



June 5, 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: Proposed Regulation Changes for Assisted Living Residences: I.D. No. HLT-14-23-00009-P

Dear Ms. Ceroalo:

I am writing on behalf of the members of LeadingAge New York's not-for-profit assisted living providers to offer comments on the above-referenced proposed regulation, which seeks to update assisted living residence (ALR) regulations to reflect changes in law and policy and modify the structural and environmental regulations.

Recommendations Regarding 1001.16

LeadingAge NY recommends the deletion of the word "accurate" in the below passage, as indicated. It is expected that all record keeping by the ALR is accurate. Further, the information included in the records is obtained by asking individuals about their service history. Thus, the accuracy of the information in the records hinges upon the accuracy of the information provided. We also recommend omitting the requirement that this information be documented in two places; documenting in admission forms for all incoming residents should suffice to ensure that the information is gathered and properly noted.

1001.16 of this Part. Subdivision (g) of Section 1001.7 is amended to add paragraphs (1) through (3) to read as follows: (1) Assisted living residences shall keep and maintain accurate records identifying veterans and their spouses residing within such facilities. Such information shall be solicited by asking prospective and current residents the question "Have you or your spouse ever served in the United States military?" Admission forms and resident files must include the answer to this question.

LeadingAge NY recommends the deletion of the words "and certified" to the below passage as indicated, as this would incorrectly suggest that the requirement applies only to those entities that have enhanced or special needs certification. We also advise that the wording be modified to advise all prospective residents identifying themselves as veterans or spouses of veterans since this question will be addressed at admission and the term "individuals" is too broad. Lastly, we recommend that the ALR be responsible for transmitting information to the Department of Veteran's Services for residents identifying as veterans or spouses of veterans. Prospective residents could encompass anyone that shows interest in the community, including those who do not complete paperwork or choose to reside

in the community. This places an undue burden on the ALR to track information and obtain permission to share information for individuals for whom they may not even know their whereabouts.

1001.16 of this Part. Subdivision (g) of Section 1001.7 (2) Every assisted living residence licensed ~~and certified~~ by the department shall in writing advise all ~~individuals~~ prospective residents identifying themselves as veterans or spouses of veterans that benefit assistance to veterans and their spouses is available through the Department of Veterans' Services and local veterans' service agencies; and provide the name, address, and telephone number of the New York State Department of Veterans' Services, the nearest Department of Veterans' Services office, the nearest county or city veterans' service agency, and the nearest accredited veterans' service officer. (3) With the permission of ~~the individuals~~ residents identifying as veterans or spouses of veterans, the assisted living residence shall transmit veteran status information to the Department of Veterans' Services.

Recommendations Regarding 1001.8

As indicated below we recommend the addition of the words "increased charges for" to provide greater clarity to the passage. In addition, we recommend the retention of the highlighted passage (a) which was proposed to be struck, with suggested lead in language to clarify that a rate increase made also be made in this circumstance. This provision should remain intact, as it was not affected by the lawsuit nor subsequent changes in statute.

Subparagraph (xvi) of paragraph (2) of subdivision (b) of Section 1001.8 is amended to read as follows: (xvi) Every resident shall have the right to written notice of any fee increase not less than forty five days prior to the proposed effective date of the fee increase, provided however, increased charges for providing additional services to a resident [in accordance with section 461-c(2) of the Social Services Law,] shall not be considered a fee increase pursuant to this paragraph. [in the following situations:

A rate increase may also be made ~~(a)~~ if a resident, resident representative or legal representative agrees in writing to a specific rate or fee increase, through an amendment of the residency agreement, due to the resident's need for additional care, services or supplies, the operator may increase such rate upon less than forty-five days written notice.

(b) if the operator provides additional care, services or supplies upon the written order of the resident's primary physician, the operator may, through an amendment to the residency agreement, increase such rate upon less than forty-five days written notice; or

(c) in the event of an emergency which affects the resident, the operator may assess additional charges for the benefit of the resident as are reasonable and necessary for services, materials, equipment and food supplies during such emergency.]

Recommendations Regarding 1001.11

The below deletion of "special needs assisted living residence" is necessary to be consistent with the assisted living statute, which unfortunately does not allow for the direct provision of nursing services

by the ALR in any setting but the enhanced assisted living residence. LeadingAge NY also recommends the insertion of the words “or arrange for” to allow the enhanced assisted living residence to arrange for certified home health agency services as appropriate to ensure the resident can utilize their Medicare benefits.

Subdivision (j) of Section 1001.11 is amended to read as follows:

(j) An enhanced assisted living residence ~~or a special needs assisted living residence~~ shall provide, either directly or through contract, or arrange for sufficient nursing staff to meet the health care needs of the residents. [Nursing coverage requirements, at a minimum, include: (1) a registered professional nurse on duty and on-site at the residence, for eight hours per day, five days a week, and a licensed practical nurse shall be on duty and onsite at the residence for eight hours per day for the remainder of such week; (2) a registered professional nurse on call and available for consultation 24 hours a day, seven days a week, if not available onsite; and (3) additional nursing coverage, as determined necessary and documented by the resident’s medical evaluation or otherwise by the resident’s attending physician and/or the ISP.] 6 Subdivisions (k), (l), (m), (n), and (p) of Section 1001.11 are repealed. Subdivision (o) of Section 1001.11 is redesignated as subdivision (k), subdivision (q) of Section 1001.11 is redesignated as subdivision (l), and subdivision (r) of Section 1001.11 is redesignated as subdivision (m).

Additionally, current regulation 1001.11(o), which is *not* addressed in these proposed regulation changes except to redesignate it as (k), contains the same flaw noted above as it relates to nursing services. LeadingAge NY recommends statutory changes to enable nurses working in ALR and SNALR settings to be able to provide nursing services consistent with scope of practice and admission and retention standards. Until such statutory changes take place, however, the regulations should communicate clearly to the provider community what is—or what is not-- permissible in each setting. See below passage for reference.

(o) An enhanced assisted living residence ~~or a special needs assisted living residence~~ may employ or contract for appropriately trained personnel with professional licenses and registrations, as applicable, to provide health care services directly.

Recommendations Regarding 1001.13

Given the fundamental re-writing of this section of regulation, we urge that the proposed regulations reflect the input of architects, engineers and fire safety professionals who are experts in this arena. It is our belief that the architectural workgroup, which was convened over per the ALR litigation stipulation and order, had opined on these issues. That was, however, over ten years ago. We urge the Department to conduct outreach to those professionals working on projects in the state, to ensure the regulations reflect current practice and standards.

Based on input from colleagues of LeadingAge NY, we note the following issues and questions, which merit further clarification in a final regulation:

- It is important to note that New York City building code does not sub-classify I-1 occupancies into groups 1 and 2 as the New York State building code does. New York City code clearly states that residents in I-1 building are capable of self-evacuation.
- Can existing buildings not currently licensed as adult home or enriched housing but applying to become an assisted living residence, enhanced or special needs assisted living residence comply with “old” (pre-April 2023) physical plant regulations?
- These proposed regulations that within New York City, compliance with 2014 New York City building code is the standard, but 2022 code is now in effect.

We would advise that the existing building versus new construction language be re-worded to reflect where that the ALR is no longer a new construct. Further, in New York City, existing building code allows for improvement or changes to a building. The Existing Structures definition should accommodate this.

In addition, we highlight for you references in the existing structures language in (b), highlighted below, which should be modified. It references the date of adoption of this Part, which refers back to the initial adoption of the assisted living residence regulations, which was adopted nearly fifteen years ago. We believe the intention is instead to reference this current amendment and should be reflected as such.

There should be an acknowledgement that projects that are already under review are not subject to these new requirements, and that time is given to adopt these new standards, for those currently preparing for imminent submissions.

Section 1001.13 Structural and environmental standards is repealed and replaced by a new section 1001.13, to read as follows: Section 1001.13 Structural and environmental standards.

(a) An operator of an assisted living residence (ALR) shall comply with the following standards in addition to all applicable standards contained in sections 487.11, 488.11 and, 494.7 of Title 18 of the NYCRR.

(b) **Existing Structures.** (1) Definition. Existing structures are buildings: (i) which have Part 1 approval, including architectural approval, pursuant to section 485.6 of Title 18 of the Official Compilation of Codes, Rules and Regulations of the State of New York; (ii) for which construction commenced prior to the date of adoption of this Part; and (iii) for which certificates of occupancy have been issued, for which occupancy has been locally approved but such building was not yet occupied as of the **date of adoption of this Part**, or which were licensed as an adult home or enriched housing program prior to the **date of adoption of this Part**.

We raise concerns regarding the below highlighted passage which allows the Department to reexamine the adequacy of structural and environmental standards in existing structures if the applicable

requirements at the time of licensure were not met. LeadingAge NY appreciates the importance of meeting these requirements, particularly as they relate to the safety of vulnerable populations. We raise concern, however, that this allows the reversal of positions and decisions made by the Department prior, which have the potential to be at great cost to the operator. We urge, in such circumstances, a process by which the issue may be evaluated which takes into consideration the safety of residents and the cost and feasibility of the correction, as well as adequate time to achieve a reasonable accommodation.

(2) An existing structure that is not currently licensed as an enriched housing program or adult home and is seeking to be licensed as an ALR, Enhanced ALR, or Special Needs ALR shall meet all applicable structural and environmental requirements currently in effect for either an enriched housing program or an adult home, as applicable. **Provided further, the Department may reexamine the adequacy of structural and environmental standards in existing structures should it be determined that codes, rules and regulations that were applicable to the structure at the time of licensure were not met.**

With regard to the below highlighted passage, we note that there is confusion regarding the term “twenty-four hour attended central station”. We suggest considering providing a definition to clarify.

(iii) Fire protection notification systems shall be directly connected to the local fire department, or to a **twenty-four-hour attended central station.**

With regard to the below highlighted passage, we note that the reference to current licensure or certification should reference a specific date.

(vi) Accessibility: Provisions for new construction, as set forth in subdivision (c) of this section, shall apply to all building additions to existing structures. An addition that affects the accessibility to or contains an area of a primary function shall comply with the requirements for accessibility as set forth in the New York State Uniform Fire Prevention and Building Code, as incorporated by reference herein. An area of primary function shall mean an area where a major activity conducted by the facility is intended to occur. Areas of primary function include, but are not limited to, lobbies, dining areas, and meeting rooms, but shall generally not include mechanical rooms, boiler rooms, supply storage rooms, or restrooms. Any facility that is **not currently licensed or certified** shall comply with current codes, rules and regulations for accessibility.

The below highlighted reference to “appropriate hardware” as it relate to smoke-tight doors seems subjective and may require further explanation.

(5) A building used by the operator of an Enhanced ALR or Special Needs ALR which has a capacity of seventeen or more residents shall, in addition to all other requirements of

subdivision (b) of this section, have smoke barriers to divide each floor into at least two smoke compartments, neither of which shall have corridors exceeding one hundred feet in length. For the purposes of this section, a smoke barrier means a continuous fire-rated partition or wall, extending from one exterior wall to another exterior wall, with all openings, including but not limited to doorways, protected with 45-minute fire-rated and smoke-tight doors equipped with appropriate hardware.

With regard to the below passage regarding Special Needs Assisted Living Residence requirements, new requirements should be imposed moving forward and not required retroactively. We believe new provisions are include in (ii) and (iii), highlighted below. We also raise concern regarding (6)(ii)(a) which requires constant supervision provided by staff. We offer modified language, highlighted and underlined below, to allow for the potential for technologies to support and enhance staff supervision, perhaps in ways we can't anticipate at this time.

(6) A building used by the operator of a Special Needs ALR, without regard to the capacity of residents, shall, in addition to all other requirements of subdivision (b) of this section, comply with the following additional environmental standards:

(i) Units shall be designed and operated as self-contained sub-units, otherwise known as household units. If operated as a portion of a residence, the unit must also provide self contained leisure and dining room space. Support services and spaces may be located within adjacent programs or areas, and visitors and staff shall not regularly pass through a special needs unit to reach other areas of the residence.

(ii) Secure outdoor space and walkways shall be provided that will allow residents to ambulate, with or without assistive devices such as wheelchairs or walkers.

(a) Residents shall have regular access to secure outdoor areas, which have mechanisms in place to ensure ongoing supervision and monitoring - ~~constant supervision provided by staff.~~

(b) Outdoor space shall have fencing or barriers that prevent injury and elopement. Fencing shall be designed not to be easily climbable and shall be a minimum of 72 inches high.

(c) Provide lighting for evening visibility with use of direct down-light fixtures with careful consideration to control light pollution and unwanted light glare affecting adjacent dwelling units or sleeping units.

(iii) All windows shall be equipped with mechanisms to limit window openings to a maximum of four inches to prevent elopement and accidental falls.

We note that (8) and (9) below are unrelated provisions, and (9), highlighted, should actually be the beginning of a new roman numeral indicating a new section. We also note that the following passages applied to all buildings, and then reverts to new buildings. It should be more clearly laid out to separate these sections.

(8) Emergency lighting shall be provided at the door.

(9) The operator shall provide a supportive environment for residents, staff, and visitors, including but not limited to the use of self-contained units of limited size, quiet areas, and appropriate wander paths.

(10) The operator shall limit access to potentially harmful or disruptive equipment, including but not limited to fire alarms, elevators, fire extinguishers, and cooking equipment.

(11) To ensure safety for all, the operator shall consider whether to allow smoking within the program or facility. If residents are allowed to smoke, appropriate supervision and locations must be provided.

(12) The operator shall maintain site control over the building in which the program is located.

(b) The operator shall have a written policy and procedure plan approved by the Department, which details the procedures to be followed for the proper protection of residents and staff in the event of an actual or threatened emergency or disaster, which interrupts normal service. All staff shall be trained to execute the facility disaster and emergency plan. Such policy and procedure plans shall be designed appropriately for residents with dementia characteristics, which may include relying more heavily on staff training and support than resident training or practice. (c) Where appropriate and approved by both local authorities and the Department, progressive evacuation procedures are recommended. (d) Monthly fire drills for staff and volunteers shall be conducted at varied times during the day and night.

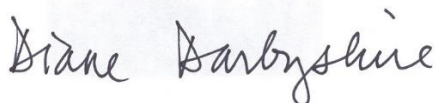
(c) **New Structures.**

Lastly, we note inconsistent references to NFPA standards which should be clarified.

Conclusion

Again, we appreciate the opportunity to comment on these regulation changes. Thank you very much for your consideration of these issues.

Sincerely,



Diane Darbyshire
Vice President for Advocacy and Public Policy

Cc: Valerie Deetz
Heidi Hayes
KellyAnn Anderson
Karen Walker