

REGULATORY IMPACT STATEMENT

Statutory Authority:

The authority for the promulgation of these regulations is contained in Section 4662 of the Public Health Law (PHL), through Chapter 2 of the Laws of 2004 (known as the “Assisted Living Reform Act” or ALRA, PHL Article 46-B). PHL Section 4662 authorizes the Commissioner of Health to promulgate, in consultation with the Director of the State Office for the Aging, such rules and regulations as are necessary to implement the provisions of this article. Section 4662 further authorizes the Commissioner to receive and investigate complaints regarding the condition, operation and quality of care of any entities holding themselves out as “assisted living” or advertising themselves by a similar term, and to exercise all other powers and functions as are necessary to implement the provisions of Article 46-B.

In order to be licensed as an assisted living residence (ALR), Article 46-B requires all residences to be certified as an adult home or enriched housing program in accordance with Article 7 of the Social Services Law (SSL). Residences that are currently unlicensed desiring to be licensed as an ALR must simultaneously submit an application for licensure as an ALR and an SSL Article 7 application to seek approval as an adult home or enriched housing program. The residence must also be in compliance with all rules and regulations applicable to such facilities (18 NYCRR Parts 485, 486, and 487 (adult homes) or 488 (enriched housing programs)) unless a provision of the ALRA supercedes the Article 7 statutory or regulatory provision. Section 122(c) of Chapter 436 of the Laws of 1997 provides that effective April 1, 1997, the functions, powers, duties

and obligations of the former Department of Social Services concerning adult homes, enriched housing programs, residences for adults and assisted living programs (i.e., “adult care facilities”) are transferred to the New York State Department of Health.

Legislative Objectives:

In enacting Chapter 2 of the Laws of 2004, the Legislature found and declared that congregate residential housing with supportive services in a home-like setting, commonly known as “assisted living,” is an integral part of the continuum of long term care. Further, the philosophy of assisted living emphasizes aging-in-place, personal dignity, autonomy, independence, privacy and freedom of choice. The legislative objective of PHL Article 46-B is to create a clear and flexible statutory structure for assisted living that provides a definition of “assisted living residence”; that requires licensure of the residence; that requires a written residency agreement that contains consumer protections; that enunciates and protects resident rights; and that provides adequate and accurate information for consumers, which is essential to the continued development of a viable market for assisted living.

“Assisted living” and “assisted living residence” means an entity which provides or arranges for housing, on-site monitoring, and personal care services and/or home care services (either directly or indirectly), in a home-like setting to five or more adult residents unrelated to the assisted living provider. An applicant for licensure as assisted living that has been approved in accordance with the provisions of this article must also provide daily food service, twenty-four hour on-site monitoring, case management services, and the development of an Individualized Service Plan for each resident. An operator of assisted living shall provide each resident with considerate and respectful care

and promote the resident's dignity, autonomy, independence and privacy in the least restrictive and most home-like setting commensurate with the resident's preferences and physical and mental status.

Needs and Benefits:

For many years, it has been very difficult for consumers to compare one assisted living residence to another because, in New York State, there had been no standard definition. This opinion was echoed in a 1999 report by the federal General Accounting Office (GAO), which outlined the results of a two-year study of assisted living in four states. A major finding of the report was that consumers need clear and complete information regarding facility services, costs and policies in order to make an informed decision and that, in the states studied, seniors were not routinely provided with sufficient information to allow them to select the most appropriate setting.

To help seniors make such informed decisions before agreeing to live in an assisted living residence, the ALRA requires every residence to provide clear and complete information to prospective residents before they sign a contract. Under this new law, ALRs must use a standard "plain language" contract – with no small print – that fully discloses what services are provided, by whom, and the cost. The law also requires ALRs to disclose to seniors the conditions under which an operator can terminate a residency agreement and what the resident can expect to happen if they can no longer pay the fees.

The ALRA also fills the gaps in adult residential services law that in some instances allowed facilities to operate without any licensure or State surveillance. For instance, it requires certain adult residences that had operated without license (known as

“look alike” facilities) to become certified as adult care facilities and therefore subject to State regulation and oversight. Any residence that then wishes to market itself as assisted living must seek additional licensure as an Assisted Living Residence.

In other instances, facilities had long been prevented from appropriately expanding the range of services provided to their residents as their needs changed over time. The ALRA provides a mechanism to allow those operators who wish to provide a broader range of services, known as “aging in place”, to do so by becoming licensed as an Assisted Living Residence and obtaining additional certification for Enhanced Assisted Living from the Department. Those operators seeking to provide specialized services to special needs residents, such as those with Alzheimer’s or dementia, will likewise have to be licensed as an Assisted Living Residence and also obtain a Special Needs Assisted Living certificate.

To obtain either the Enhanced Assisted Living or Special Needs Assisted Living certifications, operators must submit a plan to the Department demonstrating how they will safely and appropriately meet all of their residents’ needs, and have policies in place to continually meet those needs as they change over time. The plan must include, but not be limited to, a written description of services, staffing levels, staff education and training, work experience, and any environmental modifications that have been or will be made to protect the health, safety and welfare of such residents.

The ALRA provides several important opportunities for consumers and providers: greater clarity as to the definition of “assisted living”; greater assurance that the combinations of housing and services referred to as assisted living will be subject to State oversight; significant protection of consumer/resident rights; the opportunity to age in

place with dignity and choice in a more home-like setting; as well as the opportunity for persons with special needs to obtain specialized care by persons with appropriate qualifications and experience. These regulations further the goals of PHL Article 46-B by creating the regulatory framework necessary for implementation of the provisions therein, including but not limited to criteria by which applications for licensure and certification can be reviewed, 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.

Costs for the Implementation of and Continuing Compliance with these Regulations to the Regulated Entity:

PHL Section 4656(6) prescribes the fees associated with licensure and certification for assisted living. The basic biennial assisted living residence fee is \$500 per facility plus an additional \$50 for each ALR resident whose income exceeds 400% of the Federal Poverty Level (FPL). The maximum ALR fee required for an individual facility is \$5,000. In 2006, 400% of the Federal Poverty Level represents an income level of \$39,200 per individual. Financial information on residents who are below the 400% FPL threshold and are not Medicaid or SSI eligible must be maintained to verify their eligibility for an exemption to the \$50 fee for residences.

The biennial fee for Enhanced Assisted Living certification is \$2,000. The biennial fee for Special Needs Assisted Living is also \$2,000. Facilities applying for Enhanced Assisted Living and Special Needs Assisted Living at the same time are entitled to a discount and are only required to remit a total of \$3,000 for both

certifications. All applicable fees must be submitted with the initial application for licensure/certification.

Cost to State and Local Government:

None.

Cost to the Department of Health:

Passage of the ALRA has necessitated the Department hiring of staff to implement its licensure and certification provisions, specifically the review of initial applications submitted to the Department. Under this Act, through creation of a new State Finance Law Section 99-1, a special fund is created in the joint custody of the State Comptroller and the Commissioner of Health – the “Assisted Living Residence Quality Oversight Fund.”

This fund shall consist of all money collected by the Department pursuant to PHL Article 46-B, including licensure fees, certification fees and civil penalties collected. Any interest earned on investment of monies by such fund becomes part of the fund. The fund shall be available to the Department for the purpose of implementation of PHL Article 46-B.

Through passage of the SFY 2007-08 Budget, the Department has been authorized up to \$2 million from this special revenue account for the implementation and oversight activities related to this Act. In addition, the Act provides that \$500,000 is to be available from this fund to the State Office for Aging’s Long-Term Care Ombudsman Program for the purposes of carrying out the provisions of Article 46-B.

Local Government Mandates:

None.

Paperwork:

In many regards, the application process for ALRs is very similar to the process that operators currently utilize to obtain certification for an adult home or enriched housing program. Likewise, with regards to obtaining an Enhanced Assisted Living or Special Needs Assisted Living Certificate, operators will have to submit an application to the Department providing a plan which sets forth how the additional needs of such residents will be safely and appropriately met, including but not limited to, a written description of services, staffing levels, staff education and training, work experience, and any environmental modifications.

In addition to these application processes to obtain licensure as an ALR and/or certification for Enhanced and/or Special Needs Assisted Living, the Assisted Living Reform Act contains numerous provisions to ensure resident rights are protected and adequate and accurate information is available for consumers. For instance, the Act requires a written residency agreement that contains consumer protections, and enunciates and protects resident rights.

A key provision of the Act is development of an Individualized Service Plan (ISP). A written ISP must be developed for each resident upon admission. The ISP is to be developed with the resident, resident's representative and resident's legal representative, if any; the operator; and, if necessary, a home care services agency. The initial ISP will be developed in consultation with the resident's physician. If the

physician determines that the resident is not in need of home care services, a home care services agency need not participate in the development of the ISP.

The ISP will take into account the medical, nutritional, rehabilitation, functional, cognitive and other needs of the resident. The ISP will include the services to be provided, and how and by whom services will be provided and accessed. The ISP is to be reviewed and revised as frequently as necessary to reflect the changing care needs of the resident, but no less frequently than every six months. To the extent necessary, such review and revision will be undertaken in consultation with the resident's physician.

The ALRA requires that certain important information be disclosed to prospective residents and their representatives, pursuant to PHL Section 4658(3). Among the items to be disclosed are: a consumer guide to inform and assist the consumer in the selection of an ALR (prepared by DOH in consultation with the State Office for the Aging, consumers, operators of ALRs, and home care services providers); a statement listing the residence's licensure status and whether it has an Enhanced Assisted Living or Special Needs Assisted Living certificate; a statement that the resident shall have the right to receive services from service providers with whom the operator does not have an arrangement; a statement that the resident shall have the right to choose their health care providers, notwithstanding any agreements to the contrary; and a statement regarding the availability of Long-Term Care Ombudsman Services and the telephone number of the local and State ombudsman.

Duplication:

This regulation does not duplicate any other state or federal law or regulation. PHL Section 4656(1) requires that, in order to operate as an assisted living residence, an

operator shall be certified as an adult home or enriched housing program pursuant to Title 2 of Article 7 of the Social Services Law. PHL Section 4656(2) goes on to require the assisted living operator to comply with all applicable statutes, rules and regulations required for maintaining a valid operating certificate for an adult home/enriched housing program.

In PHL Section 4656(7), this lack of duplication is emphasized, stating that the requirements of PHL Article 46-B “shall be in addition to those required of an adult care facility. In the event of a conflict between any provision of this article and a provision of Article 7 of the Social Services Law or a regulation adopted thereunder, the applicable provision of [PHL Article 46-B] or the applicable regulation shall supersede Article 7 of the Social Services Law or the applicable regulation thereunder to the extent of such conflict.” In addition, the application process provides for a streamlined procedure for review of character and competence for those existing operators of adult homes and enriched housing programs who are in “good standing” with the Department in terms of compliance. Operators are being requested to submit only those application materials that are updated information or that is different from what they may have submitted to the Department in previous applications.

Alternative Approaches:

No alternative approaches were considered. Section 7 of Chapter 2 of the Laws of 2004 prohibits the Department from issuing emergency regulations in regard to PHL Article 46-B.

Federal Requirements:

This regulatory amendment does not exceed any minimum standards of the federal government for the same or similar subject areas.

Compliance Schedule:

As Section 7 of the Laws of Chapter 2 of the Laws of 2004 prohibits the Department from issuing emergency regulations in regard to PHL Article 46-B, this regulation will take effect upon publication of a notice of adoption in the New York State Register.

In terms of compliance schedule, the “Assisted Living Reform Act” became effective 120 days after being signed into law. Since the Governor signed the bill on October 26, 2004, the Act was effective as of February 23, 2005.

The Act states that any entity which qualifies as an ALR pursuant to PHL Article 46-B and operating as an ALR on or before the effective date shall, within 60 days of such effective date (that is, by April 25, 2005) apply to be licensed or certified with the Commissioner of Health in accordance with the provisions of Article 46-B upon approval of all licenses and certification for which the entity has applied.

Given the very short timeframe for implementation provided under the Act, the ALR application was not available to applicants until June 3, 2005. Therefore, the Department extended the deadline for submission of the application to August 3, 2005. This regulation will enable the Department to act upon those applications, and perform the oversight functions necessary for implementing the provisions of the Act.

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REGULATORY FLEXIBILITY ANALYSIS
FOR SMALL BUSINESS AND LOCAL GOVERNMENTS

Effect of Rule:

There are 500 existing adult homes and enriched housing programs in New York State. Of those, 371 have been identified as being certified for 100 or fewer beds and considered a small business (74%).

To date, 226 existing adult homes and enriched housing programs have applied for licensure as Assisted Living Residences (ALRs). An additional 46 applications have been received by the Department by facilities proposing to be certified as an adult home/enriched housing program and subsequently licensed as an ALR.

The Department has advised prospective applicants that, in order to be licensed as an ALR, the facility's entire capacity will have to be subject to such licensure. Currently with regards to adult care facilities, for example, a 100-bed facility could be comprised of 80 adult home beds and 20 enriched housing program beds. If this same facility desired licensure as an ALR, all 100 beds would have to be licensed as such. It is expected the majority of facilities applying for ALR licensure will be for 100 or fewer beds and, thereby, considered a small business.

Local governments are not affected by this rule, unless they intend to apply to the Department to operate an ALR.

Compliance Requirements:

In order to comply with these requirements, any entity wishing to establish, operate, provide, conduct, or offer "assisted living" in New York state, or hold itself out

as an entity which otherwise meets the definition of “assisted living” or by a similar term, must apply and obtain approval of the Department to operate as an adult care facility (either an adult home or an enriched housing program) and as an assisted living residence. This shall not apply to Assisted Living Programs (ALPs) approved by the Department pursuant to SSL Section 461-1.

Currently, a list of questions and answers related to this regulation appears on the DOH website to assist in compliance.

Professional Services:

All facilities required to obtain licensure as an ALR must have staff trained and qualified to provide the care and services the residence has been approved by the Department to provide.

Compliance Costs:

PHL Section 4656(6) prescribes the fees associated with licensure and certification for assisted living. The basic biennial assisted living residence fee is \$500 per facility plus an additional \$50 for each ALR resident whose income exceeds 400% of the Federal Poverty Level (FPL). The maximum ALR fee required for an individual facility is \$5,000. In 2006, 400% of the Federal Poverty Level represents an income level of \$39,200 per individual. Financial information on residents who are below the 400% FPL threshold and are not Medicaid or SSI eligible must be maintained to verify their eligibility for an exemption to the \$50 fee.

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Enhanced Assisted Living and Special Needs Assisted Living at the same time are entitled to a discount and are only required to remit a total of \$3,000 for both certifications. All applicable fees must be submitted with the initial application for licensure/certification.

Economic and Technological Feasibility:

As the majority of such existing facilities are small businesses, it should be economically and technologically feasible for small businesses to comply with the regulations.

Minimizing Adverse Impact:

The “Assisted Living Reform Act” created a Task Force on Adult Care Facilities and Assisted Living Residences, “to update and revise the requirements and regulations applicable to [ACFs and ALRs] to better promote resident choice, autonomy and independence. The Task Force consists of ten appointed members (six appointed by the Governor, two by the Senate, and two by the Assembly), as well as four ex-officio members (the Commissioner of Health, the Director of the State Office for the Aging, the Commissioner of the Office of Mental Health, and the Chair for the Commission on Quality of Care and Advocacy for Persons with Disabilities). Beginning with their first meeting in April 2005, the Task Force also makes recommendations with respect to “minimizing duplicative or unnecessary regulatory oversight.” In order to minimize adverse impact, the Department has consulted with the Task Force on the principles contained within this regulatory package.

Small Business and Local Government Participation:

As stated above, the Task Force on Adult Care Facilities and Assisted Living Residences first convened in April 2005, and has met a total of thirteen times through October 2007. In addition to ex-officio members of four State agencies, the Task Force includes representatives of the ACF and assisted living industry, home care representatives, and consumer advocates.

RURAL AREA FLEXIBILITY ANALYSIS

Pursuant to section 202-bb of the State Administrative Procedure Act, a rural area flexibility analysis is not required. These provisions apply uniformly throughout New York State, including all rural areas.

The proposed rule will not impose an adverse economic impact on rural adult care facilities or assisted living residences.

JOB IMPACT STATEMENT

A Job Impact Statement is not included because it is apparent from the nature and purpose of this regulation that it will not have a substantial adverse impact on jobs and employment activities.