

Assessment of Public Comment

The proposed assisted living residences regulation is intended to create the regulatory framework necessary for implementation of the provisions of the Assisted Living Reform Act of 2004 (ALRA), including but not limited to, the following elements: establishing the criteria by which applications for licensure and certification will be reviewed; establishing standards for admission and retention, consumer and resident protections, resident services, personnel, records and reports, structural and environmental standards, management contracts; defining “independent senior housing”; establishing standards for the hiring of direct care staff by residences; and generally clarifying and carrying out the intent of the law.

On December 26, 2007, the Department published a Notice of Revised Rule Making, reflecting changes made to the proposed regulation as a result of the initial 45-day public comment period which expired on May 14, 2007. This publication initiated a subsequent 30-day public comment period, which expired on January 25, 2008, resulting in the receipt of approximately 600 additional written comments from individuals and organizations. A majority of the comments (approximately 550) were submitted as testimonials in support of “A Place for Mom,” a Seattle-based internet referral service, and other referral entities who have assisted individuals locate adult care/assisted living providers throughout the State.

Many of the remaining comments received noted and appreciated the changes made to the proposed regulation as a result of the initial public comments, while some were dissatisfied with the extent and/or form of amendments made. Likewise, other commentors continued to voice displeasure with particular amendments not made.

It is important to remember that the Task Force on Adult Care Facilities and Assisted Living Residences, established via the ALRA, will continue to “gather information regarding the various ways in which existing requirements and guidelines unduly infringe on affordability of care and services, individual resident choice, autonomy and independence, examine and evaluate such requirements and guidelines, and make recommendations” with regard to, among other things, minimizing duplicative or unnecessary regulatory oversight; ensuring that the indigent have adequate access to, and that there are a sufficient number of, enhanced assisted living residences; and developing affordable assisted living. While the Department is confident that the regulatory package proposed is consistent with both the legislative intent and the letter of the ALRA, the Task Force will be active in the coming months and years assessing the implementation of the ALRA through this regulatory package and proposing future amendments to both regulation and statute to address any problematic issues identified through this implementation.

Due to the volume of comments submitted, the following presents the most prevalent issues raised and responses to those issues.

Issue:

While acknowledging the revisions made by the Department to significantly reduce the number of hours of nurse staffing coverage required for enhanced assisted living residences (EALRs) and special needs assisted living residences (SNARLs), some providers continued to state that nurse staffing requirement fails to take into account the actual needs of the resident population. In particular, the providers believe the financial

impact of requiring a registered professional nurse (RN) for 7 days per week to be cost prohibitive for their facilities and residents.

Response:

The proposed minimum nurse staffing requirement for enhanced assisted living residences (EALRs) and special needs assisted living residences (SNARLs) had been previously revised to provide that an RN be on duty and on site at the residence for eight hours per day, seven days a week. By contrast, the original proposed regulation would have required on site coverage by an RN or a licensed practical nurse (LPN) at least sixteen hours per day, seven days a week, which included on site coverage by an RN eight hours a day, five days a week. In response to comments received during this past public comment period, the proposed regulation has been amended further to provide that an EALR/SNALR can substitute an LPN for the RN for two days of the residence's seven day coverage. However, an RN must be on call and available for consultation during the two days while the LPN is on site. The regulations will continue to require that the operator arrange for additional nursing coverage where determined to be necessary by the resident's physician and/or the ISP process.

Issue:

To address industry comments received during the initial public comment period, the provisions pertaining to management contracts were revised to: (1) add a provision that the Department must provide a written response within 90 days after the submission by an applicant or operator of a proposed management agreement, provided that the Department has received all information necessary for its review; (2) increase the duration for approved management contracts from 3 years to 5 years; (3) eliminate the

requirement that the operator demonstrate that “goals and objectives” of the management contract have been met; (4) clarify that for an already approved contract, only revisions related to a substantive change in terms of power delegated, management fees, the term of the agreement, and changes to the management entity itself or its principals, must receive the prior written approval of the Department; and (5) develop in consultation with the industry a model Management Agreement. Further, the provision pertaining to contractor’s fees had been deleted in its entirety, while language was added to require that management contracts contain the method and amount of payment for management services provided to the ALR. Although a segment of the industry continued to state that the provisions pertaining to management contracts should be deleted in their entirety, industry comments highlighted four specific concerns: (1) opposed to creation of a Model Management Contract, believing such transactions to be unique to the parties involved; (2) opposed to requiring such contracts to include amount of payment; (3) opposed to the five-year term limit to such contracts; and (4) questioning the applicability of such provisions to related parties within a health care organization operating ALRs.

Response:

The Department of Health continues to believe in the need to regulate management agreements for ACFs/ALRs to assure that only duly approved operators are given independent authority for the operation of the facility, as well as the need to conduct character and competency reviews on proposed managers. As a result of the new comments received, the Department has made one additional technical revision to provide that the method and amount of payment stated within such contracts may be stated as a flat fee or a percentage. In addition, it is important to note that use of the

Model Management Contract (to be developed) would not be a requirement; rather, it was included as an optional mechanism to expedite Department approval of management agreements for the industry.

Issue:

At the suggestion of consumer and resident advocates, the initial proposed regulations were amended to provide that “[n]o residence, agent, consultant, employee or representative thereof, shall make any payment as compensation for referring a resident for admission.” This amendment induced approximately 550 comments during this past public comment period from individuals in support of referral entities who have assisted individuals locate adult care/assisted living providers throughout the State, most notably an internet referral service called “A Place for Mom”. These commentators stated that they found the services offered by such entities invaluable, and opposed any regulation that would limit the ability of such entities to operate in New York State.

Response:

The provision added to the proposed regulation is similar to the regulatory language which currently exists in New York State for hospitals, nursing homes, certified home health agencies, hospices, and diagnostic and treatment centers. In order to assure consumer protection, and to distinguish established referral entities paid advertising fees from “head hunters” who are paid a per person fee for each resident admitted, the Department has amended this provision to require an ALR to obtain a signed agreement with a referral entity disclosing that it is compensated by the referred ALR.

Issue:

A segment of the industry continues to oppose the provisions of the proposed regulation defining “Independent Senior Housing” (ISH), and describing when exactly a housing entity must become certified as an ACF or licensed as an ALR. Some commentators proposed that, rather than stating the “triggers” for certification/licensure, the Department should define that which does not require certification/licensure.

Response:

The Department proposes no further change to these provisions, believing the proposed regulation clearly identifies when an entity is subject to ACF certification and when it is subject to ALR licensure, as required under the ALRA. Specifically, PHL §4651(1)(j) states that "[f]or purposes of this article and for purposes of determining certification pursuant to [SSL Article 7], the department shall by regulation, define [ISH]" (emphasis added).

Issue:

Comments were made that proposed case management staffing requirements are overly burdensome, particularly for facilities of less than twenty-five beds, believing that ALR case management responsibilities are no greater than what is currently required in the ACF.

Response:

The Department strongly believes the industry is underestimating the workload and responsibility of case managers in the ALR setting; not merely at the outset, but ongoing due to the increased coordination role required due to the variety of service and/or service providers possible. Pursuant to the ALRA, the mechanism from which all ALR services are based is the Individualized Service Plan (ISP). The ISP describes what

services will be provided and the identified provider or staff responsible. It must be reviewed and updated every six months as well as whenever a resident has a significant change in needs, and will require review of an individual's medical, nutritional, rehabilitative, functional and cognitive needs and a plan to meet the individual's needs. Development of the ISP must include the resident, the resident's representative and/or legal representative if any, the ALR operator, and, if necessary, a home care services agency. The ISP must also be developed in consultation with the resident's physician. As such, the ISP is more than just 'another piece of paper' – it is intended to be an ongoing process, updated "as necessary."

Issue:

Comments continued from industry representatives expressing concern that the proposed environmental and structural standards will require many existing ACFs to make substantial and costly changes to their buildings and environmental systems, claiming such operators will either be forced to withdraw their ALR applications or to impose significant costs upon residents in order to comply with the new standards.

Response:

The Department continues to believe the proposed standards to be necessary to modernize the building standards for ACFs/ALRs, which have not been updated in years, to reflect the change in resident populations over that time. The Department recognizes the impact this will have on older existing facilities, yet believes the State must balance that with the need to protect a frailer resident population in the EALR, and individuals with dementia or other special needs in the SNALR. Further, it must be remembered that the proposed regulation not only provides for a process by which an applicant can request

a waiver of any non-statutory requirement in regulation, but that the recent solicitation for “round 7” of HEAL NY provides \$150 million in funding which existing ACFs/ALRs can access to make the improvements necessary to meet the new standards. As such, the Department proposes no change to these standards.

Issue:

A large segment of the industry continues to state their belief that the ALRA was clear regarding written notice of charges. They cite the statute which states that “providing additional services to a resident shall not be considered a fee increase” and, thereby, not subject to the 45-day requirement for fee increases.

Response:

As currently proposed, the Department believes the regulation clearly spells out those instances where fees can be increased with less than 45 days notice: (1) if the resident agrees to such increase due to the need for additional care, services, or supplies; (2) if the operator provides additional care, services or supplies upon the written order of the resident's primary physician; or (3) in the event of an emergency which affects the resident, such additional charges are reasonable and necessary for services, materials, equipment and food supplies during such emergency. These three circumstance appear to adequately cover the legitimate circumstances under which fees would need to be increased in exchange for the provision of additional services. Therefore, the Department proposes no change to the regulation, believing these provisions better support operators than the industry has stated.