

DISABILITY RIGHTS NEW JERSEY

ADVANCING JUSTICE. ADVOCATING INCLUSION.

GWEN ORLOWSKI, EXECUTIVE DIRECTOR

August 19, 2022

Douglas Swan
Office of Program Integrity and Accountability
Department of Human Services
PO Box 700
Trenton, New Jersey 08625-0700
Email: doug.swan@dhs.nj.gov

**Re: Community Residences for Individuals with Developmental Disabilities
Proposed Amendments: N.J.A.C. 10:44A-1.1, 1.3, 1.4, 1.9, 1.10, 1.11, 1.12,
2.1 through 2.6, 2.9, 2.10, 3, 4.1, 4.2, 5.1, 5.2, 5.3, 5.4, 5.5, 5.7, 5.8, 6.1
through 6.10, and 6.12 through 6.17
Proposed Repeals and New Rules: N.J.A.C. 10:44A-1.5, 1.6, 1.7, 1.8, 2.7, 2.8,
4.3 and 5.6
Proposed Repeal: N.J.A.C. 10:44A Appendix
Proposal Number: PRN 2022-083**

Dear Mr. Swan:

Thank you for the opportunity to comment on the Proposed Amendments for the Standards for Community Residences for Persons with Head Injury. Disability Rights New Jersey (Disability Rights NJ) is the designated federally funded Protection and Advocacy system for individuals with disabilities in New Jersey. Disability Rights NJ advocates for the human, civil, and legal rights of individuals with disabilities including individuals with brain injuries who reside in community residences. Disability Rights NJ is submitting these comments to the proposed rules in the manner set forth in the agency notice.

Overall, Disability Rights NJ supports the Department of Human Services' proposed changes to these regulations to comply with Medicaid's Home and Community-Based Settings Rule (HCBS Rule) found in 42 CFR § 441.301(c). The regulations as proposed place a greater emphasis of person-centered planning and providing more autonomy and inclusion in the community for individuals residing in these facilities. Although we generally support these regulations, we have some additional comments and concerns which we set out below.

10:44A-1.3 – Definitions

The new use of the term "Care Manager" to describe a case manager or support coordinator in the Division of Developmental Disabilities (DDD) system is likely to cause

NEW JERSEY'S DESIGNATED PROTECTION AND ADVOCACY AGENCY.

confusion. The same term is currently used to describe Managed Care Organization (MCO) staff assigned to coordinate care planning for Medicaid managed care services. The use of identical terminology in an already complex system is more likely to unnecessarily confuse individuals with intellectual and developmental disabilities, their families, advocates, and other stakeholders, especially for those with particularly complex needs and needs for assistance in planning their own care. The current distinction in title between existing MCO care managers and support coordinators/case managers in the DDD fee-for service waiver needs to be maintained so long as those roles are distinct in fact.

As proposed, the regulations would include a definition for “Eviction,” which we support. However, the definition proposed – “Eviction” means an actual expulsion of a tenant out of the premises – is not sufficiently compliant with the federal HCBS Rule. In order to meet the requirements of the federal HCBS Rule, the individual must have the same responsibilities and protections from eviction that tenants have under the landlord/tenant laws of New Jersey. The center piece of that law is New Jersey’s Eviction with Good Cause statute, N.J.S.A. 2A-18-61.1 et seq. This proposed definition should be amended to specifically refer to all NJ landlord/tenant protections including but not limited to those in N.J.S.A. 2A-18.61.1 et seq. We also recommend that either in the definition or elsewhere in the revised regulations, it should make clear that the forum for seeking an eviction order is the Superior Court, Special Civil Part.

The regulations include a definition for “Person-centered planning”. However, to ensure that all licensees understand the process and use it consistently among all residences, we recommend that the term “person-centered planning process” be defined consistent with the federal person-centered planning rule, 42 CFR § 441.301(c)(1), (2) and (3).

As proposed, the regulations would include a definition for “Roommate” (meaning the person with whom one shares a bedroom), and consistent with the federal law, that definition should be expanded to make clear that individuals sharing units must have a choice of roommates, 42 CFR § 441.301(c)(4)(vi)(B)(2).

10:44A-3.1(b) – Disability Rights NJ supports the additional language in this section that adopts the Division’s “rights document” as mandatory on licensees, requires training for waiver beneficiaries, and identifies that the rights protect individuals receiving services, not their guardians or family. To strengthen the amendment, Disability Rights NJ requests that the Division include the actual language rather than refer to an external rights document so that individuals can point to the administrative code, and so that the regulated public is on notice of the rights DDD intends to protect.

10:44A-3.2(d)(5) – The appeals procedure required by the HCBS Rule should not end with the licensee self-policing its own conduct. While some disputes may be resolved in such a manner, providers are obviously inclined to support their own decisions and there may be no oversight over a provider that restricts residents’ rights. An additional external appeal and grievance procedure that gives beneficiaries access to present their concerns to DDD and in

turn receive binding decisions from the Division is managed by the HCBS Rule at 42 CFR § 441.301(c)(v).

To the extent that a rule is the basis for an eviction action, the regulations must make clear that the tenant has the protections of the Eviction for Good Cause statute.

10:44A-4.1(d) - Disability Rights NJ proffers that the proposed language added at 4.1(d) to the New Jersey regulations, assumedly to comply with, 42 CFR § 441.301(c)(4)(vi)(A), is confusing and should be re-written to more clearly and fully meet the requirements of the federal HCBS Rule and state landlord/tenant eviction law. We propose the following:

The first paragraph of subsection 4.1(d) should be re-written to say: Upon admission (delete where applicable), a written lease agreement shall be signed by the person receiving services (the tenant) or guardian, where applicable, and the licensee (the landlord), which shall provide the tenant (delete consumer) with all the rights and responsibilities accorded by New Jersey tenant and landlord law, including by not limited to N.J.S.A. 2A:18-61.1 et seq., and shall be comparable to leases for all other persons in the State.

The second proposed paragraph at 4.1(d)(1) should be deleted. It is inconsistent New Jersey's landlord tenant statute, and is unenforceable as written (i.e., a consumer residency agreement cannot provide eviction processes, only the law can). At the very least, this paragraph is confusing and suggests a regulatory scheme where some individuals receiving services are tenants under leases with the full protections of New Jersey's eviction with good cause statute, and some individuals receiving services have rights that are created by a "consumer resident agreement" (not law) that are comparable, but not the same, as the rights of tenants. Such a dual result would be untenable.

Finally, this section should make clear that where licensees engage in self-help lockout or evictions, the person served (the tenant) can avail themselves of New Jersey's forceable or unlawful entry and detainer laws, N.J.A.C. 2A:39-1 et seq., to affirmatively seek redress in Superior Court. An example of self-help evictions that we've seen at Disability Rights NJ is when a provider/licensee will not allow the return of a resident of a group home after a hospitalization. That would not be lawful in a traditional apartment, and it should not be lawful in a HCBS setting subject to the federal HCBS Rule.

Because many residents have never experienced being a tenant, we recommend that the licensees be required to provide the residents upon admission a copy of their rights under NJ Landlord/Tenant law.

10:44A-4.1(g)(2) – The term "personal advocate" is not defined. Only the beneficiary, a court-appointed guardian, or an agent appointed pursuant to N.J.S.A. 42:2B-8.2 should be authorized to sign documents on behalf of the beneficiary.

10:44A-4.2(b) - This section appears to be in conflict with 10:44A-4.1(d) as it permits the licensee and the placing agency to determine that the residence is no longer suitable and may transfer or discharge the resident without going through the process set forth in the Eviction for Good Cause statute. Termination of a lease can only occur following a summary proceeding in New Jersey Superior Court Special Civil Part.

Again, thank you for the opportunity to comment on these proposed regulations, and please contact me at mciccone@drnj.org or (609) 292-9742 should you have any questions or want more information.

Sincerely,

DISABILITY RIGHTS NEW JERSEY

s/Mary Ciccone

By: Mary Ciccone
Director of Policy