NAELA

Massachusetts Chapter

National Academy of Elder Law Attorneys, Inc.

December 16, 2014

VIA E-MAIL Siobhan.Coyle@State.MA.US
AND FIRST-CLASS MAIL
Ann Hartstein, Secretary
Executive Office of Elder Affairs
One Ashburton Place.
Boston, MA 02108

Re: Proposed Changes to 651 CMR 12.00
Certification Procedures and Standards for Assisted Living Residences

Dear Secretary Hartstein:

The Massachusetts Chapter of the National Academy of Elder Law Attorneys (MassNAELA)[1] submits these comments pursuant to the Public Notice requesting testimony and comments on the proposed changes to the regulations governing assisted living residences (ALRs). MassNAELA strongly supports EOEA's initiatives to strengthen protections for assisted living residents. Among other things, the increased requirements for staff training, more frequent activities in dementia special care units, and annual evacuation drills are likely to be of immediate benefit to assisted living residents.

However, MassNAELA believes that the proposed new regulation addressing residents with "Skilled Nursing Care" needs raises several problems, and that EOEA should take additional steps to protect consumers in this market, as more fully set out below.

Background – Consumers Mistakenly Believe that ALRs Provide Medical Care

ALRs were historically developed along "residential" rather than "medical" lines. According to EOEA's regulations, ALRs are "an important part of the spectrum of living alternatives for the elderly" in Massachusetts and "should be operated and regulated as residential environments . . . and not as medical or nursing facilities, and should support the goal of aging in place through services."[2] Over the past few years, EOEA and other state agencies have actively

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[1]NAELA is a national professional association of over 4,200 attorneys dedicated to improving the quality of legal services provided to seniors and people with special needs. With nearly 500 members, the Massachusetts chapter of NAELA is the state's leading organization of elder law professionals. Elder law has developed as a separate specialty area to address the unique and complex issues faced by older persons and persons with disabilities.

[2] 651 CMR 12.01.

developed and promoted alternatives to allow elders to "age in place" and avoid unnecessary institutionalization in nursing homes. One of these alternatives is the so-called Special Care Residence (SCR), i.e., an ALR offering enhanced supports and services for residents with dementia and other cognitive impairments. 651 CMR 12.02 (definitions).

It appears that elders who reside today in ALRs, and particularly those who live in SCRs, are the same residents who previously would have had no alternative but to move to skilled nursing facilities. In light of the care needs of today's ALR population, and the stated commitment to allow elders to "age in place," the bright line between the "residential" model of an ALR and the "medical" model of nursing facilities is no longer apposite.

In a recent report, Pro Publica stated:

> Over the past two decades, assisted living has undergone a profound transformation. What began as a grassroots movement aimed at creating a humane and innovative alternative to nursing homes has become a multibillion-dollar industry that houses some 750,000 American seniors. *Assisted living facilities, at least initially, were meant to provide housing, meals and help to elderly people who could no longer live on their own. But studies show that increasing numbers of assisted living residents are seriously ill and that many suffer from dementia.* The workers entrusted with their care must manage complex medication regimens, safeguard those for whom even walking to the bathroom can be dangerous and handle people so incapacitated they can be a threat to themselves or others.[3]

Unfortunately, oversight of ALRs has not kept pace with consumers' changing expectations of these facilities.

Despite EOEA's carefully worded consumer advisory[4] and despite recent exposés by the

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[3]"Life and Death in Assisted Living," Pro Publica, October 29, 2013, http://www.propublica.org/article/elderly-at-risk-and-haphazardly-protected (last accessed December 1, 2014) (emphasis added). See also Best Practices in Assisted Living: Considering Potential Reforms for California, National Senior Citizens Law Center Special Report (February, 2014), http://www.nsclc.org/wp-content/uploads/2014/02/Final-Draft-Best-Practices-in-Assisted-Living.pdf (last accessed 12/5/14) (California's regulatory system has failed to keep pace with increased needs of assisted living residents).

[4]EOEA's "Assisted Living Overview" website states, "One of the most rapidly growing forms of residential long-term care in Massachusetts is Assisted Living. Assisted Living Residences (ALRs) offer a combination of housing, meals and personal care services to adults on a rental basis. Assisted living residences are not the same as licensed nursing facilities; ALRs do

press and public interest organizations[5], the fact remains that an overwhelming number of current and prospective ALR residents and their families continue to believe that medical and other skilled care will be available to them onsite.

The New Regulation Concerning Skilled Care Will Not Solve This Problem

The proposed new regulations prohibit ALRs from serving residents who need more than 90 days of "Skilled Nursing Care," stating: no ALR shall "provide [sic], admit or retain any Resident in need of Skilled Nursing care unless . . . the Resident requires Skilled Nursing Care no more than ninety consecutive days or such care is limited to a periodic scheduled basis."[6] The term "Skilled Nursing Care" incorporates by reference the Department of Public Health regulation concerning Medicaid eligibility for nursing home services,[7] which includes a wide range of services, such as intravenous, intramuscular, or subcutaneous injection, artificial nutrition, wound care, gait training, and physical therapy, among other services.

This new regulation presents several problems. First, it does not specify who would decide who needs "Skilled Nursing Care," or what the process would be for making that determination. The reference to care "limited to a periodic scheduled basis" is also not readily understood.

The provision is too narrow in that it does nothing to reduce the risks faced by cognitively impaired residents, many of whom do not need any "Skilled Nursing Care" whatsoever. For example, a recent *Boston Globe* story on ALRs led off with, "In Stoughton, an elderly woman walked out of a locked dementia unit at an assisted living residence in May, wandered into

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not provide medical or nursing services. They are not designed for people who need serious medical care."

[5]Pro Publica report (see note 1); Colman M. Herman, "Elder Affairs Lets Athol Facility Remain Open," *Commonwealth Magazine*, 9/23/14 http://www.commonwealthmagazine.org/News-and-Features/Online-exclusives/2014/Summer/080-Elder-Affairs-lets-Athol-facility-remain-open.aspx#.VIIMhUAo6ig (last accessed 12/5/14); Kay Lazar, "Elder Advocates Raise Concerns on Assisted Living," *Boston Globe*, 9/21/14 http://www.bostonglobe.com/metro/massachusetts/2014/09/20/assisted/Z1dzkfCG8MGydRPmpBr4kI/story.html (last accessed 12/5/14).

[6]651 CMR 12.04(3)(b)3.

[7]651 CMR 12.02 (definitions); referring to 130 CMR 456/409(A) (defining "Skilled Services").

another room and fell from a second-story window."[8] The risks that these residents face (and the documented harms that they have suffered) result from inadequate supervision and assistance, rather than from any need for skilled care.

The proposed regulation is also too broad in that the need for any single item defined as "Skilled Nursing Care" would trigger ineligibility for residence in an ALR. However, some individuals who may need those services could safely remain in assisted living with adequate supports, and should not be unnecessarily forced into institutionalized care. For example, a "subcutaneous injection" is defined as "Skilled Nursing Care" under the new regulation.[9] If it were applied as written, the proposed regulation would require an ALR to evict a resident who was fully *compos mentis* but who needed insulin injections, even if the resident herself (or a professional, aide or family member) was able to administer the injection. This cannot have been the intended result of the proposed change.

In fact, ALR residents have the same right to obtain health care services, including "skilled" services, as do individuals residing in private homes. The ALR statute specifically provides that residents have the right to "directly engage or contract with any licensed health care professionals and providers to obtain necessary health care services, in the resident's unit or in such other space in the assisted living residence as may be made available to residents for such purposes to the same extent available to persons residing in private homes."[10] To the extent that it infringes on these rights, the new regulation runs afoul of the ALR statute and regulations, as well as the Americans with Disabilities Act.

The New Skilled Care Regulation Will Mislead Consumers

From a consumer protection standpoint, MassNAELA is particularly concerned about the likelihood that the new regulation will mislead the ordinary ALR consumer. Consumers may not be aware that, just as a private landlord cannot summarily evict a tenant on medical grounds, neither can an ALR provider evict a resident without giving notice and obtaining a court order. Although the ALR statute[11] and regulations[12] are clear on this point, the new regulation is likely to

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[8]Kay Lazar, "Elder Advocates Raise Concerns on Assisted Living," *Boston Globe*, 9/21/14 http://www.bostonglobe.com/metro/massachusetts/2014/09/20/assisted/Z1dzkfCG8MGydRPmpBr4kI/story.html (last accessed 12/5/14).

[9]130 CMR 456.409(A)(1). This particular prohibition also appears to conflict with existing ALR regulations at 651 CMR 12.04(3)(c).

[10]G.L. c. 19D, §9(7); 651 CMR 12.08(1)(g).

[11]G.L. 19D, §9(18) (ALR residents may not be evicted "except in accordance with the provisions of landlord tenant law as established by chapter one hundred and eighty-six or chapter

cause confusion and mislead consumers about their rights.

Within days after the new regulations were announced, I received a call from a retired legal professional whose spouse was living in an ALR. The spouse suffers from advanced dementia and is receiving private-duty round-the-clock care in addition to the ALR's services. The caller had read about the proposed 90-day rule and was extremely apprehensive about the risk of eviction from the ALR. I asked about the specific services that the spouse was receiving. Since they appeared to fall outside of the definition of "Skilled Nursing Care," I was able to reassure the caller that the ALR provider would not have grounds to evict based on the new regulation. But the call exemplifies the risk of confusion and intimidation that the proposed regulation would cause, particularly for cognitively impaired or unsophisticated ALR residents and their family members.

The proposed regulation concerning skilled care is unlikely to benefit ALR residents and may cause confusion and intimidation among residents and their families and should be deleted from the regulations. In the alternative, if this new regulation is to remain in place, it should be amended to expressly state that the ALR's right to evict a resident because of the need for Skilled Nursing Care is subject to existing summary process protections. In addition, ALRs should be required to give residents written notice when the ALR is no longer an appropriate environment for the residents, including the basis for such a finding, and a statement notifying residents of their rights under landlord-tenant law.[13]

What Consumers Really Need

Instead of prohibiting ALRs from accepting or retaining residents with skilled care needs, we respectfully propose that EOEA consider the following measures:

1. Vigorously Enforce Existing Regulations – EOEA already has the authority to impose fines and other penalties on ALRs that are operating in violation of the regulations or without certification.[14] In practice, these penalties are rarely imposed. For example, an investigative journalist reported this year that an Athol boarding house operated as an uncertified assisted living residence for over two years, even after the town's Board of Health reported the

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two hundred and thirty-nine").

[12]651 CMR 12.08(1)(r).

[13]Cf. 651 CMR 12.03(e)(f)(10), concerning Operating Plan requirements for notice procedure.

[14]651 CMR 12.09(2) (EOEA may impose administrative sanctions for ALR's non-compliance with regulations; 651 CMR 12.12 (EOEA may impose civil penalty of not more than $500 per day for operating an ALR without required certification).

situation to EOEA.[15] Massachusetts elders deserve better.

2. Improve Transparency of and Access to ALR Information – The cost and quality of assisted living services can vary significantly, with high cost not necessarily indicating high quality. Consumers need cost and quality information in order to be able to make informed decisions. Transparency tools can provide such information to consumers and others.[16] By mandate, EOEA already compiles information about ALR certifications and resident complaints. According to one investigative journalist, EOEA receives "about 6,500 reports a year of abuse, neglect, falls, and other incidents, but does very little with the information."[17] Elder advocates have repeatedly reported that it is difficult to gain access to this information and that they have had to resort to FOIA requests, which take weeks or months to process.

EOEA's certification reports and complaints identify the ALRs, but do not contain personal health information or the names of individual residents. Most states already require inspection data to be made available online.[18] The marginal cost to EOEA of making this information readily available to consumers is negligible, compared to the benefit to consumers who are looking to make informed decisions about ALRs. EOEA should be required to post information about ALR certification and complaints online for the benefit of consumers, family members and advocates.

3. Strengthen Consumer Disclosures – When consumers contacts EOEA or an ALR for information, they should receive a standard disclosure that clearly puts them on notice of the limits of ALR services. The notice could also include information about financing ALR services and what residents are appropriate for ALRs. EOEA could develop a standard form of disclosure

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[15]Colman M. Herman, "Elder Affairs Lets Athol Facility Remain Open," *Commonwealth Magazine*, 9/23/14, http://www.commonwealthmagazine.org/News-and-Features/Online-exclusives/2014/Summer/080-Elder-Affairs-lets-Athol-facility-remain-open.aspx#.VIIMhUAo6ig (last accessed 12/5/14);

[16]See e.g., Health Care Transparency, Actions Needed to Improve Cost and Quality Information for Consumers, GAO-15-11: Published: Oct 20, 2014. Publicly Released: Nov 18, 2014 http://www.gao.gov/assets/670/666572.pdf (Last accessed 12/5/14).

[17]Colman M. Herman, "Oversight Questions Raised on Elder Affairs," *Commonwealth Magazine*, 9/12/14 http://www.commonwealthmagazine.org/News-and-Features/Online-exclusives/2014/Summer/072-Oversight-questions-raised-on-Elder-Affairs.aspx#.VII8CMnrRwE (Last accessed 12/5/14).

[18]State-by-State: Assisted Living Regulations, Pro Publica (10/29/13), http://projects.propublica.org/tables/assisted-living-regulations (last accessed 12/5/14) (28 states and District of Columbia require state to post inspection data online).

that ALRs would be required to provide to prospective residents.

Other Issues

1. Resident Records – ALRs are currently required to include various advance health care directives in resident records, including health care proxies, guardianship orders, and so on.[19] Medical Orders for Life Sustaining Treatment (MOLST) orders should be included in that list. Residents should also be given notice that their records will be available to EOEA in the course of the agency's oversight and certification process.

2. Sale of ALR – The new regulations eliminate the requirement that sponsors notify residents of the sale of the ALR.[20] For the benefit of consumers, MassNAELA respectfully suggests that this requirement be reinstated.

3. **Sub-regulatory Guidance** – So-called sub-regulatory guidance[21] is promulgated without the protections of public notice and comment. Its use is likely to undermine consumer protections and is at odds with the overall purpose of the proposed new regulations. The references in the proposed new regulations to sub-regulatory guidance should be curtailed or eliminated.

Conclusion

In sum, MassNAELA proposes that EOEA take the following steps:

1. Delete the proposed new regulation concerning Skilled Nursing Care (651 CMR 12.04(3)(b)(3)) from the regulations. If the new regulation is to remain in effect, it should expressly be made subject to residents' rights under landlord-tenant law, and ALRs should be required to give residents written notice when the ALR is no longer an appropriate environment for the residents, including the basis for such a finding and a statement notifying residents of their rights under landlord-tenant law.[22]

2. Vigorously enforce existing consumer protections, including the imposition of decertification and civil penalties as appropriate.

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[19]651 CMR 12.05(1)(g).

[20]651 CMR 12.03(10).

[21]651 CMR 12.09 (see multiple references in this section to "sub-regulatory guidance" from EOEA).

[22]Cf. 651 CMR 12.03(e)(f)(10), concerning Operating Plan requirements for notice procedure.

3. Make information about ALR certification and complaints available online for the benefit of consumers, family members and advocates.

4. Develop a mandated form of disclosure that all ALRs would be required to deliver to consumers who inquire about ALR services.

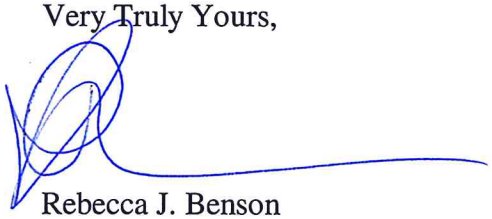
5. Include MOLST orders in the list of documents that must be included in the resident record under 651 CMR 12.05(1)(g).

6. Reinstate the requirement that residents be notified of the sale of an ALR, pursuant to 651 CMR 12.03(10).

7. Eliminate or limit the use of sub-regulatory guidance.

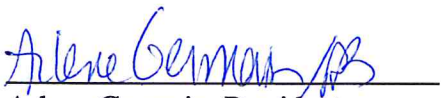
Thank you for the opportunity to submit these comments. If you have any questions, please feel free to contact us.

Very Truly Yours,



Rebecca J. Benson
Susan Levin, Chair
Public Policy Committee
Massachusetts NAELA

The foregoing comments are also endorsed by:



Arlene Germain, President
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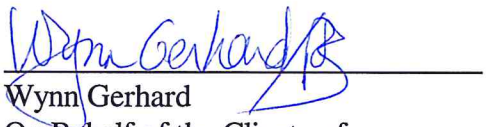

Wynn Gerhard
On Behalf of the Clients of
Greater Boston Legal Services