

Title 64 Series 14
Department of Health and Human Resources
Office of Inspector General
Office of Health Facility Licensure and Certification
ASSISTED LIVING RESIDENCES

Summary of Public Comments

Section 2. Definitions

Comment:

2.2. A typographical error appears in the second sentence. "Include" should be "includes." The second sentence is unclear. A word or words may be missing. We suggest the following: "Abuse also includes the willful deprivation of goods and services that are necessary to attain or maintain a resident's physical, mental, and psychosocial well-being."

Response:

The Department has reviewed this comment and finds clarification is needed, therefore, changes were made.

Comment:

2.11. The language highlighted above is unnecessary. Direct Care Staff provides services to all residents. It is unnecessary to describe residents with specific behavioral problems.

Response:

The Department has reviewed this comment and finds clarification is needed, therefore, changes were made.

Comment:

2.19. We suggest you replace the highlighted sentence with the following: "Legal representatives may have limited authority to act on behalf of the resident."

Response:

The Department has reviewed this comment and finds clarification is needed, therefore, changes were made.

Comment:

Suggest clarifying the definition of "legal representative", Proposed Rule 2.19, to reflect the current concepts of support-decision-making. Suggest "*A person chosen by the resident, authorized by state or federal law, or appointed by a court of competent jurisdiction to act on behalf of the resident in order to support the resident in decision-making; access medical, social or other personal information of the resident; manage financial matters; or receive notifications. Various types of legal representatives may not necessarily have the lawful authority to act on behalf of the resident in all matters that require action by the legal representative. Nothing in this rule is intended to expand the scope of authority of any legal representative beyond that authority specifically authorized by the resident, state or federal law, or a court of competent jurisdiction. Legal representatives include:*"

Response:

The Department has reviewed this comment and finds clarification is needed, therefore, changes were made.

Comment:

2.19.1.; 2.19.2.: The phrase “appointing order” may cause problems. The order “appointing” the legal representative may be subsequently modified. The court may change a full guardianship to a limited guardianship or may revise the parameters of a limited guardianship. The most recent order by the court should be followed, not the original order “appointing” the guardian.

Response:

The Department has reviewed this comment. Existing provisions in the rule address this issue adequately, and, therefore, no changes were made.

Comment:

The citation to the W. Va. Code in Proposed Rule 2.19.7 is incorrect. Replace “W. Va. Code 39-4-1” with “*W. Va. Code 39B-1-101.*”

Response:

The Department has reviewed this comment and finds clarification is needed, therefore, changes were made.

Comment:

2.22. The words limited and intermittent describe scope and duration. They do not refer to “direct, hands-on nursing care.” A suggestion is to define limited and intermittent to mean “not more than two hours for a period of time and no longer than 90 consecutive days.” The easiest solution may be to include the full definition of limited and intermittent nursing care found at § 16-5D-2(a)(5).

Response:

The Department has reviewed this comment and finds clarification is needed, therefore, changes were made.

Comment:

2.26. Other definitions related to abuse require the act to be willful. We believe that conduct resulting in neglect should also be willful. “Willful failure of the facility, its employees, or service providers to ...”

Response:

The Department has reviewed this comment. Existing provisions in the rule address this issue adequately, and, therefore, no changes were made.

Comment:

2.28. This definition of physical abuse is unclear and impractical. First, it is unclear what the phrase “with fingers or nails” means. Is the prohibition on twisting limited to the use of fingers and nails? Is the prohibition of “fingers and nails” broader than twisting? Does it apply to “shoving, pushing, pulling, pinching and tugging?” Does abuse occur if a staff member pulls or tugs without using fingers or nails? The sentence should be clearer.

Secondly, exceptions are needed for physical attacks. If a resident attacks a staff member, the staff member should move away. That cannot happen if the resident has grabbed the staff member’s hair, clothing or another body part. The staff member will have to extricate herself or himself from the situation before she can move away. Also, if a resident is pummeling a staff member, the natural, human reaction is to block the blows as you are moving away. That should not be considered physical abuse. Finally, consideration must be given to a resident attacking another resident. What is the staff member to do? The staff member may have to touch the aggressor to protect the victim. Responses to physical attacks must be further examined and defined.

We have significant concerns with the construction and clarity of the entire definition.

Response:

The Department has reviewed this comment and finds clarification is needed, therefore, changes were made.

Comment:

Suggest clarifying the second part of the definition of “restraint”, Proposed Rule 2.30.2. Suggest replacing “Any drug used to limit movement or mental capacity of a resident beyond the requirements of therapeutic treatment” with “*any drug that is used for discipline or staff convenience and not required to treat medical symptoms.*” The suggested language is clearer and reflects the current view of chemical restraints.

Response:

The Department has reviewed this comment and finds clarification is needed, therefore, changes were made.

Comment:

2.33. The word “or” should be placed after sexual assault, not before it. The phrase “graphic images of a resident’s body” is too broad. Graphic can be defined as giving a clear and effective picture. As written, any photograph taken of a resident would be sexual abuse. A head shot at a facility picnic would be a graphic image of a resident’s body. The resident’s head would not be clothed or covered. The photo would be a graphic depiction of a body part. Similarly, a photo taken of a bruise that is noticed when a resident returns from a family visit to the hospital or other health care facility would be sexual abuse. Photos taken for medical reasons would be sexual abuse. One could argue that an x-ray is a graphic image of a resident’s body. That too would be sexual abuse. This definition needs to be thoroughly examined and severely limited. A finding of sexual abuse can destroy a health care provider’s career.

Response:

The Department has reviewed this comment and finds clarification is needed, therefore, changes were made.

Comment:

Suggest including a definition for "ombudsman." There are numerous references to "ombudsman" in the Proposed Rule. These uses refer to representatives of the West Virginia Long-term Care Ombudsman Program. However, there are a variety of ombudsmen, including but not limited to West Virginia's Behavioral Health Ombudsman and the federal Medicare Ombudsman. Suggest "*Ombudsman -- Any person or organization designated by the State Long Term Care Ombudsman as part of the West Virginia Long-Term Care Ombudsman Program.*"

Response:

The Department has reviewed this comment and finds clarification is needed, therefore, changes were made.

Section 3 State Administrative Procedures

Comment:

3.1.2.a. The assisted living residence shall notify the Secretary in writing 30 days prior to a change in name or physical address of the program and request an application form from a licensure amendment. Please note the typographical error.

Response:

The Department has reviewed this comment and finds clarification is needed, therefore, changes were made.

Comment:

3.4.1.b.1. The applicant or licensee has a personal history that has: ***

3.4.1.b.2. Receipt of an ineligible employment fitness determination from the West Virginia Clearance for Access: Registry and Employment Screening unit of the Department of Health and Human Resources and has not received a variance;

The transition from subsection 1 to 2 does not flow well.

Response:

The Department has reviewed this comment and finds clarification is needed, therefore, changes were made.

Section 4 Administrative Requirements

Comment:

4.1.7. All employees and volunteers of an assisted living residence shall be subject to the provisions of the West Virginia Clearance for Access: Registry and Employment Screening Act, W.Va. Code §§16-49-1. et seq. and W.Va. Code R. §§69-10-1. et seq.. (Class II)

The term volunteers should be defined or eliminated. AL communities encourage resident interaction with the community. A variety of visitors/volunteers enter the communities, such as church groups, dog owners, and scout groups. Must every 10-year-old be fingerprinted before he or she sings Christmas carols? This requirement will discourage the community from visiting the elderly and isolate residents.

Response:

The Department has reviewed this comment and finds clarification is needed, therefore, changes were made.

Comment:

Suggest modifying Proposed Rule 4.7.4.a. to require the inclusion of the residence smoking policy as one of the items that must be disclosed at admission. Many residences have gone smoke free. Consequently, this is extremely important information for residents who are also smokers. Suggest "House rules governing resident behavior and responsibilities, *including the residence smoking policy.*"

Response:

The Department has reviewed this comment and finds that clarification is needed, therefore, changes were made.

Comment:

Suggest modifying Proposed Rule 4.7.7. to require that whenever the licensee initiates a discharge, the licensee be required to assist the resident in finding alternative placement. Complaints about discharge from assisted living residents have been among the top five most frequent complaints to the LTCOP for the past ten years. Residents, and their representatives, assert that the current rule does not provide them with sufficient protections when the licensee proposes a discharge against the resident's wishes. Given the private, contractual nature of assisted living, it is important to create a safety net through rules in the event of unscrupulous practice. Suggest "The licensee shall give the resident notice of and file a copy of the notice in the resident's record of the 30-day written notice prior to discharge, unless an emergency arises that requires the resident's transfer to a hospital or other higher level of care, or if the resident is a danger to him or herself or others. *The licensee shall assist the resident in identifying an alternative placement that is appropriate to the resident's individual needs as identified by the service plan. The licensee shall document all efforts made and the results.*"

Response:

The Department has reviewed this comment and finds that clarification is needed, therefore, changes were made.

Comment:

Suggest adding a timeframe to Proposed Rule 4.8.7, which currently requires the licensee to provide an accounting and refund of any money in a resident account when the resident request to terminate the account. As currently written there is not a timeframe in which this should be done. Suggesting adding

"within 5 business days" to the end of Proposed Rule 4.8.7. Many residents have limited finances and should be assured that they will receive their money within a reasonable period of time.

Response:

The Department has reviewed this comment and finds clarification is needed, therefore, changes were made.

Section 5 Resident Rights

Comment:

Suggest clarifying Proposed Rule 5.1.6. to emphasize that licensees must not allow legal representatives to exercise more authority than the legal representative has been given. The "over reach" of legal representatives is a problem that the LTCO see quite often. Allowing a legal representative to act contrary to the terms of his designation is a significant violation of the resident's right to autonomy and self-determination. Once these representatives are permitted to act contrary to the terms of their authority it is highly unlikely that they will pull back. Suggest replacing current Proposed Rule 5.1.6. with "*5.1.6. The resident has the right to have a representative exercise one or more of the resident's rights, to the extent provided by federal and state law.*

5.1.6.a. The licensee must treat the decisions of the legal representative as the decisions of the resident to the extent required by a court or delegated by the resident, in accordance with federal and state law.

5.1.6. b. The resident retains the right to exercise those rights not delegated to the legal representative, including the right to revoke a delegation of rights, except as limited by state law. 5.1.6.c. The licensee shall not extend the legal representative the right to make decisions on behalf of the resident beyond the extent required by the court or delegated by the resident, in accordance with federal and state law.

5.1.6.d. The licensee shall obtain and retain a copy of all of the documents granting legal authority to a representative in the resident's record

5.1.6.e. The involvement of a representative does not relieve the licensee of the duty to promote and protect the resident's interests. To the extent practicable, the licensee must provide the resident opportunities to participate in choices about daily living and care."

Although including this language does contribute to the length of the proposed rule, the benefit to the residents is well worth the additional word count. In the spirit of "an ounce of prevention is worth a pound of cure" providing more guidance about the legal representative's role may head off a world of problems for our residents.

Response:

The Department has reviewed this comment and finds clarification is needed, therefore, changes were made.

Comment:

Suggest adding language to Proposed Rule 5.2.8. to clarify that the resident has the right to make choices beyond when to awake and when to retire. Suggest replacing the phrase "such as" in Proposed Rule 5.2.8. with "*including, but not limited to,*"

Response:

The Department has reviewed this comment and finds clarification is needed, therefore, changes were made.

Comment:

Suggest adding language to Proposed Rule 5.2.10. to encompass current technology. Suggest adding "*computer and other electronic*" between "telephone" and "communication" in Proposed Rule 5.2.10.

Response:

The Department has reviewed this comment and finds clarification is needed, therefore, changes were made.

Comment:

Suggest switching the order of Proposed Rule 5.2.15. and 5.2.16. Proposed Rule 5.2.16. confers a broad right opposed to the limited right in Proposed 5.2.15. Reversing the order allows for easier reading.

Response:

The Department has reviewed this comment and finds clarification is needed, therefore, changes were made.

Comment:

Suggest including Internet access in Proposed Rule 5.3. to reflect the current technology. Suggest adding *"The resident has the right to have reasonable access to and privacy in the use of electronic communications such as email and video communications and for internet research. (a) If the access is available to the facility. (b) At the resident's expense, if any additional expense is incurred by the licensee to provide such access to the resident."* Suggest adding this new language rule as Rule 5.3.7. and retaining and renumbering current Proposed Rules, 5.3.7., 5.3.8. and 5.3.9.

Response:

The Department has reviewed this comment, and no changes were made. Licensed providers may create a policy to address the issue.

Comment:

There is a typographical error in current Proposed Rule 5.3.9. The word "presentative" should be "representative".

Response:

The Department has reviewed this comment and finds clarification is needed, therefore, changes were made.

Section 6 Health Care Standards

Comment:

Suggest clarifying Proposed Rule 6.1.3. Suggest the following deletion/addition. "If a resident exhibits symptoms of a mental or developmental disorder that seems-te pose a risk to self or others, and the resident is not receiving behavioral health services, the licensee shall advise the resident or his or her legal representative of the behavioral health service options within the community. The resident shall have 30 days to obtain necessary services. If the resident or his or her legal representative fails to seek treatment in a timely manner and the risk persists, then the licensee after consultation with the resident's physician, shall refer the resident to a licensed behavioral health provider." The deletion of the phrase "seems to" and the later addition of "and the risk persists" helps to eliminate ambiguity.

Response:

The Department has reviewed this comment and finds clarification is needed, therefore, changes were made.

Comment:

Suggest renumbering Proposed Rule 6.1.4. as Proposed Rule 6.1.3.a. As currently written, Proposed Rule 6.1.4. seems to provide an alternative, additional response to residents who exhibit symptoms of mental or developmental disorders. If this is the intent, it is clearer to move it to a sub-rule of Proposed 6.1.3. If that is not the intent, Proposed Rule 6.1.4. needs rewritten. As currently written it is overbroad and ambiguous.

Response:

The Department has reviewed this comment. Existing provisions in the rule address this issue adequately, and, therefore, no changes were made.

Comment:

Suggest replacing Proposed Rule 6.1.6. with *"The licensee shall assist the resident in identifying an alternative placement that is appropriate to the resident's individual needs as identified by the service plan. The licensee shall document all efforts made and the results."* (See above comments to Proposed Rule 4.7.7. for rationale.)

Response:

The Department has reviewed this comment. Existing provisions in the rule address this issue adequately, and, therefore, no changes were made.

Comment:

Suggest specifying that evidence of the legal representative's authority must be included in the resident's record. Suggest *"Copies of all documents granting legal authority to a representative."* be inserted as Proposed Rule 6.2.2.e. and then renumber existing Rule 6.2.2.e.

Response:

The Department has reviewed this comment and finds clarification is needed, therefore, changes were made.

Comment:

Suggest replacing the word "given" with the word "administered" in Proposed Rule 6.4.6. to accurately reflect the professional service being documented, *i.e.*, medication administration.

Response:

The Department has reviewed this comment and finds clarification is needed, therefore, changes were made.

Comment:

Suggest specifying in Rule 6.4. what is to be done with unused, discontinued, or outdated drugs. Proposed Rule 6.4.11, is limited only to those drugs listed in Schedules II, III, IV or V of the Federal Comprehensive Drug Abuse Prevention and Control Act of 1970. Must the licensee return all drugs not specifically addressed by Proposed Rule 6.4.11. to the pharmacy? What about over-the-counter medications? Are there situations when some drugs could be returned to resident? Suggest providing these answers as clarifying information in a new sub-rule of Proposed Rule 6.4.

Response:

The Department has reviewed this comment and finds clarification is needed, therefore, changes were made.

Comment:

Suggest deleting the clause "within reasonable expectations" from Proposed Rule 6.6.3. Its use makes the rule too ambiguous to enforce.

Response:

The Department has reviewed this comment and finds clarification is needed, therefore, changes were made.

Comment:

Proposed Rule 6.7.1. uses the phrase "next of kin" but neither the Proposed Rule nor the authorizing statute provides a definition. Suggest including the definition from the current Nursing Home Licensure Rule, W. Va. Code of State Rules, tit. 64, ser. 13, rule 2.38. Suggest *"Next of Kin. In descending order of priority;*

- a. The resident's spouse;
- b. The resident's adult children;
- c. The resident's parents;
- d. The resident's adult siblings;
- e. The resident's adult grandchildren;
- f. The resident's close friends; and

Any other person or entity, including guardians, public officials and private corporations and other persons or entities which the department may from time to time designate in rules promulgated pursuant to W. Va. Code § 29A-1-1 et seq.

Response:

The Department has reviewed this comment, and no changes were made. Licensed providers may create a policy to address the issue.

Section 7 Activities

Comment:

The lack of meaningful social and recreational activities can have a dramatic adverse impact to a resident's quality of life. Suggest enhancing Proposed Rule 7 to reflect the importance of a quality activity program. Suggest Proposed Rule 7.1 *"The licensee shall provide an activity program designed to meet the interests and promote the highest level possible level of well-being in all dimensions of life including physical, psychological, social, and spiritual, of each resident."* and Proposed Rule 7.2.1. *"Provide information and referral services and facilitate opportunities for using the social, recreational, and vocational activities within the community; "*

Response:

The Department has reviewed this comment and finds clarification is needed, therefore, changes were made.

Section 8 Dietary Services

Comment:

The word "receipt" in Proposed Rule 8.8. should be *"receipts"*.

Response:

The Department has reviewed this comment and finds clarification is needed, therefore, changes were made.

Section 11 Licensure Denials, Revocations, and Suspensions

Comment:

11.1.1. The Secretary may deny, revoke, or suspend a license issued pursuant to this rule if any provisions of federal or state law or this rule are violated. The Secretary may revoke a license and prohibit all licensed professionals associated with the assisted living resident from practicing at the residence location based upon the findings and results of an annual, periodic, complaint, or other inspection and evaluation. The period of suspension for the licensure of an assisted living residence shall be prescribed by the Secretary, but may not exceed one year. Surveyors identify minor infractions of state and federal law when they inspect facilities. The Secretary should not have the authority to deny, revoke, or suspend a license for a minor violation. The second sentence, which addresses licensed professionals, needs clarification. Does the phrase, "The secretary

may revoke a license" refer to the facility's license or the health care provider's license. The first sentence specifically discusses revoking the facility's license. Does that mean the second sentence gives the Secretary the authority to revoke a health care provider's license? If so, we object. The rule does not provide due process for the health professional. Moreover, only a licensing authority should be able to revoke a professional's license.

Response:

The Department has reviewed this comment, and no changes were made in response. The rule provision is consistent with the requirements of the statute.

Comment:

11.2.1. If a license for an assisted living residence has been revoked, the Secretary may stay the effective date of the revocation if the owner or owners and administrator of the assisted living residence can show that the stay is necessary to ensure appropriate referral and placement of residents. The facility may not be able to hire an administrator if the license has been revoked and the facility is closing. Requiring the owner AND administrator to act may be an impossibility. In this case, perhaps the owner should be the only person needed to act.

Response:

The Department has reviewed this comment and finds clarification is needed, therefore, changes were made.

Comment:

11.2.5. If the licensee of an assisted living residence is revoked or suspended, no person named in the licensure documents of the residence, including persons owning or operating the assisted living residence, may apply to own, license, or operate another assisted living residence for five years after the date of revocation or suspension, either individually or as part of a group, firm, association, or corporation.

11.2.6. If an assisted living residence licensee is denied or revoked, a new application for licensure shall be considered by the Secretary, if, when, and after the conditions upon which denial or revocation were based have been corrected and evidence of this fact has been furnished. A new license may then be granted after proper inspection has been made and the Secretary makes a written finding that all provisions of this rule have been satisfied. The penalty in section 11.2.5 is harsh. A five-year ban on a person who has a minority interest in a corporation is severe. The minority owner may have been outvoted and had no control over the situation. Additionally, the ban on persons "named in the licensure documents" and who operate the residence is too broad and too vague. The Department of Health and Human Resources' "Initial and Change of Ownership" License Application for Assisted Living Residences includes the names of the "Administrator / Executive Director" and the "Supervising / Consultant Registered Nurse." Are the administrator and supervising nurse banned from operating a residence for five years? They should not be. The administrator and nurse may have stayed to care for the residents as the facility declined or were denied the resources they needed to properly operate the facility. We do not want to create an adverse incentive for professionals to abandon residents to save their careers. Finally, sections 11.2.5 and 11.2.6 appear to be contradictory with respect to revocations. Section 11.2.5 states that a person associated with a revocation cannot own, license, or operate a residence for five years. Section 11.2.6 states that a new application for licensure will be considered if a revocation occurs and certain conditions are met. These sections seem to be contradictory. Further explanation and clarification is needed.

Response:

The Department has reviewed this comment and finds clarification is needed, therefore, changes were made.

Section 12 Penalties and Equitable Relief

Comment:

12.1.1. Any person, partnership, association, or corporation which establishes, conducts, manages, or operates an assisted living residence without first obtaining a license therefore or which violates any provisions of this law or rule shall be assessed a civil money penalty by the Secretary in accordance with this rule, and, if applicable, W.V. Code §16-5D-10. The use of the word "shall" in this section requires the Secretary to impose a civil money penalty for every violation regardless of its significance. This represents a major policy change from current practice. We suggest the permissive term "may" be inserted in place of "shall."

Response:

The Department has reviewed this comment and finds clarification is needed, therefore, changes were made.

Comment:

12.1.2. Each day of continuing violation after notification of the infraction shall be considered a separate violation. Section 12.1.1 requires a civil money penalty when any provision of the rule is violated. This means that a CMP must be imposed each day of a continuing violation. Some violations may require days to correct. For example, a facility may need to order a part for equipment, plumbing, or HVAC, and it may take several days to receive it. A separate CMP should not be required for each day.

Response:

The Department has reviewed this comment, and no changes were made in response. The rule provision is consistent with the requirements of the statute.

Comment:

12.1.4. If an owner or owner or administrator of an assisted living residence concurrently operate an unlicensed assisted living residence, the Secretary may impose a civil money penalty upon the owner or owners or administrator, or both, not to exceed \$5,000 per day. A typographical error appears in the first sentence.

Response:

The Department has reviewed this comment and finds clarification is needed, therefore, changes were made.

Comment:

12.1.6. If an owner administrator knowingly operates, owns, or manages an unlicensed assisted living residence that is required to be licensed pursuant to this article; knowingly dispenses or causes to be dispensed, controlled substances in an unlicensed assisted living residence that is required to be licensed; or attempts to procure a license for an assisted living residence for any other person by making causing to be made any false representation, the Secretary may assess a civil money penalty of not more than \$20,000. The penalty may be in addition to or in lieu of any other action that may be taken by the Secretary or any other board, court, or entity. A typographical error is highlighted.

Response:

The Department has reviewed this comment and finds clarification is needed, therefore, changes were made.

Comment:

12.3.2.a. The gravity of the violation, including the probability that death or serious physical or emotional ham to a resident has resulted, or could have resulted, from the assisted living residence's actions or the

actions of the administrator or any licensed practitioner employed by or associated with the residence, the severity of the action or potential harm, and the extent to which the provisions of the applicable laws or rules were violated. A typographical error is highlighted.

Response:

The Department has reviewed this comment and finds clarification is needed, therefore, changes were made.

Section 13 Administrative Due Process

Comment:

§64-14-13. Administrative Due Process. Throughout the rule, administrators are subject to punishment, but this section does not provide them with any administrative due process. In a couple of sections, the supervising nurse can be penalized, but this section does not provide that individual with any due process rights.

Response:

The Department has reviewed this comment and finds clarification is needed, therefore, changes were made.

Section 14 Administrative Appeals and Judicial Review

Comment:

§64-14-14. Administrative Appeals and Judicial Review. This section does not provide an administrator or supervising nurse with any appeal rights.

Response:

The Department has reviewed this comment and finds clarification is needed, therefore, changes were made.

Ms. Kathy Lawson, Inspector General
State Capitol Complex
Building 6, Rm 817
Charleston, WV 25305

July 20, 2018

RE: LTCOP Comments to the Proposed Assisted Living Residence Licensure Rule (64 CSR 14)

Dear Ms. Lawson

Please consider these comments to the Proposed Assisted Living Residence Licensure Rule (64 CSR 14) submitted by the West Virginia Long-term Care Ombudsman Program (LTCOP) on behalf of West Virginia's assisted living residence population.

Definitions

Suggest clarifying the definition of "legal representative", Proposed Rule 2.19, to reflect the current concepts of supported-decision-making. Suggest *"A person chosen by the resident, authorized by state or federal law, or appointed by a court of competent jurisdiction to act on behalf of the resident in order to support the resident in decision-making; access medical, social or other personal information of the resident; manage financial matters; or receive notifications. Various types of legal representatives may not necessarily have the lawful authority to act on behalf of the resident in all matters that require action by the legal representative. Nothing in this rule is intended to expand the scope of authority of any legal representative beyond the authority specifically authorized by the resident, state or federal law, or a court of competent jurisdiction. Legal representatives include:"*

The citation to the W. Va. Code in Proposed Rule 2.19.7 is incorrect. Replace "W. Va. Code 39-4-1" with *"W. Va. Code 39B-1-101."*

Suggest clarifying the second part of the definition of "restraint", Proposed Rule 2.30.2. Suggest replacing "Any drug used to limit movement or mental capacity of a resident beyond the requirements of therapeutic treatment" with *"any drug that is used for discipline or staff convenience and not required to treat medical symptoms."* The suggested language is clearer and reflects the current view of chemical restraints.

Suggest including a definition for "ombudsman." There are numerous references to "ombudsman" in the Proposed Rule. These uses refer to representatives of the West Virginia Long-term Care Ombudsman Program. However, there are a variety of ombudsmen, including but not limited to West Virginia's Behavioral Health Ombudsman and the federal Medicare Ombudsman. Suggest *"Ombudsman -- Any person or organization designated by the State Long Term Care Ombudsman as part of the West Virginia Long-Term Care Ombudsman Program."*

Administrative Requirements

Suggest modifying Proposed Rule 4.7.4.a. to require the inclusion of the residence smoking policy as one of the items that must be disclosed at admission. Many residences have gone smoke free. Consequently, this is extremely important information for residents who are also smokers. Suggest "House rules governing resident behavior and responsibilities, *including the residence smoking policy.*"

Suggest modifying Proposed Rule 4.7.7. to require that whenever the licensee initiates a discharge, the licensee be required to assist the resident in finding alternative placement. Complaints about discharge from assisted living residents have been among the top five most frequent complaints to the LTCOP for the past ten years. Residents, and their representatives, assert that the current rule does not provide them with sufficient protections when the licensee proposes a discharge against the resident's wishes. Given the private, contractual nature of assisted living, it is important to create a safety net through rules in the event of unscrupulous practice. Suggest "The licensee shall give the resident notice of and file a copy of the notice in the resident's record of the 30-day written notice prior to discharge, unless an emergency arises that requires the resident's transfer to a hospital or other higher level of care, or if the resident is a danger to him or herself or others. *The licensee shall assist the resident in identifying an alternative placement that is appropriate to the resident's individual needs as identified by the service plan. The licensee shall document all efforts made and the results.*"

Suggest adding a timeframe to Proposed Rule 4.8.7, which currently requires the licensee to provide an accounting and refund of any money in a resident account when the resident request to terminate the account. As currently written there is not a timeframe in which this should be done. Suggesting adding "*within 5 business days*" to the end of Proposed Rule 4.8.7. Many residents have limited finances and should be assured that they will receive their money within a reasonable period of time.

Resident Rights

Suggest clarifying Proposed Rule 5.1.6. to emphasize that licensees must not allow legal representatives to exercise more authority than the legal representative has been given. The "over reach" of legal representatives is a problem that the LTCO see quite often. Allowing a legal representative to act contrary to the terms of his designation is a significant violation of the resident's right to autonomy and self-determination. Once these representatives are permitted to act contrary to the terms of their authority it is highly unlikely that they will pull back. Suggest replacing current Proposed Rule 5.1.6. with "5.1.6. *The resident has the right to have a representative exercise one or more of the resident's rights, to the extent provided by federal and state law.*

5.1.6.a. The licensee must treat the decisions of the legal representative as the decisions of the resident to the extent required by a court or delegated by the resident, in accordance with federal and state law.

5.1.6.b. The resident retains the right to exercise those rights not delegated to the legal

representative, including the right to revoke a delegation of rights, except as limited by state law.
5.1.6.c. *The licensee shall not extend the legal representative the right to make decisions on behalf of the resident beyond the extent required by the court or delegated by the resident, in accordance with federal and state law.*

5.1.6.d. *The licensee shall obtain and retain a copy of all of the documents granting legal authority to a representative in the resident's record*

5.1.6.e. *The involvement of a representative does not relieve the licensee of the duty to promote and protect the resident's interests. To the extent practicable, the licensee must provide the resident opportunities to participate in choices about daily living and care."*

Although including this language does contribute to the length of the proposed rule, the benefit to the residents is well worth the additional word count. In the spirit of "an ounce of prevention is worth a pound of cure" providing more guidance about the legal representative's role may head off a world of problems for our residents

Suggest adding language to Proposed Rule 5.2.8. to clarify that the resident has the right to make choices beyond when to awake and when to retire. Suggest replacing the phrase "such as" in Proposed Rule 5.2.8. with "*including, but not limited to,*"

Suggest adding language to Proposed Rule 5.2.10. to encompass current technology. Suggest adding "*computer and other electronic*" between "telephone" and "communication" in Proposed Rule 5.2.10.

Suggest switching the order of Proposed Rule 5.2.15. and 5.2.16. Proposed Rule 5.2.16. confers a broad right opposed to the limited right in Proposed 5.2.15. Reversing the order allows for easier reading.

Suggest including Internet access in Proposed Rule 5.3. to reflect the current technology. Suggest adding "*The resident has the right to have reasonable access to and privacy in the use of electronic communications such as email and video communications and for internet research. (a) If the access is available to the facility. (b) At the resident's expense, if any additional expense is incurred by the licensee to provide such access to the resident.*" Suggest adding this new language rule as Rule 5.3.7. and retaining and renumbering current Proposed Rules, 5.3.7., 5.3.8. and 5.3.9.

There is a typographical error in current Proposed Rule 5.3.9. The word "presentative" should be "*representative*"

Health Care Standards

Suggest clarifying Proposed Rule 6.1.3. Suggest the following deletion/addition. "If a resident exhibits symptoms of a mental or developmental disorder that ~~seems to~~ pose a risk to self or others, and the resident is not receiving behavioral health services, the licensee shall advise the resident or his or her legal representative of the behavioral health service options within the community. The resident shall have 30 days to obtain necessary services. If the resident or ~~his~~

~~or her~~ legal representative fails to seek treatment in a timely manner and the risk persists, then the licensee after consultation with the resident's physician, shall refer the resident to a licensed behavioral health provider." The deletion of the phrase "seems to" and the later addition of "and the risk persists" helps to eliminate ambiguity.

Suggest renumbering Proposed Rule 6.1.4. as Proposed Rule 6.1.3.a. As currently written, Proposed Rule 6.1.4. seems to provide an alternative, additional response to residents who exhibit symptoms of mental or developmental disorders. If this is the intent, it is clearer to move it to a sub-rule of Proposed 6.1.3. If that is not the intent, Proposed Rule 6.1.4. needs rewritten. As currently written it is overbroad and ambiguous.

Suggest replacing Proposed Rule 6.1.6. with "*The licensee shall assist the resident in identifying an alternative placement that is appropriate to the resident's individual needs as identified by the service plan. The licensee shall document all efforts made and the results.*" (See above comments to Proposed Rule 4.7.7. for rationale.)

Suggest specifying that evidence of the legal representative's authority must be included in the resident's record. Suggest "*Copies of all documents granting legal authority to a representative.*" be inserted as Proposed Rule 6.2.2.e. and then renumber existing Rule 6.2.2.e.

Suggest replacing the word "given" with the word "administered" in Proposed Rule 6.4.6. to accurately reflect the professional service being documented, *i.e.*, medication administration.

Suggest specifying in Rule 6.4. what is to be done with unused, discontinued, or outdated drugs. Proposed Rule 6.4.11. is limited only to those drugs listed in Schedules II, III, IV or V of the Federal Comprehensive Drug Abuse Prevention and Control Act of 1970. Must the licensee return all drugs not specifically addressed by Proposed Rule 6.4.11. to the pharmacy? What about over-the-counter medications? Are there situations when some drugs could be returned to resident? Suggest providing these answers as clarifying information in a new sub-rule of Proposed Rule 6.4.

Suggest deleting the clause "within reasonable expectations" from Proposed Rule 6.6.3. Its use makes the rule too ambiguous to enforce.

Proposed Rule 6.7.1. uses the phrase "next of kin" but neither the Proposed Rule nor the authorizing statute provides a definition. Suggest including the definition from the current Nursing Home Licensure Rule, W. Va. Code of State Rules, tit. 64, ser. 13, rule 2.38. Suggest "*Next of Kin. In descending order of priority;*

- a. The resident's spouse;*
- b. The resident's adult children;*
- c. The resident's parents;*
- d. The resident's adult siblings;*
- e. The resident's adult grandchildren;*
- f. The resident's close friends; and*

g. Any other person or entity, including guardians, public officials and private corporations and other persons or entities which the department may from time to time designate in rules promulgated pursuant to W. Va. Code § 29A-1-1 et seq.

Activities

The lack of meaningful social and recreational activities can have a dramatic adverse impact to a resident's quality of life. Suggest enhancing Proposed Rule 7 to reflect the importance of a quality activity program. Suggest Proposed Rule 7.1 *"The licensee shall provide an activity program designed to meet the interests and promote the highest level possible level of well-being in all dimensions of life including physical, psychological, social, and spiritual, of each resident."* and Proposed Rule 7.2.1. *"Provide information and referral services and facilitate opportunities for using the social, recreational, and vocational activities within the community;"*

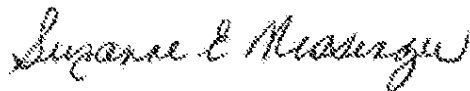
Dietary Services

The word "receipt" in Proposed Rule 8.8. should be *"receipts"*.

Conclusion

The Proposed Rule contemplates several important improvements in the areas of residents' rights and quality. These comments were made with goal of further empowering and protecting West Virginia's assisted living residents while creating a culture of care that allows for maximum accommodation of each individual resident's needs and preferences and facilitates the creation of a homelike environment. Thank you for your consideration of these comments. Please feel free to contact me directly if you require any clarification or additional information.

Respectfully submitted,



Suzanne E. Messenger, Esq.
State Long-term Care Ombudsman

July 19, 2018

Ms. Kathy Lawson
Inspector General
State Capitol Complex
Building 6, Room 817
Charleston, WV 25305

Dear Ms. Lawson:

On behalf of the Assisted Living members of the West Virginia Health Care Association, Inc., we offer the following comments to the proposed modifications to WVCSR 64-14-1 *et seq.*, the Assisted Living Residences Rule:

2.2. Abuse. The willful infliction of injury, unreasonable confinement, intimidation, or punishment with resulting physical harm, pain, or mental anguish. Abuse also include the deprivation by an individual, including a caretaker, of goods and services that are necessary to attain or maintain physical, mental, and psychosocial well-being. Instances of abuse of all residents, irrespective of any mental or physical condition, cause physical harm, pain, or mental anguish. It also includes verbal abuse, sexual abuse, physical abuse, and mental abuse including abuse facilitated or enabled through the use of technology. Willful, as used in this definition of abuse, means that individual must have acted deliberately, not that the individual must have intended to inflict injury or harm.

A typographical error appears in the second sentence. "Include" should be "includes." The second sentence is unclear. A word or words may be missing. We suggest the following: "Abuse also includes the willful deprivation of goods and services that are necessary to attain or maintain a resident's physical, mental, and psychosocial well-being."

2.11. Direct Care Staff. – Individuals who assist or actually perform activities for residents such as eating, dressing, oral hygiene, toileting, personal grooming, repositioning, ambulating residents from one location to another, or provide care to residents who have one or more inappropriate behaviors that reasonable require additional staff to control, such as sexually acting out, stripping in public settings, refusing basic care, or destroying property; or injurious behavior to self or others.

The language highlighted above is unnecessary. Direct Care Staff provides services to all residents. It is unnecessary to describe residents with specific behavioral problems.

2.19. Legal representative – A person appointed by an individual or by a duly authorized agency or court, or otherwise authorized by law to exercise some degree of control over a resident’s affairs. Various types of legal representatives may not necessarily have the lawful authority to act on behalf of the resident in all matters that require action by the legal representative. For example, a conservator has responsibility for financial affairs, but not personal affairs such as medical care. Legal representatives include:

We suggest you replace the highlighted sentence with the following: “Legal representatives may have limited authority to act on behalf of the resident.”

2.19.1. A conservator, temporary conservator or limited conservator appointed pursuant to the West Virginia Legal Guardianship and Conservatorship Act, W.Va. Code §544A-1-1, et seq., within the limits set by the appointing order;

2.19.2. A guardian, temporary guardian or limited guardian appointed pursuant to the West Virginia Guardianship and Conservatorship Act, W. Va. Code §544A-1-1, et seq.; within the limits set by the appointing order;

The phrase “appointing order” may cause problems. The order “appointing” the legal representative may be subsequently modified. The court may change a full guardianship to a limited guardianship or may revise the parameters of a limited guardianship. The most recent order by the court should be followed, not the original order “appointing” the guardian.

2.22. Limited and intermittent – Direct, hands-on nursing care of an individual who needs no more than two hours of nursing care per day for a period of time no longer than 90 consecutive days per episode.

The words limited and intermittent describe scope and duration. They do not refer to “direct, hands-on nursing care.” A suggestion is to define limited and intermittent to mean “not more than two hours for a period of time and no longer than 90 consecutive days.” The easiest solution may be to include the full definition of limited and intermittent nursing care found at §16-5D-2 (a)(5)

2.26. Neglect – Failure of the facility, its employees, or service providers to provide goods and services to a resident that are necessary to avoid physical harm, pain, mental anguish, or emotional distress.

Other definitions related to abuse require the act to be willful. We believe that conduct resulting in neglect should also be willful. "Willful failure of the facility, its employees, or service providers to ..."

2.28. Physical Abuse. – Includes, but is not limited to, striking the resident with a part of the body or with an object; shoving, pushing, pulling, pinching, tugging or twisting any part of the resident's body with fingers or nails; burning or striking the resident with an object; engaging in physical contact that is knowing, intentional, reckless, or careless that causes or is likely to cause death, physical injury, pain, or psychological harm to the resident; inappropriate or improper use of restraints or isolation; acts of retaliation; and even in response to a physical attack. Physical abuse also includes controlling behavior through corporal punishment.

This definition of physical abuse is unclear and impractical. First, it is unclear what the phrase "with fingers or nails" means. Is the prohibition on twisting limited to the use of fingers and nails? Is the prohibition of "fingers and nails" broader than twisting? Does it apply to "shoving, pushing, pulling, pinching and tugging?" Does abuse occur if a staff member pulls or tugs without using fingers or nails? The sentence should be clearer.

Secondly, exceptions are needed for physical attacks. If a resident attacks a staff member, the staff member should move away. That cannot happen if the resident has grabbed the staff member's hair, clothing or another body part. The staff member will have to extricate herself or himself from the situation before she can move away. Also, if a resident is pummeling a staff member, the natural, human reaction is to block the blows as you are moving away. That should not be considered physical abuse. Finally, consideration must be given to a resident attacking another resident. What is the staff member to do? The staff member may have to touch the aggressor to protect the victim. Responses to physical attacks must be further examined and defined.

We have significant concerns with the construction and clarity of the entire definition.

2.33. Sexual Abuse. – Includes, but is not limited to, sexual harassment, sexual coercion, sexual exploitation, or sexual assault, sexual contact, or graphic images of a resident's body, including, but not limited to, private areas.

The word "or" should be placed after sexual assault, not before it.

The phrase "graphic images of a resident's body" is too broad. Graphic can be defined as giving a clear and effective picture. As written, any photograph taken of a resident would be sexual abuse. A head shot at a facility picnic would be a graphic image of a resident's body. The resident's head would not be clothed or covered. The photo would be a graphic depiction of a body part. Similarly, a photo taken of a bruise that is noticed when a resident returns from a

family visit or visit to the hospital or other health care facility would be sexual abuse. Photos taken for medical reasons would be sexual abuse. One could argue that an x-ray is a graphic image of a resident's body. That too would be sexual abuse. This definition needs to be thoroughly examined and severely limited. A finding of sexual abuse can destroy a health care provider's career.

3.1.2.a. The assisted living residence shall notify the Secretary in writing 30 days prior to a change in name or physical address of the program and request an application form from a licensure amendment.

Please note the typographical error.

3.4.1.b.1. The applicant or licensee has a personal history that has:

3.4.1.b.2. Receipt of an ineligible employment fitness determination from the West Virginia Clearance for Access: Registry and Employment Screening unit of the Department of Health and Human Resources and has not received a variance;

The transition from subsection 1 to 2 does not flow well.

4.1.7. All employees and volunteers of an assisted living residence shall be subject to the provisions of the West Virginia Clearance for Access: Registry and Employment Screening Act, W.Va. Code §§16-49-1. Et seq. and W.Va. Code R. §§69-10-1. et. seq., (Class II)

The term volunteers should be defined or eliminated. All communities encourage resident interaction with the community. A variety of visitors/volunteers enter the communities, such as church groups, dog owners, and scout groups. Must every 10-year-old be fingerprinted before he or she sings Christmas carols? This requirement will discourage the community from visiting the elderly and isolate residents.

11.1.1. The Secretary may deny, revoke, or suspend a license issued pursuant to this rule if any provisions of federal or state law or this rule are violated. The Secretary may revoke a license and prohibit all licensed professionals associated with the assisted living resident from practicing at the residence location based upon the findings and results of an annual, periodic, complaint, or other inspection and evaluation. The period of suspension for the licensure of an assisted living residence shall be prescribed by the Secretary, but may not exceed one year.

Surveyors identify minor infractions of state and federal law when they inspect facilities. The Secretary should not have the authority to deny, revoke, or suspend a license for a minor violation.

The second sentence, which addresses licensed professionals, needs clarification. Does the phrase, "The secretary may revoke a license" refer to the facility's license or the health care provider's license. The first sentence specifically discusses revoking the facility's license. Does that mean the second sentence gives the Secretary the authority to revoke a health care provider's license? If so, we object. The rule does not provide due process for the health professional. Moreover, only a licensing authority should be able to revoke a professional's license.

11.2.1. If a license for an assisted living residence has been revoked, the Secretary may stay the effective date of the revocation if the owner or owners and administrator of the assisted living residence can show that the stay is necessary to ensure appropriate referral and placement of residents.

The facility may not be able to hire an administrator if the license has been revoked and the facility is closing. Requiring the owner AND administrator to act may be an impossibility. In this case, perhaps the owner should be the only person needed to act.

11.2.5. If the licensee of an assisted living residence is revoked or suspended, no person named in the licensure documents of the residence, including persons owning or operating the assisted living residence, may apply to own, license, or operate another assisted living residence for five years after the date of revocation or suspension, either individually or as part of a group, firm, association, or corporation.

11.2.6. If an assisted living residence licensee is denied or revoked, a new application for licensure shall be considered by the Secretary, if, when, and after the conditions upon which denial or revocation were based have been corrected and evidence of this fact has been furnished. A new license may then be granted after proper inspection has been made and the Secretary makes a written finding that all provisions of this rule have been satisfied.

The penalty in section 11.2.5 is harsh. A five-year ban on a person who has a minority interest in a corporation is severe. The minority owner may have been outvoted and had no control over the situation.

Additionally, the ban on persons "named in the licensure documents" and who operate the residence is too broad and too vague. The Department of Health and Human Resources' "Initial and Change of Ownership" License Application for Assisted Living Residences includes the names of the "Administrator / Executive Director" and the "Supervising / Consultant Registered Nurse." Are the administrator and supervising nurse banned from operating a residence for five years? They should not be. The administrator and nurse may have stayed to care for the residents as the facility declined or were denied the resources they needed to properly operate

the facility. We do not want to create an adverse incentive for professionals to abandon residents to save their careers.

Finally, sections 11.2.5 and 11.2.6 appear to be contradictory with respect to revocations. Section 11.2.5 states that a person associated with a revocation cannot own, license, or operate a residence for five years. Section 11.2.6 states that a new application for licensure will be considered if a revocation occurs and certain conditions are met. These sections seem to be contradictory. Further explanation and clarification is needed.

12.1.1. Any person, partnership, association, or corporation which establishes, conducts, manages, or operates an assisted living residence without first obtaining a license therefore or which violates any provisions of this law or rule shall be assessed a civil money penalty by the Secretary in accordance with this rule, and, if applicable, W.V. Code §16-5D-10.

The use of the word "shall" in this section requires the Secretary to impose a civil money penalty for every violation regardless of its significance. This represents a major policy change from current practice. We suggest the permissive term "may" be inserted in place of "shall."

12.1.2. Each day of continuing violation after notification of the infraction shall be considered a separate violation.

Section 12.1.1 requires a civil money penalty when any provision of the rule is violated. This means that a CMP must be imposed each day of a continuing violation. Some violations may require days to correct. For example, a facility may need to order a part for equipment, plumbing, or HVAC, and it may take several days to receive it. A separate CMP should not be required for each day.

12.1.4. If an owner or owner or administrator of an assisted living residence concurrently operate an unlicensed assisted living residence, the Secretary may impose a civil money penalty upon the owner or owners or administrator, or both, not to exceed \$5,000 per day.

A typographical error appears in the first sentence.

12.1.6. If an owner administrator knowingly operates, owns, or manages an unlicensed assisted living residence that is required to be licensed pursuant to this article; knowingly dispenses or causes to be dispensed, controlled substances in an unlicensed assisted living residence that is required to be licensed; or attempts to procure a license for an assisted living residence for any other person by making causing to be made any false representation, the Secretary may assess a civil money penalty of not more than \$20,000. The penalty may be in addition to or in lieu of any other action that may be taken by the Secretary or any other board, court, or entity.

A typographical error is highlighted.

12.3.2.a. The gravity of the violation, including the probability that death or serious physical or emotional harm to a resident has resulted, or could have resulted, from the assisted living residence's actions or the actions of the administrator or any licensed practitioner employed by or associated with the residence, the severity of the action or potential harm, and the extent to which the provisions of the applicable laws or rules were violated.

A typographical error is highlighted.

§64-14-13. Administrative Due Process

Throughout the rule, administrators are subject to punishment, but this section does not provide them with any administrative due process. In a couple of sections, the supervising nurse can be penalized, but this section does not provide that individual with any due process rights.

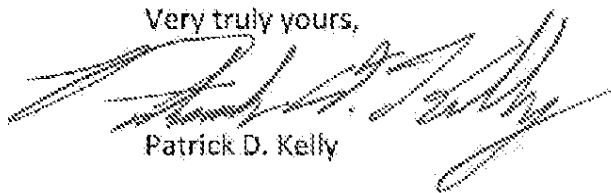
§64-14-14. Administrative Appeals and Judicial Review.

This section does not provide an administrator or supervising nurse with any appeal rights.

Thank you for your consideration of these comments. Please contact me if you have any questions.

Very truly yours,

Patrick D. Kelly

A handwritten signature in black ink, appearing to read 'Patrick D. Kelly', is written over the typed name. The signature is stylized and somewhat illegible due to the cursive nature of the handwriting.