection requirements in § 117.3 (relating to inspections).

(d) It is unlawful for a livery operator to fail to comply with the responsibilities in § 117.4 (relating to responsibilities).

(e) It is unlawful for a personal watercraft livery operator to fail to comply with § 117.5 (relating to personal watercraft liveries).

§ 117.7. Administrative actions.

(a) *Appeal.* A person aggrieved by the action of the Commission's staff in granting, denying, imposing conditions on or suspending or revoking a livery operator's permit may appeal to the Commission within 30 days after the staff action. The 30-day administrative appeal period is an exception to 1 Pa. Code § 35.20 (relating to appeals from actions of staff).

(b) *Suspension and revocation.* The Commission may suspend or revoke a livery operator's permit of a livery operator who is convicted of or acknowledges guilt for a violation of the code or this title.

(c) *Denial of livery operator's permit.* The Commission may deny an application for a livery operator's permit when the applicant has, within 2 years prior to the application, been convicted of or acknowledged guilt for a violation of the code or this title or when the applicant has not provided full or complete information in support of the application.

[Pa.B. Doc. No. 99-819. Filed for public inspection May 21, 1999, 9:00 a.m.]

[58 PA. CODE CH. 97]

Personal Flotation Devices

A notice of proposed rulemaking was published at 28 Pa. B. 5131 (October 10, 1998), containing an amendment to 58 Pa. Code § 97.4 (relating to personal flotation devices). Specifically, the Fish and Boat Commission (Commission) proposed amending this section to provide that between October 1 and the Friday before Memorial Day, all persons shall wear a Type I, II, III or V Coast Guard approved PFD when onboard any canoe or kayak or any other boat less than 16 feet in length when the boat is being operated and not affixed or made fast to the shore.

Notice is hereby given that at its meeting on May 3, 1999, the Commission voted not to adopt this amendment.

PETER A. COLANGELO,
Executive Director

[Pa.B. Doc. No. 99-820. Filed for public inspection May 21, 1999, 9:00 a.m.]