



July 3, 2023

Katherine Ceroalo  
NYS Department of Health  
Bureau of Program Counsel  
Reg. Affairs Unit  
Corning Tower, Room 2438  
Empire State Plaza  
Albany, NY 12237

**Re: Update Standards for Adult Homes and Standards for Enriched Housing Programs  
ID: HLT-18-23-00013-P**

Dear Ms. Ceroalo:

I am writing on behalf of the members of LeadingAge New York's not-for-profit adult care facility (ACF) and assisted living providers to offer comments on the above-referenced proposed regulation, which seeks to incorporate aspects of the federal home and community based settings (HCBS) rule into state regulation. In our review of the proposed regulations, these changes appear to be very similar to those changes proposed in Dec. 2022; we appreciate that some of the modifications address comments LeadingAge NY submitted in response. Our below comments are updated to reflect the changes that are notable, and address outstanding issues.

LeadingAge New York members embrace the spirit of the federal regulation, to ensure choice and provide services in a person-centered way. Their fundamental concern is how the Department of Health (DOH) will shift their approach the survey process. We feel that there should be a common understanding among all parties regarding the changes. This should include DOH guidance and training that allows for a dialogue with providers, and the opportunity for questions and answers. As written, the effective date of these changes is immediate upon promulgation. **We urge the state to allow more time to ensure a common understanding of how the regulations can be implemented and will be surveyed.** An effective date of 6 months from promulgation would allow this DOH education and training to occur.

**Specific Comments on the Proposed Regulation Changes:**

**With regard to the below proposed change in Section 487.5(2)(a), with similar language proposed in 488.5(a):**

*A copy of the statement of rights issued by the department shall be posted in a conspicuous location in a public area of the facility, provided to each resident at the time of admission, and reviewed with the resident periodically thereafter.*

**Comment:** While we believe this language is consistent with the federal rule, the standard of “periodically” is subjective. Given that this information statement of rights is given at time of admission and posted in the building, we believe *annually* would be a reasonable standard.

**The below comments relate to several proposed changes in Section 487.5 (a)(3), with similar language in 488.5(a)(3):**

- *At a minimum, the operator shall afford each resident the following rights and protections: \* \* \* (vi) A resident shall have the right to manage [his or her] their own financial and personal affairs, including but not limited to the right to determine from whom medical services are received, provided such services are within the provider’s scope of practice. (vii) A resident shall have the right to privacy in [his/her] their own room or sleeping unit, and in caring for personal needs, with only appropriate staff having access.*

**Comment:** While this language is consistent with the federal rule, we want to ensure all parties recognize that there will be different ways in which the privacy of a sleeping unit may be accomplished. Given that some resident rooms are shared, and there is not funding in the Medicaid ALP rates to implement significant structural modifications, there must be flexibility.

- *(viii) [A resident shall have the right to confidential treatment of personal, social, financial and health records.] A resident shall be provided the ability to select a private room if one is available and affordable to the resident. Residents in shared rooms shall be afforded a choice of roommates and operators shall take all reasonable steps to accommodate a resident’s expressed choice.*

**Comment:** Again, this provision below also in this section will require education to ensure common understanding. We presume this right would also extend to residents of different gender wanting to live together.

- *(ix) [A resident shall have the right to receive courteous, fair and respectful care and treatment at all times, and shall not be physically, mentally or emotionally abused, or subject to any occurrence which would constitute a reportable incident.] A resident shall have the right to decorate their room to taste according to the terms of the resident’s admission or residency agreement and in compliance with all applicable local and state fire and safety codes.*

**Comment:** We appreciate the new inclusion of the language “according to the terms of the resident’s admission or residency agreement” in the above passage. We believe this guards against some of the concerns raised in comments submitted by LeadingAge New York in February 2023, which recommended that the amendment allow providers to impose reasonable limits on decorative changes

and preferences that impact health and safety more generally – not just those that implicate fire and safety codes. For example, a change in flooring or rugs may create a falls risk. Likewise, hoarding or excessive furniture may create safety hazards that are not contemplated by fire and safety codes. This modification enables reasonable parameters and we support the language change.

- *(xiv) [A resident shall not be permitted, or obliged, to provide any operator or agent of the operator any gratuity in any form for services provided or arranged for in accord with law or regulation.] A resident shall be permitted to engage in community life, including life outside of the facility, to the degree that the resident prefers and in full recognition of the resident’s safety.*

**Comment:** Again, DOH education and guidance regarding the balance of resident choice and safety is warranted.

- We also note that the enriched housing regulation seems to differ in its proposed regulation change regarding access to the community:

*488.5(a)(3) (xiv) [to object if the operator terminates the resident's admission agreement against his/her will.] to the extent the resident prefers, be permitted to engage in activities outside the facility;*

**Comment:** We would recommend that the language mirror that of the adult home regulation proposed change, again recognizing the need to balance resident safety. If the Department believes the language should not be consistent, this should be explained.

- *A resident shall be afforded the right to control their own schedule and activities and have access to food at any time.*

**Comment:** We appreciate the deletion of the words “of preference” in this updated proposed regulation regarding access to food at any time, consistent with the federal rule. Incorporating the resident’s preferences is inherent in the person-centered planning process. This modification recognizes that there are limitations, based on health and safety considerations, seasonal availability and financial feasibility. The language as modified in this proposed regulation is clearer and consistent with the federal rule, and we support the language change.

We continue to urge further guidance and clarification to ensure a common understanding that access to food at any time does not necessarily mean a fully cooked meal in the middle of the night, for example. In addition, there must also be guidance for the provider about how to manage resident choice if a resident is on a special diet and wants food that are outside of that special diet or pose a safety risk. These are all issues where a common understanding of the intent of the language and the practical limitations are critical.

**With regard to the below changes to Section 487.7(d) and similar wording in Section 488.7(b):**

These modifications require operators to file a report with the Justice Center for the Protection of People with Special Needs in the event of a resident's death or attempted suicide, or when a felony crime may have been committed by or against a resident, *if the resident had at any time received services from a mental hygiene services provider.*

**Comment:** While we do not object to the modifications, we believe the regulatory language would benefit from some additional parameters regarding the standard: "if the resident had at any time received services from a mental hygiene services provider." This is a remarkably broad standard. Residents may not recall if they received services earlier in their life, and the provider may not have documentation of services that were provided. Providers that are not under the general jurisdiction but file a report with the Justice Center because a resident at one time received mental hygiene services are often met with confusion about why the report is being filed. We believe that the standard is written more broadly than the intent. Refinement of the term "mental hygiene services" and "at any time received" would be beneficial, while still preserving the intent.

**With regard to the below changes to Section 487.7(g) and similar wording in Section 488.7(e)**

*Each resident shall be provided such case management services as are necessary to support the resident in maintaining independence of function and personal choice[.], including, but not limited to, decisions regarding which daily activities to participate in, individuals with whom to interact, and the physical environment in which the resident resides.*

**Comment:** The Department must ensure that this concept is reflected in the Department's oversight and practices. For example, should this result in a change in the food service regulations which only allow in room tray service under limited circumstances? If a resident prefers not to eat communally, can this be accommodated without having to submit a waiver or equivalency? Or if an ALP is experiencing an infectious disease outbreak, and infection prevention guidance requires quarantine, does this provision require communal activities?

**With regard to the below proposed change: Section 487.11 (l) and similar wording in Section 488.11(h):**

*All bedrooms shall be: (a) above grade level; (b) adequately lighted; [and] (c) adequately ventilated[.]; and (d) lockable by the resident via an appropriate locking mechanism, with only appropriate staff having access.*

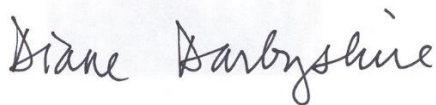
**Comment:** We understand this language is consistent with the federal rule. We would appreciate clarification to the following questions: In settings where residents share a unit, with a locked door, but have individual bedrooms-must the bedrooms themselves have a lock? Additionally, if a private unit has a locked door but the bedroom door itself does not, must the bedroom have a lock installed?

**Conclusion**

Again, we appreciate the opportunity to comment on these regulation changes. While we understand that the changes in regulation outlined above mirror federal regulation, we believe there is important work to be done in the implementation phase to ensure a common understanding of the standards. To that end, more time for education and training is warranted. We look forward to working with the Department on these efforts.

Thank you very much for your consideration of these issues.

Sincerely,

A handwritten signature in cursive script that reads "Diane Darbyshire". The signature is written in black ink on a white background.

Diane Darbyshire  
Vice President for Advocacy and Public Policy

Cc: Valerie Deetz  
Heidi Hayes  
KellyAnn Anderson  
Karen Walker  
Karen Meier  
Madeline Kennedy