



Elder Law Project

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TO: Legislative Committee on Administrative Rules

FROM: Leah Burdick, Staff Attorney, Elder Law Project

SUBJECT: 23P-044 Final Proposed Rule; *Residential Care Home and Assisted Living Residence Licensing Regulations*

DATE: July 22, 2024

The Elder Law and Disability Law Projects of Vermont Legal Aid submit these comments to LCAR on the proposed regulations governing residential care homes (RCH) and assisted living residences (ALR). Vermont Legal Aid has a long history of advocacy on behalf of individuals in these settings. We also join the comments submitted by Kaili Kuiper, Esq, Project Director for the Vermont Ombudsman Project.

VLA previously submitted comments to DAIL during the drafting process; however, several of our comments were not incorporated into the final version. We are concerned that the proposed rules do not adequately inform residents of their fundamental legal rights, do not adequately protect residents' rights under the law; do not adequately inform home operators and staff of their legal obligations.

Notably, this rule set does not specify how these regulations apply to facilities that provide Enhanced Residential Care (ERC). ERC is defined in the regulations as "Enhanced Residential Care, a service option administered by the Department of Disabilities, Aging and Independent Living, Adult Services Division, which allows for the care of nursing home level of care residents in approved residential care homes and assisted living residences." As DAIL stated in the rules' Concise Summary, this rule set was updated specifically to address the changing complex care needs of residents, including those receiving Choices for Care and ERC.

DAIL declined to include how these regulations apply to homes providing ERC because DAIL considers administering ERC as beyond the scope of the Division of Licensing and Protection. DAIL's Adult Services Division has not published any rules or regulations on the administration of the ERC program. Homes that offer ERC are still under the purview of DAIL's Division of Licensing and Protection. This omission is a serious oversight and must be addressed.

Residential Care Homes

II. Definitions

2.2 Specific Definitions

“**Emergency Discharge.**” We are concerned with the third portion of this definition “any other unforeseen event that cannot be addressed in the home.” This phrase is overly broad and may lead to improper emergency discharges for inappropriate reasons. This vague language should be removed; instead, a reference should be provided to the rule section explicitly stating the circumstances under which an emergency discharge may occur. DAIL declined to make this change. We anticipate confusion among residents and home staff if the definition section and the rule itself are inconsistent. The definition of “Emergency Discharge” should simply restate those explicit parameters in the rule, not expand them.

IV. Licensing Procedures

5.3.a(1)(iii) Involuntary Discharge for “The resident presents a threat to resident’s self or welfare of other residents or staff.”

We are concerned that the concept of “threat to self or others” is vague and lacks necessary nuance for behavior that may be present in homes providing ERC. We suggest adding the words “actual and credible” in front of the word “threat” to ensure home staff are accurately assessing and documenting the seriousness of the situation before attempting to discharge a resident under this criterion. As noted in the Concise Summary of the rule set, these rules were modernized specifically to address homes providing complex care for residents with a wide variety of medical needs. A resident may threaten to harm themselves or others due to their changing physical or mental conditions, side effects from medications, or other changes in circumstances, but have no actual capacity to act on that threat.

DAIL declined to make this change because the regulation as written “enables the licensing agency, during its review, to assess the credibility of the threat.” We are concerned that DAIL does not fully appreciate who is reading these regulations. It is not just lawyers and Department staff using these rules. Residents, advocates, the public, and critically, the staff of residential care homes will be using these regulations to guide their conduct. The regulation should be clarified so staff and residents know what behavior rises to the level of a threat justifying a discharge, effectively evicting the resident from their home.

5.3.b Emergency Discharges or Transfers

Right to Return After Improper Emergency Discharge or Transfer

While a resident may appeal the home’s decision to discharge them on an emergency basis, the emergency discharge rules do not allow the resident the right to return and remain in the home while an appeal is pending. Once a resident is forced to leave the home, it is unlikely the home will agree to re-admit the resident. This regulation should clearly specify that if the resident successfully appeals an emergency discharge or transfer to the Commissioner or the HSB, and it

was determined that the home was unauthorized in discharging or transferring the resident, the home is required to re-admit the resident.

In our experience, homes are not willing to re-admit a resident if the Commissioner or the Human Services Board finds the resident was improperly discharged, and the administrative appeal process does not provide any meaningful relief for a displaced resident. Under those circumstances, the resident is evicted from their home, often remaining in the hospital with no place to go. Section 5.3.b(3) does provide that a transfer to a hospital for medical treatment is not sufficient for an emergency discharge and the home may not refuse to re-admit the resident without following the emergency discharge procedure. However, the enforcement mechanism for overturning a home's refusal to re-admit a resident remains unclear. The regulations should explicitly state that the resident has a right to return after a successful appeal of an emergency discharge or transfer and clarify who can require the home to re-admit the resident in these circumstances.

DAIL declined to make this change, referencing the Superior Court as the enforcement mechanism for this provision. Vulnerable residents—some of whom may have cognitive deficits or extremely limited incomes—should not bear the burden of enforcing this rule when they are experiencing a medical emergency and potential homelessness. A court process takes time and resources. We recommend that the regulations state explicitly that the Department has this enforcement authority and that the HSB has authority to order DAIL to order compliance.

5.3.b(1) Definition of “resident presents an immediate threat to health or safety of self or others.”

We are concerned that these regulations do not adequately define what behavior constitutes an “immediate threat to health or safety of self or other residents,” that would justify an emergency discharge. For the reasons previously stated, the words “actual and credible” should be added before the words “immediate threat” to ensure home staff are accurately assessing and documenting the seriousness of the situation before attempting to discharge a resident under this criterion.

Nondiscrimination

Federal and state nondiscrimination law applies to both DAIL and residential care homes. We suggest DAIL incorporate and reference the Agency of Human Services’ Nondiscrimination/Grievance policy at <https://dail.vermont.gov/content/help/helpful-resources/americans-disabilities-act-and-civil-rights> . Required notices to residents (such as appeal rights for involuntary/emergency discharges, transfers, and relocations) should include the requirements that homes may not discriminate against residents based on any protected class, as well as the requirement that they must reasonably accommodate disabilities.

DAIL declined to incorporate this suggestion into the regulations because “materials currently exist to inform the public of these protections, the resources available, and potential remedies for a violation of these laws.” Again, we are concerned that DAIL does not fully appreciate who is reading these regulations and how they will be used. Those who are protected by—and those

who must abide by—these regulations should be able to read and understand fundamental rights and responsibilities without needing to find and reference multiple sources of law. DAIL does not need to write an entirely new policy or regulation; they only need a paragraph in the General Provisions section of the regulations to reference the nondiscrimination policy already written by AHS. Or, they could simply add this additional paragraph to Section 9.5, which already references the accessibility requirements for homes under the Americans with Disabilities Act.

Application of Federal HCBS Rule and Right to Lease-Like Protections

These regulations should incorporate the rights of HCBS recipients under the federal Medicaid Home and Community Based Services (HCBS) Setting Requirements Final Rule, as this rule applies to homes accepting federal Medicaid funds as a provider owned/controlled setting. The Final Rule requires that in any state where HCBS settings like those subject to these regulations are exempt from landlord/tenant law, such as Vermont, “the state must ensure that a lease, residency agreement or other form of written agreement will be in place for each HCBS participant that provides protections that address eviction processes and appeals comparable to those provided under the jurisdiction’s landlord tenant law.” 42 C.F.R. § 441.530. We recommend the regulations include a model lease that meets the minimum requirements of the Settings Rule.

DAIL declined to add this change because some residents may pay privately, so including this requirement would be “inappropriate.” DAIL did not explain how including a critical federal protection for residents who receive HCBS would be inappropriate, especially because DAIL stated these rules were updated in part to modernize and reflect the reality of the many different types of populations receiving services, including those paid for by Medicaid. Residents, staff, and the public should know that a home has an obligation to provide fundamental lease-like protections for its most vulnerable residents.

Assisted Living Residences

Our comments above related to nondiscrimination policies and the HCBS Settings Rule are fully applicable to the proposed regulations for Assisted Living Residences.

13.4.e Involuntary Discharge of Residents

We appreciate the Department’s emphasis on residents aging in place in ALRs. We suggest adding the words “actual and credible” to the “serious threat” language in Sections 13.4.e(1) and (2) for the same reasons as stated above.

We note, however, that these regulations lack clear direction for ALRs to provide involuntary discharge notices to the resident. Section 13.4.e explicitly supersedes the involuntary discharge criteria in Section 5.3.a(1) but fails to reference the critical notice provisions in the RCH rules that ALRs are required to follow. Simply adding a reference to the applicable discharge rules in this section would prevent confusion for home staff and residents.