LeadingAge Minnesota

MEMORANDUM

To: Administrative Law Judge Ann C. O'Reilly

From: LeadingAge Minnesota, submitted by Kari Thurlow, Senior Vice President of Advocacy

Date: January 15, 2020

Re: Proposed Rules of the Minnesota Department of Health Governing Licensed Assisted Living Facilities, Minnesota Chapter 4659, Minnesota Revisor ID R-4605

OAH Docket # 65-9000-37175

Introduction

LeadingAge Minnesota (hereinafter "LeadingAge MN") is the largest association of organizations serving Minnesota seniors. Our mission is to transform and enhance the experience of aging. Today our membership encompasses more than 1,000 organizations serving nearly 70,000 seniors every day in all of the places they call home, including adult day, independent senior housing, assisted living communities, in-home services and skilled nursing facilities. Included in our membership are 626 registered housing with services establishments with arranged home care providers, most of which have an assisted living designation and will be serving residents within the new assisted living licensure system.

We appreciate the opportunity to provide comments on the Minnesota Department of Health's (MDH) proposed rules. In addition to this memorandum, LeadingAge MN and Care Providers of Minnesota jointly retained the firm of Fredrickson & Byron as the "Long-Term Care Imperative" to provide comments on sections of the proposed rules we are especially concerned about, and we appreciate your consideration of that submission as well.

The Assisted Living Rules Should Reflect the Core Values Identified by Stakeholders and Reflected in the Enabling Legislation

The enabling legislation represents the work of dozens of stakeholders over the course of two years and hundreds of hours of time in planning, negotiating and substantive working group discussions. LeadingAge MN was proud to collaborate with Minnesota Department of Health ("MDH"), senior advocates, interested stakeholders, and Minnesota legislators to help craft Minn. Stat. §§ 144G.01-144G.9999, which is the enabling legislation underlying the proposed rules. The effort to develop and enact this important legislation was significant.

The assisted living licensure enabling legislation grew out of the work of discussions of the Elder and Vulnerable Adult Abuse Prevention Working Groups[1]. (*see, e.g.,* Elder and Vulnerable Adult Abuse Prevention Working Groups Summary Report, January 24, 2019, available at https://www.health.state.mn.us/facilities/regulation/ohfc/prevworkgroups/index.html). The MDH Assisted Living Licensure Work Group – one of the six Elder and Vulnerable Adult Abuse Working Groups – identified the following core values/goals:

- We seek to improve quality of life for all.
- We respect the rights, dignity and right to choice of elders and vulnerable adults.
- We will strive to balance personal rights, autonomy, choice and privacy with safety and

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[1] Following the 2018 legislative session, MDH Commissioner Jan Malcolm asked six workgroups to form on the following topics: Licensure for Assisted Living Facilities; An Assisted Living Report Card; Certification of Dementia Care Units; Improving Quality and Safety in Long-Term Care Settings; Consumer Rights and Electronic Monitoring in Care Facilities. The goal of these work groups was to forge consensus where possible on legislative proposals for consideration by lawmakers and to clearly and objectively describe the areas of disagreement. In addition to identifying and proposing action in areas needing changes in statutes or rules, each work group was asked to advance collaboration on initiatives that could be led by the community without waiting for legislation. (see, https://www.health.state.mn.us/facilities/regulation/ohfc/prevworkgroups/index.html).

health protection for vulnerable adults.

▪ We will value person-centered solutions over those that are primarily institution-centered.

▪ It is our goal to fill gaps in regulation to increase quality and safety, but it is not our goal to drive more people into institutions.

▪ At the same time, there is a need and a goal to maintain high quality nursing homes in the care continuum; this capacity must be maintained.

▪ Care settings need to be and remain accessible to low income populations. Any new regulatory system must allow sustained access to Home and Community Based Services Medicaid funding; access should be improved for those on Elderly Waiver.

▪ Whatever we do as a state we need to be able to pay for. (*Id*. at 10)

The Working Group's core values and goals referenced above helped define the purpose and goals of Chapter 144G. These core values should guide whether MDH's proposed rules are rationally related to the ends sought to be achieved by Chapter 144G.

While the oversight of assisted living settings has been significantly changed by the enabling legislation, assisted living settings remain part of our network of community-based settings and services. The 2019 legislation represents generational change to the assisted living sector itself. Minnesota has long been nation-leading in our "housing with services" approach that separates oversight of housing from the home health services a senior may receive in that setting. Services are licensed as "home care" and provided to clients based on an individual service plan. Minn. Stat. §§ 144A.43-144A.483. Clients contract for housing separately through a lease agreement. Minn. Stat. § 144D. Individuals living in these settings are not required to contract for services from the arranged home care provider connected to the housing with

services setting and can tailor his or her service plan to his or her own individual needs. Under the new law, providers seeking to offer assisted living services or assisted living plus dementia care services will be required to hold a license that governs both the housing and services aspects of these settings, and there will be one contract between the provider and the client for both services and housing.

To the extent that the proposed rules borrow from state and federal nursing home regulations, we urge caution and additional scrutiny. Stakeholders intentionally decided not simply to duplicate nursing home regulations in designing the assisted living licensure legislation. This was done in order to avoid creating new institutions and to preserve assisted living settings as home and community based services. Home and community-based services (HCBS) provide opportunities for individuals to receive services in their own home or community rather than institutions or other isolated settings. This approach to assisted living aligns with another key authority that governs and guides the delivery of services in Minnesota. In 2014, the Centers for Medicare & Medicaid Services (CMS) finalized what many refer to as the "HCBS Settings Rule," which raises expectations around what is possible for older adults and people with disabilities and what is required when serving them. The HCBS Settings Rule notably compliments the goals and values of Minnesota's Olmstead Plan. It requires assurances that all people have information and experiences with which to make informed decisions. It also requires the services they receive to meet a prescribed set of standards. Any assisted living facility in Minnesota that participates in Medical Assistance waiver programs must meet the standards and have characteristics that are home and community-based (*see, e.g.,* 42 CFR §441.301(c)(4), 441.710(a)(1) and 441.530(a)(1)). State and federal nursing home regulations may run afoul these important standards for HCBS services.

It is also important to evaluate the potential impact of these proposed rules on the affordability of assisted living services for seniors. Affordability was a core value identified by stakeholders. (*see, e.g.,* Elder and Vulnerable Adult Abuse Prevention Working Groups Summary Report, January 24, 2019, available at https://www.health.state.mn.us/facilities/regulation/ohfc/prevworkgroups/index.html). "Any new regulatory system must allow and sustain access to Home and Community Based Services Medicaid funding. . .") Any increased costs due to new regulations will inevitably impact consumers of assisted living services. Elderly Waiver, the Medical Assistance program that covers assisted living services for low income seniors, fails to cover the costs of providing services even today. A 2019 Minnesota Department of Human Services (DHS) report found that Elderly Waiver reimbursement rates for customized living (the services offered in housing with services settings) were more than 30% below the rates needed to appropriately cover the cost of providing the service, and that gap has only grown as Elderly Waiver rates have been frozen since that time.

There are key aspects of the proposed rule that will inevitably impact the cost of assisted living services in the future. Examples include the proposed rule on Emergency and Disaster Planning, the requirement that registered nurses conduct assessments, and the proposed rule requiring a 10-minute response time on the night shift. Importantly, Minnesota's lawmakers have not appropriated any additional funding to the Elderly Waiver program to offset these costs. In addition, assisted living providers who serve customized living clients receive reduced rent from those clients – typically less than half of market rate rent for an assisted living apartment. If there are reasonable, less costly-alternatives to these proposals that do not diminish quality care, it would serve the state well to modify the proposed rule accordingly. If the regulations render care

completely unaffordable to those on Elderly Waiver, those individuals may be forced to seek more expensive nursing home care at a greater cost to state taxpayers.

The Assisted Living Rules Should Reasonably and Realistically Reflect the State of the Senior Care Environment

Stakeholders spent considerable time articulating shared understanding of the senior care environment, as the group felt it "should inform future policy." (*see*, Elder and Vulnerable Adult Abuse Prevention Working Groups Summary Report, January 24, 2019, p. 10). Included in those shared understandings is the recognition that senior care "workforce challenges exist now and will likely worsen." (*Id.*) Significantly, the recognition of these chronic workforce challenges occurred two years ago – prior to the current pandemic that has further exacerbated workforce challenges in senior care. As an example of the impact of the pandemic, in a survey we found that 15% of direct caregiver positions in Assisted Living buildings were vacant in August 2020, up from 13% in December 2019. That level of vacancy translates into more than 7,000 caregiver jobs in Assisted Living settings waiting to be filled.

Overall, the proposed staffing rule is reasonable and reflects a person-centered approach that is central to Minnesota's approach to assisted living regulation. It should be noted these proposed rules will be in addition to the extensive staffing and training requirements already included in Minn. Stat. §§ 144G.01-144G.9999. The proposed rule would require a clinical nurse supervisor to develop and implement a staffing plan that provides an adequate number of qualified staff to meet the residents' needs 24-hours a day, seven days a week. This approach recognizes that needs of residents may vary, and staff experience may vary and entrusts the expertise of a clinical nurse supervisor to ensure appropriate, person-centered staffing.

LeadingAge MN generally supports the proposed rule with regard to staffing standards (Section 4659.0180), and we are pleased that MDH resisted proposing a specific staffing ratio. We do believe certain aspects of the staffing rule, including portions of the staff posting requirements and the ten-minute response time at night are not reasonable and/or arbitrary and capricious. We refer to the Long-Term Care Imperative's written comments for additional details on these concerns.

We are aware that some stakeholders are proposing a specific staffing ratio and may be advocating for such during the hearing on these proposed rules. LeadingAge MN advocates against any such proposal. Not only would such proposals run afoul of the statutory intent to promulgate person-centered rules (*see*, Long-Term Care Imperative's Comments and Legal Memorandum at p.6-8), but it would be impractical, given current workforce realities. Any rulemaking regarding staffing should also be done with clear recognition of the significant workforce shortages in this sector. Providers are operating with the reality that fewer people are choosing professional caregiving as a career at a time when there is a growing demand. After years of slow and steady growth, MDH recently reached 2,000 registered housing with services providers offering assisted living services, and with the ongoing growth of the senior population this provider segment will continue to grow and the staffing shortages mentioned above are likely to get worse.

We also want to express caution against utilizing staffing standards from other states. Most states that have imposed staffing ratios also have acuity limits for assisted living. Minnesota lawmakers avoided including any acuity limits in the assisted living licensure statute. This was intentional, as it affirmed a core value shared by stakeholders that seniors should have the ability to age in place. In addition, the assisted living licensure statute affirms that an

individual assisted living resident may elect to import services from outside providers of their choosing into the assisted living setting. Minn. Stat. §144G.50, subd. 2(e) 4. These factors would make a uniform staffing ratio for assisted living settings unreasonable and unworkable.

We would advocate to amend 4659.0100—Initial Assessment and Continuing Assessment of the proposed rule to allow licensed practical nurses (LPNs) to complete some of the assessments – after the initial admission assessment. Such an approach is consistent with the Nurse Practice Act (*see, e.g.,* Minn. Stat. §148.171, allowing LPN's to complete focused assessments) recognizes workforce shortages in the sector and allows assisted living settings to better utilize healthcare resources within the organization. A reasonable modification to the rule would be to require an registered nurse (RN) to conduct assessments upon admission, due to a significant change in condition, and annual assessments, but permit LPNs to conduct other quarterly assessments with communication and collaboration with the RN.

Additional Changes are Needed for Clarity and Reasonableness

LeadingAge MN and our members have been heavily engaged in the rulemaking process. As members of the MDH Assisted Living Licensure Rulemaking Advisory Committee, we have provided extensive comments to help shape the proposed rule. We are pleased that the proposed rule reflects many of our comments, and as a result, we are supportive of large portions of the rule.

However, there remain certain aspects of the rule that are either unclear, unreasonably burdensome or unnecessarily costly where changes could and should be made without sacrificing quality care. While we did share these suggested changes with MDH on October 30, 2020, prior to publication of the proposed rules, it does not appear these proposed changes were considered or incorporated. We are submitting with this letter a revised version of these suggested changes

to address our continuing questions concerns. Because assisted living providers will be asked to operationalize these rules in an extremely truncated timeline, it is important to address these issues before the rule is finalized.

LeadingAge MN and Care Providers of Minnesota jointly retained the firm of Fredrickson & Byron as the "Long-Term Care Imperative" to provide comments on sections of the proposed rules we are most concerned about. We ask that you also consider those written comments.

Conclusion

LeadingAge Minnesota is largely supportive to the majority of the proposed rule. We appreciate that MDH has reflected stakeholder input and dialogue and has attempted to balance resident safety with resident choice. However, we do feel that key aspects of the rule must be revised before it is finalized to better reflect stakeholder core values, and to ensure that it is clear and reasonable and affordable for seniors. We appreciate the opportunity to provide comments on the Minnesota Department of Health's (MDH) proposed rules. Thank you for your consideration of these written comments.