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July 22, 2024

TO: Legislative Committee on Administrative Rules

FROM: Kaili Kuiper, State Long-Term Care Ombudsman, Long Term Care Ombudsman Program, Vermont Legal Aid

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

Thank you for taking the time to review and consider the Vermont Long Term Care Ombudsman Program's testimony on the 2024 proposed Residential Care Home and Assisted Living Residence Regulations. Vermont's Long Term Care Ombudsman Program was established by the federal government to advocate for long term care residents. We appreciate the time DAIL has taken to consider our feedback on previous drafts. DAIL addressed a number of our concerns. We ask LCAR to address five outstanding issues that are essential to facility residents' rights and welfare:

1) The Rules rely on the moment of the resident's "admission" but do not define the word.

The rules need to include a definition of "admission." The rules tie resident rights and protections to the moment of admission. We have seen homes say these rights and protections do not apply to some residents, because they don't consider the residents to have been officially admitted, even after living there for several weeks. There are numerous provisions in the rules that are triggered by a resident's "admission." For example, a home officially becomes responsible for the resident's care needs at admission (5.5.a.), and an assessment of the resident's needs must be completed within fourteen days of admission (5.7.b). In addition, at admission, a facility must provide a resident with a Uniform Consumer Disclosure Agreement (5.2.a), a written admission agreement (5.2.b), and a copy and explanation of the residents' rights (6.2 and 6.18). We suggest the following definition of admission:

Admission for a resident means the time period immediately preceding when a facility begins providing any services to the resident including room, board, personal care, general supervision, medication management, or nursing overview.

2) The Rules do not provide enough time for residents to react to cost increases.

Earlier drafts of the rules required facilities to provide residents with a ninety day notice of any rate change. The latest draft shortens this to thirty days, because Medicaid rate changes are not announced until January 1 of each year. There is an extreme shortage of long-term care beds in Vermont. Thirty days is not enough time for residents to find new housing if they cannot afford a rate change. A home should be able to anticipate voluntary rate changes further than thirty days in advance. For situations, such as Medicaid rate increases, where the rate change is not within the facility's control and the resident has some protection against out-of-pocket increases, thirty days is reasonable. We ask for the following change:

5.2.f. In general, Any change of rate or services must be preceded by a ninety (90) thirty (30)-day written notice to the resident and the resident's legal representative, if any. Annual Medicaid room and board rate changes can be implemented after a thirty (30) day written notice to residents and their legal representatives.

3) The Rules fail to recognize that a resident's discharge location preference should always be considered, whereas family members, as a class, do not have a right to influence a resident's discharge location.

While deciding whether a discharge location is suitable, the proposed rules require facilities to consider the resident's wishes and the family's wishes "when practicable and appropriate." A resident's wishes regarding their own discharge location should always be considered. On the other hand, family members as a class do not have a right to have their opinion considered. If a resident is unable or unwilling to provide input on the location, their representative can act in their place. The rule should be changed to require facilities to consider the resident's wishes and refer to a resident representative instead of family members. We note that requiring the facility to *consider* the resident's wishes does not require them to *fulfill* the resident's wishes:

5.3.a (2) vi. Ensure that the facility or location to which the resident will be discharged or transferred is appropriate to meet the assessed needs of the resident. To determine whether the new facility or location is appropriate, the manager must consider the assessed needs of the resident and the ability of the proposed facility to meet those needs. ~~When practicable and appropriate, t~~The manager must take into consideration the resident's wishes, the family's wishes, the resident representative's input, when appropriate, and the proximity of the proposed facility to the current home.

4) The draft rules wrongly allow drugs to be used on residents for discipline or convenience, and not to treat symptoms.

These rules define "chemical restraint" as "any drug that is used for discipline or convenience and not required to treat medical symptoms." Yet, the rules allow chemical restraints when "used in an emergency to prevent serious injury to a resident or others."

A drug should never be applied for discipline or convenience. Providing any exception where this might be allowed will only create confusion and threaten residents' welfare. We ask for the following change to clarify that chemical restraints – drugs used for discipline or convenience - are never permitted.

5.14.e Residents have a right to be free from chemical restraints and unnecessary mechanical restraints. The use of chemical restraints is not permitted. ~~unless used in an emergency to prevent serious injury to a resident or others.~~ Any time...

5) The Rules do not adequately incorporate the Enhanced Residential Care (ERC) program to allow for sufficient oversight.

ERC is a Medicaid waiver program that allows facilities that are not licensed as nursing homes to receive Medicaid payments to provide nursing home level of care. Our office regularly receives complaints from residents who are not being provided the services they should be receiving under the ERC program in Residential Care Homes. We have found there is not a sufficient process in Vermont for addressing these issues, because it is not clear under the rules that the Department of Licensing and Protection has oversight authority.

The introduction to the rule states that these rules needed to be updated to incorporate programs like ERC: “through approved variances and Vermont Medicaid waiver programs, many Residential Care Homes now house numerous residents who require nursing home level of care, and these regulations are also designed to ensure additional protections and services for those residents at nursing home level of care who reside in Vermont's residential care homes.”

While ERC is defined, it is not discussed anywhere else in the regulations. Under 33 V.S.A. §7117, the secretary of Human Services may adopt rules that set minimum standards of care and program administration for long term care facilities. These rules need to ensure that facilities are providing residents with the services the state is paying the facilities to provide.

At a minimum, we ask that the following underlined language be added to these regulations in sections 5.2.b and 12.1.a:

5.2.b. (1) The admission agreement must specify at least how the following services will be provided, and what additional charges there will be, if any, for such services: all personal care services; nursing services; medication management; laundry; transportation; toiletries; and any additional services provided under ACCS or a Medicaid Waiver program. The licensee must comply with the terms in the admission agreement. Any changes to the agreement must be in writing.

12.1.a. The provision of nursing home level of care means the provision of services that require specialized knowledge, judgment and skill, all of which

meet the standards of nursing as set forth in 26 V.S.A. § 1572. A home that wishes to admit or retain a resident who requires nursing home level of care must obtain prior written approval from the licensing agency in the form of a variance and must demonstrate to the licensing agency's satisfaction that it has the capacity to provide the necessary care and services. Enhanced Residential Care providers must provide the services agreed to in the Enhanced Residential Care provider agreement with the state of Vermont and outlined in their Admissions Agreements with ERC residents.

Thank you again for taking the time to consider our comments.

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Regulations
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