

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: Manual of Standards for Community Care Residences
Proposed Amendments: N.J.A.C. 10:44B-1.3, 1.4, 1.5, 2.1, 2.2, 2.3, 2.4, 2A.1, 2A.2, 3.1, 3.2, 3.3, 3.4, 3.5, 4.1, 4.2, 5.1, 5.2, 6.1, 6.3, 6.4, and 6.5
Proposal Number: PRN 2022-086

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.

10:44B-1.3 – Definitions

As proposed, "Community residence for [the] individuals with developmental disabilities [developmentally disabled]" means any community facility housing up to 16 individuals with [a] developmental [disability] disabilities." Although the proposed regulations explicitly states that the community residence shall not be on the grounds or adjacent to a public institution, Disability Rights NJ is concerned that the maximum number of residents (16) may violate the Home and Community Based Settings Rule, and as such, the facility would no

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longer be considered a community residence in that based on size it may have the effect of isolating individuals receiving Medicaid HCBS from the broader community of individuals not receiving Medicaid HCBS. See 42 CFR § 441.301(c)(5)(v).

As proposed, the regulations do not include a definition for “Eviction.” Because of the HCBS requirements that licensees enter into a landlord/tenant relationship with the resident, it is important that eviction be defined in a manner that meets the requirements of the HCBS Rule which requires that 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. Furthermore, the definition should 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.

As proposed, “Person-centered planning process” is not defined and is used throughout the proposed regulations. To ensure that all licensees understand the process and use it consistently among all residences, it is important 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 do not include a definition for “Roommate.” The regulations should have a definition that specifies that a roommate is a person with whom one shares a bedroom and should also make clear that individuals sharing units must have a choice of roommates, 42 CFR § 441.301(c)(4)(vi)(B)(2).

10:44B-2.1(e) – This section identifies individuals and groups that the licensee must allow access to protect the rights of, and advocate on behalf of, the individuals placed in the residence. Disability Rights NJ is New Jersey’s designated protection and advocacy organization, and under federal law, has access to individuals with disabilities in any facility in which they are found. As such, Disability Rights NJ requests that they be listed as an entity that has access to the facility.

10:44B-2.2(e)(1) - This section appears to be in conflict with 10:44C-2.2(g) 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.

10:44B-2.2(g) - Disability Rights NJ proffers that the proposed language added at 2.2(g) 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 2.2(g) 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 2.2(g)(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 have 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.

10:44B-3.1(c) – Under the Eviction for Good Cause statute, landlords are permitted to have rules so long as those rules are reasonable and have been accepted by the tenant in writing or made part of the lease at the beginning of the lease term. N.J.S.A. 2A:18-61.1(d). Rules that conflict with state or federal law would not be considered reasonable. Furthermore, under the Fair Housing Amendments Act, landlords must make reasonable accommodations in their rules to ensure that individuals with disabilities have an equal opportunity to use and enjoy the premises. 42 U.S.C. § 3604(f). Amendments to this proposed regulation must be clear that the licensee comply with all state and federal laws regarding reasonable rules incorporated into the lease.

10:44B-3.1(c)(2) – Disability Rights NJ supports the changes regarding visitation. However, Disability Rights NJ recommends that the amendments include requiring the licensee to provide a private space for a resident to meet with a visitor to ensure privacy.

10:44B-3.1(e)(1) – Disability Rights NJ generally supports the amendment proposing that licensees shall provide and make arrangements for the individual’s access to scheduled and unscheduled community activities. However, Disability Rights NJ recommends that additional language be included that specifies a licensee’s obligation to ensure the individual is aware of, notified of, and/or encouraged to but not coerced to participate in activities outside the home.

Again, thank you for the opportunity to comment on these proposed regulations, and please contact me at mciccione@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