September 30, 2022

Margaret M. Rose

Attn: 22-P-01

Division of Medical Assistance and Health Services

Office of Legal and Regulatory Affairs

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**Re: Home and Community Based Services Provided in Assisted Living Residences, Comprehensive Personal Care Homes, and Assisted Living Programs Injuries**

**Proposed New Rules: N.J.A.C. 10:53**

 **Proposal Number: PRN 2022-096**

Dear Ms. Rose:

Thank you for the opportunity to comment on the Proposed New Rules for Home and Community Based Services Provided in Assisted Living Residences, Comprehensive Personal Care Homes, and Assisted Living Programs. 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 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 new rules 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. We are concerned, however, that the proposed rules do not give individuals living in these settings the full protection of tenants under New Jersey’s Eviction with Good Cause Statute, which is required under state and federal law. We have some additional comments and concerns that we set out below.

**10:53-1.3** – Definitions

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 rules do not include a definition for “Eviction.” Because of the HCBS Rule requirements that assisted living residences and comprehensive personal care homes enter into a landlord/tenant relationship with the resident, it is important that eviction be defined in a manner consistent with state law and 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, the rules 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).

**10:53-2.3(a)(1)** Disability Rights NJ proffers that the proposed language 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 sentence of paragraph 2.3(a)(1) should be re-written to say: Upon admission, 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 with all the rights and responsibilities accorded by New Jersey tenant and landlord law, including but 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 sentence at N.J.A.C. 10:53-2.3(a)(1) should be deleted. It is inconsistent with 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 sentence 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 an assisted living residence 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.

Furthermore, we believe that the federal requirements that licensees and residents enter into a landlord/tenant relationship and be governed by the Eviction for Good Cause statute conflicts with other regulations regarding assisted living residences and comprehensive personal care home settings. 8:36-5.1(d) and (e) identifies higher levels of care that permits a facility to move a resident from the setting. This rule needs to be rewritten to include the requirements of NJ’s Eviction for Good Cause statute and ensure that licensees comply with this statute. In addition, N.J.A.C. 8:36-5.14 permits a licensee to involuntarily discharge a resident with thirty-days-notice. Under the anti-eviction statute, termination of a lease can only occur following a summary proceeding in New Jersey Superior Court Special Civil Part. We believe that N.J.A.C. 8:36-5.14 must be rewritten to include the Eviction for Good Cause statute to comply with the federal HCBS Rule requirements.

Because many residents may not understand their rights as tenants in an assisted living residence or comprehensive personal care home, we recommend that the licensees be required to provide the residents upon admission a copy of their rights under NJ Landlord/Tenant law.

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

Sincerely,

DISABILITY RIGHTS NEW JERSEY



By: Gwen Orlowski

Executive Director