STATE OF MINNESOTA

OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE COMMISSIONER OF HEALTH

In the Matter of the Proposed Rules of the Minnesota Department of Health Governing Assisted Living Facilities, Minnesota Rules Chapter 4659

Docket No. OAH 65-9000-37175

Revisor's ID No. R-4605

Administrative Law Judge
Ann C. O'Reilly

THE LONG-TERM CARE IMPERATIVE'S RULEMAKING COMMENTS AND LEGAL MEMORANDUM

INTRODUCTION

The Long-Term Care Imperative (hereinafter referred to as "the Imperative") is a collaboration between two of Minnesota's largest provider associations, LeadingAge Minnesota and Care Providers of Minnesota. The Imperative advances a vision, shared by both associations, for older adult housing, health care, and supportive services. That shared vision pursues state policies that allow individuals to age in the settings of their choice and to access a menu of quality person-centered services designed to meet each individual's needs.

Representatives from the Imperative collaborated with the 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. They were active members of the "Advisory Committee" referenced on page 4 of the SONAR and participated in stakeholder sessions convened by MDH regarding Minn. R.

ch. 4659. They submitted comments and suggestions during the early drafting stages for these proposed rules.

The Imperative appreciates the opportunity to submit additional testimony and comment in this rulemaking hearing, not only because these new rules will have significant impact on assisted living communities, but also because the informal discussions with MDH staff and other stakeholders were unfortunately truncated when everyone turned their attention to battling the COVID-19 pandemic throughout Minnesota generally, and within Minnesota's senior service residential settings specifically.

Chapter 144G materially changed Minnesota's licensure system governing assisted living. For years, Minnesota took a bifurcated approach to regulating assisted living communities. The entities that provided home health services within each assisted living building were licensed by MDH as "home care providers." Each building was separately registered with MDH as a "Housing with Services" establishment under Minn. Stat. ch. 144D. Once licensed, certain home care providers were authorized to deliver services at one or more sites, as long as those sites were registered with MDH.

Minnesota's unique bifurcated approach was designed to enhance the independent ability of individuals to choose from a broad menu of offered services by contracting with a home care provider of their choice, regardless whether they lived in an assisted living congregate setting or in their personal residence. Minnesota's approach reduced the concern that a one-size-fits-all licensing approach might homogenize and standardize the delivery of services within each assisted living community. While Minnesota's bifurcated model had its historic benefits, this

unique approach occasionally resulted in unnecessary confusion for residents, families, insurers,[1] home care providers, their staff, and regulators.

The registered nurses, licensed practical nurses, home health aides, management executives, and other staff who provide daily services and supports in Minnesota's assisted living communities are dedicated to their residents. They are committed to providing quality services tailored to meet their residents' needs, despite the current personal risk and uncertainty presented by the COVID-19 pandemic. The Imperative is confident that these professionals, along with the boards, owners, and directors of Minnesota's assisted living communities, will embrace any reasonable, necessary and clear state regulations that transform Minnesota's bifurcated system into the new statutory approach enacted by Chapter 144G.

A careful and thoughtful review of MDH's proposed rules; however, reveals eight provisions that, as currently drafted, either exceed the authority granted MDH by the enabling legislation, or are not reasonable and necessary. Some are overly prescriptive and fail to appreciate that assisted living facilities range from small home residences with four bedrooms to large buildings housing over 100 residents. The Imperative respectfully urges Administrative Law Judge to disapprove the eight parts and subparts discussed below.

SCOPE OF REVIEW

MDH must demonstrate by an affirmative presentation of facts at the rule-making hearing that the provisions of proposed Chapter 4659 are necessary, reasonable and do not exceed the

[1] Because some insurers were flummoxed over whether this approach fit the definitional terms of their long-term care insurance policies, Minnesota enacted a statute to clarify that its bifurcated licensing and registration arrangement created an "assisted living facility." Minn. Stat. § 144D.015.

precise authority conferred by the enabling legislation.[2] A rule is reasonable if it is rationally related to the end sought to be achieved by the underlying statute.[3] The Minnesota Judiciary expects that when promulgating a rule, an agency will not arbitrarily and capriciously pick new standards on its unjustified whim. For example, in *Manufacturer's Housing Institute v. Pettersen*[4] the Minnesota Supreme Court held that an administrative rule's maximum ambient formaldehyde level of "0.5 ppm" was arbitrary and capricious because the rule making record contained:

> no explanation of how the conflicts and ambiguities in the evidence are resolved, no explanation of any assumptions made or the suppositions underlying such assumptions, and no articulation of the policy judgments. In short, there has been no reasoned determination of why a level of 0.5 ppm was selected…[5]

MDH's SONAR and evidence must explain the circumstances underlying the "need for the rulemaking and why the proposed rulemaking is a ***reasonable solution*** for meeting the need."[6] Rules that are not rationally related to the objective sought to be achieved by the enabling legislation are considered unreasonable. *See, Mammenga v. Dep't of Human Servs.,* 442 N.W.2d 786, 789-90 (Minn. 1989) (finding rule itself is unreasonable (and therefore invalid)). *See also, St. Otto's Home v. Minn. Dep't of Human Servs,* 437 NW 2d 35 (Minn. 1989) (application of rule must be fair and reasonable under the circumstances).

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[2] Chapter 22.2.1, "Nature of the Factual Presentation in Support of Need and Reasonableness," Minn. Admin. Proc. (George A. Beck and Mehmet Konar-Steenberg, eds. 3d ed. 2014).

[3] *Mammenga v. Dep't of Human Servs*., 442 N.W.2d 786, 789-90 (Minn. 1989).

[4] 347 N.W.2d 238 (Minn. 1984).

[5] *Id.* at 246.

[6] Minn. R. 1400.2070, subp. 1 (emphasis added).

MDH must also introduce evidence of need to establish that the rule is necessary. Part of that burden is satisfied by Minn. Stat. § 144G.09, subd. 3. That subdivision demonstrates that Chapter 144G's enabling legislation is not fully self-implementing, because it mandates that the Commissioner "shall adopt rules for all assisted living facilities…" While this subdivision confirms that rulemaking is necessary, certain provisions of the proposed rules are unnecessary, because they ambiguously, arbitrarily, and unreasonably stray beyond the ends sought to be achieved by the enabling legislation.

As demonstrated by *Pettersen,* state agencies run afoul of the Minnesota Administrative Procedures Act ("APA") when their proposed rules contain unjustified standards not contemplated or envisioned by the enabling legislation, or because the agency cannot articulate why the proposed standard is reasonable. For example, when the Department of Education attempted to include "charter schools" in a 2016 proposed rule governing "Achievement and Integration," the Administrative Law Judge disapproved the proposed rule because it exceeded the Department's statutory authority. Proposed rules that are "impermissibly vague" and that fail to include necessary standards will also be disapproved.[7]

By analogy, regulations proposed by federal agencies must withstand similar rulemaking review. In *Motor Vehicle Mfg. Ass'n v. State Farm Mut.*, 463 U.S. 29, 34 (1983), the U.S. Supreme Court held that the National Traffic and Highway Safety Administration failed to articulate an adequate basis for rescinding a regulation governing passive restraint systems in automobiles. More recently in *Azar v. Allina Health Services*, 587 U.S. ___; 139 S. Ct. 1804

[7] *In the Matter of the Proposed Rules of the Department of Education Governing Achievement and Integration*, Minnesota Rules Chapter 3535, Report of the Chief Administrative Law Judge OAH 16-130032227 (Chief ALJ T. Pust, March 21, 2016), concurring with Report of Administrative Law Judge (ALJ A. O'Reilly, March 11, 2016). Pursuant to Minn. Stat. § 14.15 if an agency elects not to correct the defects identified in the rulemaking report, it must submit the proposed rules for review by the Legislative Coordinating Commission and the House of Representatives and Senate policy committees with primary jurisdiction over state governmental operations. *Id.*

(2019), the Court held that the Centers for Medicare and Medicaid Services ("CMS") failed to abide by the federal APA's notice and comment rulemaking requirements before enforcing its new disproportionate share hospital payment schedules.

Agencies also run afoul of rulemaking standards when they springboard from a minor statutory provision or phrase to enact a detailed mandate to satisfy their well-meaning, but unauthorized, impulse. In *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001) the Supreme Court declined to find that a minor statutory phrase authorized the Environmental Protection Agency to conduct a cost of implementation analysis when setting air quality standards. The Court succinctly summarized *Whitman*'s formal legal analysis by explaining that Congress "does not…hide elephants in mouseholes[.]" *Id.; see also ABA v. FTC*, 430 F.3d 457, 467 (D.C. Cir. 2005).

Measuring MDH's proposed rules against these standards reveals that although the majority of the proposed rule's parts and subparts are reasonable, necessary and consistent with law, the eight outliers discussed in Section B below should not be approved as proposed.

LEGAL ANALYSIS

A. The licensing system enacted by Minn. Stat. ch. 144G expressly and explicitly requires MDH to promulgate rules that promote person-centered planning and service delivery.

1. "Person-centered planning and service delivery" is the statutory yardstick that measures whether the proposed rules are reasonable, necessary, and consistent with the enabling legislation.

In Chapter 144G, the Legislature underscored its mandate that to achieve optimal quality of life in Minnesota's assisted living communities, this new licensure system must champion person-centered planning and service delivery. This is not a mere platitude. Fourteen separate provisions of the enabling legislation emphasize this person-centered mandate.

The person-centered directive is fundamental to MDH's rulemaking responsibilities (Minn. Stat. § 144G.09, subd. 3); the provision of dementia care (Minn. Stat. § 144G.08, subd. 17); setting minimum facility requirements (Minn. Stat. § 144G.41, subd. 1 (3)); orienting and training staff and supervisors (Minn. Stat. § 144G.63, subd. 2 (6)); providing training in dementia care (Minn. Stat. § 144G.64 (b)(5)); conducting initial reviews and assessments (Minn. Stat. § 144G.70, subd. 2(b)); setting the general responsibilities of licensees (Minn. Stat. § 144G.82, subd. 1); developing policies and procedures (Minn. Stat. § 144G.82, subd. 3(a)(1)); developing intervention plans (Minn. Stat. § 144G.82, subd. 3(a)(2)); requiring additional training for dementia services (Minn. Stat. § 144G.83, subd. 1); meeting staffing requirements (Minn. Stat. § 144G.83, subd. 2(a)); assisting residents with dementia (Minn. Stat. § 144G.84, subd. (a)(1)); and developing evidence-based nonpharmacological practices (Minn. Stat. § 144G.84, subd. (a)(2)).

To further underscore the significance of this Legislative directive, Minn. Stat. § 144G.08, subd. 49 incorporates Minnesota's existing statutory definition for person-centered planning and service delivery found at Minn. Stat. § 245D.07, subd. 1 (a), (b). That statute governs home and community-based waiver service providers licensed by the Minnesota Department of Human Services ("DHS"), such as Community Residential Settings for persons with intellectual disabilities.

Among the relevant Minn. Stat. § 245D.07 standards, in order to meet the individual's "personal goals," that statute requires that services must be provided "in response to the person's identified needs, interests, preferences, and desired outcomes…" Person-centered planning and service delivery:

(i) identifies and supports what is important ***to the person*** as well as what is important ***for the person***, including preferences for when, how, and by whom direct support service is provided;

(ii) uses that information to identify outcomes the person desires; and

(iii) respects each person's history, dignity, and cultural background;[8]

This statutory definition also provides that proper person-centered planning affords "opportunities for self-sufficiency," and allows "self-determination" regarding decision making and personal choice. Significantly, this extends to allowing the resident and licensee to balance:

> between risk and opportunity, meaning the least restrictive supports or interventions necessary are provided in the most integrated settings in the most inclusive manner possible to support the person to engage in activities of the person's own choosing that may otherwise present a risk to the person's health, safety, or rights.

As described below, while many provisions of MDH's proposed rule appropriately embrace this person-centered approach, a few provisions are too prescriptive and arbitrary to pass the reasonableness test or meet the requirements of the enabling legislation.

B. Proposed criteria that unreasonably implement one-size-fits-all licensing requirements, or that borrow skilled nursing facility federal guidelines, contradict the enabling legislation's mandate for person-centered planning and service delivery and should be disapproved.

1. Minn. R. 4659.0010, subp. 14 is not reasonable as proposed. Its definition of "elopement" conflicts with person-centered autonomy by arbitrarily borrowing federal nursing home guidelines.

There is a fundamental difference between skilled nursing homes participating in the Medicaid and Medicare programs and assisted living communities. Skilled nursing homes are institutional settings operating under prescriptive regulatory standards governing virtually all aspects of operation and payment. By comparison, assisted living facilities are community-based

[8] Minn. Stat. § 245D.07, subd. 1(a) (emphasis added).

entities where the residents and staff craft and tailor the services required to meet each resident's needs.[9]

Perhaps this difference is most easily exemplified by the autonomy that many assisted living clients enjoy by coming and going as they please.[10] Many still hold driver's licenses, while others enjoy largely unsupervised visits to shopping malls, churches, community centers, theaters, casinos, and sporting events. Others enjoy leaving their apartments, locking their doors, and walking to nearby parks, perhaps with their pets, or to other destinations within walking distance, even if that means responsibly crossing a busy street at the traffic light.

The definition of "elopement" found at Minn. R. 4695.0010, subp. 14 (proposed) undermines this person-centered autonomy by adopting a one-size-fits-all standard derived from skilled nursing facilities participating in the Medicaid or Medicare program. The proposed rule defines "elopement" to mean "a resident leaves the premises or a safe area *without authorization or necessary supervision* to do so." (emphasis added). The term "elopement" was not adopted in any provision of Minn. Stat. ch. 144G.[11] Nonetheless, the concept is an important factor when developing missing resident policies and practices, so it should be defined precisely.

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[9] The Centers for Medicare and Medicaid Services ("CMS") enacted regulations designed to prevent home and community-based establishments from devolving into institutional settings that do not advance community integration. *See* Final Rule at 79 Fed. Reg. 2948 (January 16, 2014) https://www.federalregister.gov/d/2014-00487)

[10] This right is codified in the "Assisted Living Bill of Rights" at Minn. Stat. § 144G.91, subd. 9.

[11] Agencies and courts are not free to add concepts and provisions that the Legislature intentionally omitted or inadvertently deleted. *Wallace v. Comm'r of Taxation*, 289 Minn. 220, 184 N.W. 2d. 588 (Minn. 1971).

Person-centered planning as defined by Minn. Stat. § 245D.07, subd. 2 expressly contemplates a balance between risk and opportunity. It anticipates that residents have the right to engage in activities of the person's own choosing that might otherwise present a risk to that individual's health, safety, or rights. Forcing all assisted living residents to seek permission and "authorization" before leaving home is an onerous, unreasonable, and ageist standard that directly conflicts with a person-centered approach to service delivery. By comparison, when assessments are completed under Minn. Stat. § 144G, each individual resident will set their own limits for coming and going, and assisted living communities will honor those directives. This overly broad definition could create unjustified problems for the license holder who might receive a serious-level deficiency if an autonomous assisted living client is injured during an excursion.

The Imperative recognizes that some residents, such as those receiving dementia services, will have assessments that do not approve any alone time out in the community. A definition of elopement that focuses on that population would be reasonable. The Imperative proposes the following language, paraphrased from publications by the National Institute for Elopement Prevention and Resolution:

> Elopement means an undetected, unsupervised, and unsafe departure from the assisted living facility by an assisted living client whose assessment does not permit time alone in the community due to the client's cognitive, physical, mental, emotional, or other impairment.

The Imperative respectfully requests that the Administrative Law Judge disapprove the rule as proposed and, in its stead, recommend MDH adopt the alternate language above.

2. Minn. R. 4659.0180, subp. 4 (B) is not reasonable because it is overly prescriptive, exceeds statutory authority, and contravenes person-centered service planning.

The Imperative does not object to Subparts 1, 2, and 3 of proposed rule 4659.0180 governing "Staffing." As proposed these standards are premised upon person-centered planning and service delivery. These requirements properly delegate the development and implementation of staffing plans to the clinical nurse supervisor, who then must tailor the number of direct-care staff to the daily needs of the residents. Without being overly prescriptive, these provisions of the rule identify five factors that assure whether the staffing levels approved by the clinical nurse supervisor are sufficient.

The Imperative appreciates that MDH's deliberations led it to these person-centered standards, and that MDH resisted setting arbitrary minimum, one-size-fits-all staffing ratios that do not account for the differences among residents, or the vastly different sizes of licensed facilities throughout Minnesota. These standards are consistent with the enabling legislation's requirement that the rules describe "staffing appropriate for each licensure category to best protect the health and safety of residents no matter their vulnerability." Minn. Stat. § 144G.09.

Subparts 4 (and 6 below); however, contain arbitrary requirements that are not reasonable and not contemplated by statute. These subparts may impede the orderly delivery of assisted living services and should be disapproved. Minn. R. 4659.0180, subp. 4 (A) requires that the "clinical nurse supervisor" develop a 24-hour daily staffing schedule. As proposed that requirement is unreasonable. Depending upon the size of the facility or the complexity of assisted living clients' services, the clinical nurse supervisor will almost certainly need to delegate the scheduling task to staffing coordinators or others. As such, subpart 4 (A) of the rule should read the "clinical nurse supervisor *or designee* must develop a 24-hour daily staffing schedule."

Minn. R. 4659.0180, subp. 4 (B) requires that the clinical nurse supervisor must post the daily work schedule "at the beginning of each shift in a central location on each floor of the facility, accessible to staff, ***residents, volunteers, and the public***." (emphasis added). The italicized language exceeds the statutory authority and should be disapproved. No provision of the statute requires an assisted living facility to treat their daily work schedules as publicly accessible information. Doing so creates several practical problems not required by the enabling legislation.

First, the statutory staffing standards do not require a facility to post its daily work schedule, let alone one that may prove inaccurate as staff are re-deployed throughout the workday. Although facilities will assign their direct-care staff to daily scheduled shifts, and will do so in writing, reality often causes their initial daily planning to give way to intervening events and absences. People call in sick, start unexpected quarantining, or may trade shifts with other qualified staff, thereby rendering multiple posted schedules inaccurate, and perhaps unreliable. A resident who had no significant medical issues at the beginning of a shift might require significant additional staff attention by the end of the day. Or residents may unexpectedly leave the facility to join their families during a shift, enabling the clinical nursing manager or supervisory staff to re-deploy direct-care staff elsewhere. The clinical nurse supervisor needs flexibility to manage the attendance and assignments on each shift without concern that someone, including MDH surveyors, will subsequently criticize the facility because the actual services delivered on specific days were inconsistent with the scheduled expectations posted, for example, in the third floor lobby.

Second, the enabling legislation does not shift or delegate the supervisor's responsibility to assign the employed staff onto the residents themselves, or onto volunteers, or the public.[12] Managing and attaining the reasonable expectations of residents and their families should focus on the quality of care reasonably delivered by all direct-care staff, and not whether residents or their families object because the posted daily schedule on their floor reveals that their favorite direct-care staff person has been assigned to a different floor, or to a different group of residents. Posting publicly accessible assignments and work locations may also prompt families to seek out and find direct-care staff to request tasks beyond those approved in the staff's daily assignments or those required by assessments. Such requests are better directed to clinical nursing supervisors or their designees responsible for those assignments and assessments. Posted schedules should not enable well-intentioned families to avoid the facility's chain of command by seeking out and giving direct orders to, or making request of, direct-care staff who are not exclusively assigned to their resident, or who may not even be working on their floor that day.

Third, the enabling legislation does not envision that residents and employed staff must obtain or provide services by relinquishing any aspect of their privacy, including their daily work location or who is providing their care on any given day. The identity of any person receiving assisted living or dementia services is Protected Health Information under federal HIPAA requirements and state law. Posting "resident assignments" as required by Minn. R. 4659.0180 (B) in a publicly accessible space undermines those privacy interests. There is no legitimate reason for a vendor delivering requisite supplies, or any member of the public who may be

[12] When Minnesota Health Programs provide that persons receiving services may employ, fire, or schedule their personal providers, they do so expressly. *See, e.g.*, Minn. Stat. § 256B.0659, subd. 19 (under PCA Choice the recipient or responsible party shall "recruit, hire, schedule, and terminate personal care assistants…"). That concept does not exist in Chapter 144G.

visiting the facility, to have access to a posted schedule that discloses who is receiving services from whom in the facility.

It is not necessary or reasonable for these rules to mandate publicly accessible posts in order to achieve the reasonable purpose of the new 144G licensing system. If direct-care staff need to be reminded of their daily assignments, that staffing information will be available in an employee-restricted area or available from his or her supervisor. If an MDH survey team needs to confirm who was working on a particular shift on any given day, then the written daily staffing schedules on file, as adjusted for any subsequent staffing changes made during that day, will be available for MDH review, in addition to other relevant documentation.

3. Minn. R. 4659.0180, subp. 6 ten-minute arbitrary response deadline is not reasonable because it is overly prescriptive, exceeds statutory authority, and contravenes person-centered service planning.

Unlike subparts 1 - 5, subpart 6 of Minn. R. 4659.0180 is overly prescriptive and contravenes statutory authority by eschewing person-centered service planning. Governing "night supervision," this proposed subpart requires that "direct-care staff shall respond to a resident's request for assistance with health or safety needs as soon as possible, *but no later than ten minutes after the request is made."* (emphasis added). The Imperative respectfully urges the Administrative Law Judge to disapprove the italicized language. The ten-minute standard is just as arbitrary as the 0.5 ppm standard in *Pettersen.* A fully justified and warranted delay as short as a few minutes could subject a well-run organization to an unfair licensing deficiency.

Defining "as soon as possible" by applying an arbitrary timeframe is not reasonable, or consistent with person-centered service planning and delivery. The standard "as soon as possible" allows direct-care staff the opportunity to explain why it took as long as it did to respond to a request. If their excuse is that they went outside to have a smoke despite knowing that a request for attention was pending, then either a licensing deficiency or action against that

employee may be warranted. If; however, they had just left that same resident's apartment because an emergent situation with a different client was occurring down the hall, then taking more than ten minutes to return to a new request would be "as soon as possible." The SONAR does not explain or justify why MDH is opting to impose a precise response time that is more prescriptive than those required in either skilled living facilities or acute care settings, such as hospitals.

This subpart is specific to night-time supervision and MDH has not adequately explained why a one-size-fits-all arbitrary standard is necessary at night, when MDH takes a vastly different, person-centered service delivery approach during the daytime. This proposal, if approved, will also negatively impact those facilities who are already struggling to retain staff during Minnesota's workforce crisis because facilities will be trying to hire more night-time staff to assure that it does not fall below this arbitrary response time.

4. Minn. R. 4659.0100 is not reasonable as proposed. It is inconsistent with the enabling legislation because it incorporates by reference a federal guideline governing emergency preparedness for skilled nursing facilities, instead of proposing a person-centered service delivery rule tailored for assisted living communities.

Respectfully, the Administrative Law Judge should disapprove in its entirety Minn. R. 4659.0100 entitled "Emergency Disaster and Preparedness Plan; Incorporation by Reference." Minn. Stat. § 144G subd. 3 (c)(5) obligates the Commissioner to "adopt rules" on "emergency disaster and preparedness plans." The enabling legislation envisions that MDH would draft its own rules to implement the person-centered planning and service delivery focus of Chapter 144G. It did not authorize MDH to incorporate by reference standards and guidelines designed by CMS for skilled nursing facilities that participate in the Medicaid and Medicare programs. Yet Minn. R. 4659.0100, subp. (A) obligates assisted living communities to "comply with the

emergency preparedness regulations for long-term care facilities under Code of Federal Regulations, title 42, section 483.73, or successor requirements."

Although the SONAR followed the APA's technical procedures for incorporating publications as described in Minn. Stat. § 14.07, subd. 4, that provision of the APA does not, in and of itself, allow an agency to incorporate standards that are not reasonable or that deviate from the enabling legislation. If the Legislature intended to incorporate an existing legal standard when authoring Chapter 144G, it knew how to accomplish that task. That is exactly what it did when Minn. Stat. §144G.08 defined "person-centered planning and service delivery" by cross-referencing Minn. Stat. § 245D.07, subd. 1a (b).

When obligating facilities to prepare for emergencies, the Legislature did not incorporate the federal emergency preparedness regulations for skilled nursing facilities under Code of Federal Regulations, Title 42, Section 483.73 or its successor requirements. Nor did it incorporate the "State Operations Manual Appendix Z-Emergency Preparedness for All Provider and Certified Supplier Types: Interpretive Guidance" (hereinafter referred to as "Appendix Z"). Nor did it authorize MDH to incorporate such a lengthy, technical document subject to future amendments, especially since that document governs other categories of institutional providers beyond skilled nursing facilities. Agencies cannot add a missing authority that the Legislature intentionally deleted or inadvertently omitted. *Wallace v. Comm'r of Taxation,* 289 Minn. 220, 184 N.W. 2d. 588 (Minn. 1971); *see, e.g., Thompson v. Schrimisher*, 906 NW2d 495, 500 (Minn. 2018) (*citing Wallace*) (declining to read "imminent" into the definition of domestic abuse where that word did not appear in the applicable statutory definition of that term, but did appear in another, in applicable definition of domestic abuse); *Rohmiller v. Hart*, 811 NW2d 585, 590 (Minn. 2012) (interpreting scope of relatives who may petition for visitation of a child).

Appendix Z is a 72-page publication that is subject to subsequent amendment without rulemaking. It governs sixteen different types of providers participating in Medicaid, in addition to the incorporated standards for skilled nursing facilities. None of the providers governed by Appendix Z are assisted living facilities. Even by isolating about 40 pages of material specific to skilled nursing facilities, MDH's proposed rule fails to justify how these federal guidelines achieve the purposes of Chapter 144G. At their whim, without more precise guidance, MDH surveyors might evaluate an assisted living facility's emergency preparedness plan by picking and choosing Appendix Z criteria that is inapplicable to assisted living facilities.

The SONAR makes no effort to explain how Appendix Z's lengthy standards support or conflict with the emergency and safety standards enforced by the Minnesota State Fire Marshal, or by Chapter 144G, or by the current Housing with Services law, Minn. Stat. 144D.11 (repealed as of Aug. 1, 2021). Nor does the SONAR explain or reconcile how particular provisions of Appendix Z mesh or conflict with the provision of patient-centered service delivery.

Incorporating about 40 pages of Appendix Z will introduce foreign and inapplicable concepts and criteria to Minnesota's assisted living communities. For example, Section E-009 of Appendix Z and 42 CFR § 483.73(a)(4) require that the covered entity must collaborate with regional healthcare coalitions. Such coalitions have commonly worked with hospitals or skilled nursing homes, but not with community-based assisted living facilities. Perhaps more importantly, many sections of Appendix Z introduce different characterizations that conflict with Chapter 144G. Chapter 144G defines "assisted living client" (Minn. Stat. § 144G.01, subd. 3); "resident" (Minn. Stat. § 144G.08, subd. 59) and references- but does not define--the term "tenant" (Minn. Stat. § 144G.42, subd. 10(a)(5). These terms reflect that the person-centered population of an assisted living community will include people whose assessments support

receiving substantial assisted living services, while others may only be tenants without services. Yet Appendix Z repeatedly refers to "persons at risk," "residents in long term care," and "patients" to describe the emergency requirements for those populations. The SONAR's blanket incorporation makes no effort to reconcile Appendix Z's terminology with the person-centered approach of Chapter 144G.[13]

Incorporating Appendix Z also ignores the fact that the Minnesota Administrative Procedure Act, unlike its federal counterpart, does not allow state agencies to revise legislative, interpretive or procedural rules without first promulgating amendments to their existing rules. By comparison, because the federal APA is more lenient, CMS may amend the terms and conditions of Appendix Z without rulemaking.[14]

That is directly contrary to the enabling legislation of Minn. Stat. ch 144G, which expressly and specifically requires rulemaking for emergency disaster and preparedness plans. The Legislature did not authorize MDH to bypass its future rulemaking responsibilities by deferring to a federal agency's publication, or its "successor requirements."

The U.S. Supreme Court explained that Congress "does not…hide elephants in mouseholes," *Whitman*, 531 U.S. at 468. Similarly, the Minnesota Legislature did not hide the voluminous Appendix Z "elephant" in the five word "mousehole" that obligates MDH to adopt rules for "emergency disaster and preparedness plans." Moreover, the stark contrast between Appendix Z's provisions and Minn. Stat. § 144D.11 – the current law governing emergency

[13] *See*, Appendix Z at E-0007 483.73(a)(3) (emergency plans must address resident populations including but not limited to "persons at risk"); E-0018 483.73(b)(2) (policies and procedures must include a system to track sheltered residents "in the LTC facility's care"); E-0025 483.73(b)(7) (must have arrangements to maintain continuity of services to "facility patients"); E-0033 483.73(c)(4) (must have a method for sharing information and medical documentation for patients "under the facility's care," as necessary, to maintain continuity of care).

[14] That is why Minn. R. 4659.0100, subp. A refers to the federal regulations "or successor requirements."

planning--demonstrates that this proposed rule far exceeds its necessity, or the reasonable purpose of Minn. Stat. § 144G.52.

The Imperative respectfully recommends that the Administrative Law Judge should disapprove 4659.0100. Instead, the Administrative Law Judge should consider recommending that MDH adopt its December 12, 2019 "WORKING DRAFT" emergency preparedness proposal that was developed after input from Care Providers of Minnesota, LeadingAge Minnesota and other stakeholders. That proposal, on MDH letterhead, is attached hereto as Long-Term Care Imperative Exhibit A. In addition to being manageable, it is scalable. It should meet the needs of an assisted living program in a four-bedroom residential house, as well as the needs of a large building exceeding 100 units. This alternate proposal has the unique status of having been proposed by MDH itself one year before the Notice of Hearing was issued on December 14, 2020. Exhibit A borrows some of the basic concepts of Appendix Z.

Minn. Stat. § 14.131 requires that MDH's SONAR must consider eight factors, including "A description of any alternative methods for achieving the purpose of the proposed rule that were seriously considered by the agency and the reasons why they were rejected in favor of the proposed rule." MDH published its Notice of Hearing in the State Register on December 14, 2020. As Exhibit A demonstrates, one year earlier, after listening to the concerns of interested stakeholders, MDH invested the time to draft and release a proposed Emergency and Preparedness Plan tailored for person-centered assisted living communities. Exhibit A demonstrates that this alternative was obviously "seriously considered" by MDH but, in contravention to Minn. Stat. § 14.131, the SONAR does not describe why this tailor-made option that had achieved stakeholder support was rejected in favor of incorporating Appendix Z.

5. Minn. R. 4659.0120 governs Procedures for Resident Termination and Discharge Planning. The rule is not reasonable as proposed and conflicts

with the enabling legislation. It defeats the facility's ability to implement a necessary service termination in a prompt and effective manner and provides burdensome mechanisms that enable the residents' representatives to thwart necessary terminations by refusing or delaying participation.

The Imperative respectfully urges the Administrative Law Judge to disapprove the overly prescriptive Procedures governing Resident Terminations and Discharges proposed at Minn. R. 4659.0120. Termination of services and discharges are viewed by assisted living communities as a last resort. No reasonable or well-run facility accepts an admission, conducts the required assessments, and commences the provision of necessary patient-centered services with the expectation that it will involuntarily discharge and terminate services for that client. But those circumstances can and do arise.

Sometimes the assisted living client poses an unmanageable risk and danger to themselves or to other residents. Or perhaps the individual's level of nursing care may have increased throughout their stay, to the extent that an assisted living community can no longer meet their needs, so a skilled nursing facility placement becomes necessary. On other occasions, the assisted living client may simply decide for themselves that their current facility is not a good fit, not unlike a student deciding to transfer to a different school after consulting with family and guidance counselors. Or, they may elect to move to another assisted living facility that is a closer proximity to their families, or seek out a facility with different amenities, or return to a private residence while obtaining supports and services from home care providers licensed under Minn. Stat. § 144A.471. Although service terminations are last resorts, they are necessary. As proposed Minn. R. 4659.0120 adds unauthorized requirements that empower uncooperative clients and their representatives to remain longer than the statutory enabling legislation allows.

Where the statute obligates the assisted living community to schedule, and participate, in a pre-termination meeting (Minn. Stat. § 144G.52, subd. 2(a)), the proposed rule mandates that it

must guarantee a date that the resident, guests, and representatives "are able to attend." Minn. R. 4659.0120, subp. 1 (B), (D). As proposed, the rule mandates conducting a pre-termination meeting that is the equivalent of a mediation session with advanced written notice, invited guests, and offers of accommodation. If the pre-termination meeting is eventually held, the facility must then prepare and distribute a subsequent written summary. All of this occurs before the facility is allowed to issue its Notice of Termination. Minn. R. 4659.0120, subparts 1-4.

If the resident decides to voluntarily move after the facility begins this lengthy and involved process, the proposed rules still require additional evaluation, complete with a written relocation plan. Minn. R. 46459.0120, subparts 6-7. A companion rule, Minn. R. 4659.0210 grants a thirty-calendar day right to appeal to MDH and fifteen days to appeal an expedited termination of housing and services. Hearings are heard by the Office of Administrative Hearings with final orders issued by the Commissioner, with Court of Appeals review if requested. Minn. R. 4659.0210, subpart 1 (E). In addition to these procedures, if the resident refuses to leave despite losing the appeal, the facility must remove the resident by "filing an eviction action in court…" That legal process has its own considerable procedures, timetable and costs. Minn. Stat. § 504B.291-371.

The enabling legislation contemplates that an assisted living facility, in its professional judgment, may terminate or not renew a services contract. The statutes already provide robust assurances preventing arbitrary terminations. The enabling legislation already mandates the opportunity for thoughtful discussion, if the resident desires to engage in those discussions.

By contrast, the proposed Rule introduces time-consuming new requirements and renders any termination procedure more difficult and complex than is necessary. While the statute contemplates well-reasoned terminations are necessary, the additional provisions proposed under

the Rule appear designed to thwart, not enable, terminations. The Rule's flaws include the following:

a. **Scope:** Requiring a facility to develop relocation plans for a person who voluntarily agrees to leave violates the statute. Minn. Stat. § 144G.52, subd. 1 expressly provides that "termination" means "a facility-initiated termination" and not a voluntary leave;

b. **Timing:** The statute contemplates a 30-day or 15-day notice period before the effective date of the termination, depending on whether it is a standard or expedited termination. Significantly, however, where the statute provides the facility must "schedule and participate in a meeting" at least "seven days" before the facility may issue a notice of termination (Minn. Stat. § 144G.52, subd. 2(a),(b)), the proposed rule adopts additional notice requirements that expand this seven day notice period. Under 4659.0120, subp. 1(A), the facility must issue a detailed written notice five days before the pre-termination meeting. Then, within 24 hours after the pre-termination meeting the facility must issue a written summary. As such, Rule 4659.0120 expands the statutory seven-day period to a thirteen day minimum, by adding 5 days for a written pre-notice and another day after the meeting for the written summary. This time period must expire before the facility has the opportunity to issue a notice of termination.

c. **Modifying the standards:** The statute provides the facility must schedule a pre-termination meeting, but it does not require that the resident and his or her representatives must attend. The statute simply provides that the facility must make "reasonable efforts to ensure" that the resident can attend (Minn. Stat. § 144G.52, subd. 2 (b)). By comparison, the rule presumes that the pre-termination meeting must be fully attended by the resident, any representatives, or requested guests. That meeting is a precondition to the ability to

issue a notice of termination. The rule expands the statutory duty to the point that any noncompliant or uncooperative resident may avoid termination by delaying and rescheduling the pre-termination meeting at his or her whim. Any resident or representative not acting in good faith may avoid termination by asserting that a necessary guest has become surprisingly unavailable. A rule should not enable participants to engage in tactics that defeat the purpose of the statute, which is to terminate services when necessary.

d. The accommodation burden: Although the statute indicates that the agenda for the meeting must include "identify[ing] and offer[ing] reasonable accommodations or modifications…." (Minn. Stat. § 144G.52, subd. 2 (2)), the corresponding rule (Minn. R. 4659.012 subp. 3) omits an important statutory proviso. Under the statute the facility "is not required to offer accommodations, modifications, interventions, or alternatives that *fundamentally alter the nature of the operation of the facility*." (emphasis added).

Fortunately, there is a straightforward solution to the 4659.0120's significant flaws. Administrative rules are only necessary if statutes lack sufficient detail and are not self-implementing. A thoughtful and careful review of Minn. Stat. § 144G.52 demonstrates that the Legislature has already supplied assisted living communities and MDH with a sufficiently detailed termination process that identifies every required step for an effective termination, and how to appeal those terminations. The Imperative respectfully contends that the additional, burdensome, and conflicting termination requirements specified at Minn. R. 4659.0120 are unnecessary. Instead, the rule as adopted should either incorporate by reference Minn. Stat. § 144G.52 or reiterate its exact statutory terms.

6. The appeal procedures for variance denials under Minn. R. 4659.0080 diminish due process by imposing a truncated time for appeal and by adopting the Revenue Recapture Act procedures.

Minn. R. 4659.0080 imposes a ten-day appeal time for facilities to challenge denials of variance requests issued by MDH. Presumably MDH would dismiss or not initiate any tardy appeal filed on the 11th day or thereafter. These appeal procedures also require the Administrative Law Judge to employ the Revenue Recapture Act contested case hearing expedited procedures. The Revenue Recapture Act procedures reduce the discovery options available to the appealing facility. For example, depositions and requests for admissions are arguably unavailable. This limits the ability of the facility to learn the underlying facts surrounding the denial.

MDH's inadequate 10-day appeal time is invalid. MDH cannot reject variance appeals filed beyond the rule's deadline because Minn. Stat. ch. 144G does not contain a similar deadline. Nor does the enabling legislation authorize MDH to end its jurisdiction over variance requests on its own initiative by adopting a 10-day appeal deadline. *See, Leisure Hills of Grand Rapids v. Levine*, 366 N.W.2d 302 (Minn. Ct. App. 1985). In *Leisure Hills,* DHS dismissed a tardy rate appeal. Its dismissal was based on a 30-day appeal deadline promulgated at Minn. R. 9510.0140 (repealed). DHS had routinely dismissed other tardy appeals under that same rule for over a decade, but the *Leisure Hills* Court of Appeals reversed the dismissal because DHS's underlying enabling legislation contained no similar deadline. The Administrative Law Judge should either disapprove the 10-day deadline or require MDH to add language indicating the deadline is precatory.

7. The SONAR is not transparent regarding its determination of the costs for complying with the proposed rules.

At page 12 of the SONAR, MDH makes the conclusory statement that the total annual cost to comply with the proposed rule is $5,000 per facility on average. Respectfully, the Imperative trusts that the Administrative Law Judge will require a more evidentiary-based and transparent calculation of that estimate. Much of MDH's argument is a contention that because these requirements are already stated in chapter 144G, these clarifying rules cannot add material costs. This argument is unavailing.

For example, Minn. R. 4659.0180, subp. 6's proposed 10-minute nighttime response requirement is not required by chapter 144G. If approved and adopted, assuring compliance may mean that facilities will incur more staffing costs than necessary, assuming they can locate, attract, hire, and deploy additional nighttime staff during Minnesota's workforce crisis.

Terminations and discharges often occur because the family of another assisted living client is justifiably afraid of the aggressive behaviors of another client who, in the professional judgment of the staff, is no longer a safe risk for the other residents. Impeding and delaying an involuntary termination by adding arbitrary procedures beyond those required by statute increases the likelihood that the other frightened resident will become impatient and elect to leave. The departure of a resident is a cost to the facility. Moreover, processing a termination hearing before the Office of Administrative Hearing will create additional staff time and perhaps legal costs, especially if the appealed termination is overturned on a technical violation of one of the rule's many new requirements. For example, arguably an Administrative Law Judge would be required to rescind a termination if the facility only gave four days' written notice before the pre-termination meeting, instead of the rule's mandated five days, or if there was a debate over whether the requested accommodations fit the statute.

Respectfully, MDH has not met its burden to identify the probable costs associated with these rules. The Imperative recognizes that this is a difficult task, but it is nonetheless a statutory obligation under the APA.

8. Chapter 4659 misses the opportunity to clarify the difference between assisted living clients, residents, and tenants, and to pinpoint the regulatory requirements for each.

All assisted living clients are residents, but not all residents receive assisted living services. If not clarified in the proposed rule, this statement of fact may become the basis for contested case appeals of fines or other sanctions into the foreseeable future. The proposed rule is too vague and needs greater certainty and clarity on this important topic.

Chapter 144G preserves a person's right to decide which services are best for them. Nothing in Minn. Stat. § 144G.04, subd. 1 requires "an assisted living client to utilize any service provided or made available in assisted living." Clients may purchase services from the facility or from a provider of their own selection. Conversely, nothing in the chapter requires a "home care provider to offer or continue to provide services under a service agreement or service plan…" Minn. Stat. § 144G.04, subd. 3. Residents have the right to receive "care and assisted living services," or they may refuse that offered care. Minn. Stat. § 144G.91, subds. 4, 5.

Minn. Stat. 144G.01 defines "Assisted living client; client" as a housing with services resident who receives assisted living ***that is subject to the requirements of this chapter***." (emphasis added). According to Minn. Stat. § 144G.08, subd. 59, a "resident" means a person living in an "assisted living facility who has executed an "assisted living contract." That contract is the "legal agreement between a resident and an assisted living facility for housing and, if applicable, assisted living services." Minn. Stat. § 144G.08, subd. 5. As such, all assisted living

clients are residents, but all residents are not assisted living clients.[15] The proposed rule should more precisely define which people living under the assisted living facility roof are subject to the requirements of chapter 144G, and which are not.

Because assisted living facilities are community-based, they are expected to integrate people receiving services (assisted living clients) with members of the larger community (residents only receiving housing). This integration will naturally occur in many settings. For example, perhaps a married couple seek admission to an assisted living facility, yet only one spouse contracts for "assisted living services." Or, perhaps an individual needed assisted living services when she first moved into an assisted living facility, but later her assessment improved to the point that she no longer needed services. Yet she decided to remain living at the facility. Or, some facilities may choose to offer housing leases to individuals who do not request or need any assisted living services.

The proposed rule aggravates this ambiguity by glossing over the distinction between "assisted living clients" and "residents," and by often using these terms interchangeably. This ambiguity is bound to create regulatory, and contractual complications. Will MDH issue a licensing violation if a resident who receives no services sustains an injury while unattended? What assurance do regulated parties have that MDH will focus its licensing survey attention exclusively on assisted living clients, as opposed to individuals who purchase only housing? Are individuals who purchase housing included in the calculation of the assisted living facilities' licensing fees computed under Minn. Stat. §144.122 (d), (f)?[16]

[15] One provision of the statute refers to "tenant residents." Minn. Stat. 144G.42, subd. 10 (a)(5). "Tenant" is undefined.

[16] Assisted living licensing unadjusted fees are $2,000 "plus $75 per resident"and $3,000 plus "$100 per resident" for assisted living clients with dementia care. Minn. Stat. § 144.122 (d), (f).

The Imperative suggests clarifying this issue by adding a defined term, "Tenant." Tenant would be defined as "A person who enters into a housing contract with the assisted living facility and has not contracted for assisted living services. Tenants are not subject to the requirements of chapter 144G and shall not be selected by MDH for the survey sample of residents and assisted living clients. Tenants are not residents for the purpose of computing a license fee under section 144.122 (d), (f)."

CONCLUSION

For the reasons stated herein, the Long-Term Care Imperative respectfully request that the Administrative Law Judge disapprove the eight parts and subparts identified herein and recommend to the Minnesota Department of Health that it adopt the suggested alternatives proposed herein by the Imperative. The Imperative thanks MDH and the Office of Administrative Hearings for the opportunity to comment on these proposed rules.

Respectfully submitted,

Dated: January 15, 2021

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[17] In accordance with the reminder at page 3 of the December 2, 2020 Notice of Hearing, Mr. Orbovich complied with Minn. Stat. ch. 10A by registering with the State Campaign Finance and Public Disclosure Board.

Exhibit A to The Long-Term Care
Imperative's Rulemaking Comments
and Legal Memorandum

In the Matter of the Proposed Rules of the
Minnesota Department of Health Governing Assisted
Living Facilities, Minnesota Rules Chapter 4659

Docket No. OAH 65-9000-37175
Revisor's ID No. R-4605

Exhibit A

4659.XXXX EMERGENCY DISASTER AND PREPAREDNESS PLAN

Subpart 1. Definitions. In addition to the definitions under part 4659.XXXX, the following definitions apply:

A. "All hazards approach" is an integrated approach to emergency preparedness that identifies hazards and develops emergency preparedness capacities and capabilities that can address those as well as a wide spectrum of emergency and disasters.

B. "Area of risk" means the area where an emergency or disaster:
   1) occurs; or
   2) affects a facility from normally operating.

C. "Commissioner" means the Commissioner of Health.

D. "Community based" means specific to the community that the facility is located.

E. "Emergency" and "disaster" have the meanings given in Minnesota statutes, section 12.03, subdivisions 2 and 3.

F. "Emergency disaster and preparedness plan" or "plan" means a written plan that identifies a facility's response to an emergency or disaster and includes steps to:
   1) minimize loss of life;
   2) mitigate trauma to residents, staff, volunteers, and visitors; and
   3) to the extent possible, maintain services for residents and prevent or resident property loss.

G. "Facility based" means an assessment that is specific to the facility. It includes but is not limited to hazards specific to a facility based on its geographic location, and dependent resident and community population, facility type and surrounding community assets; i.e., rural area versus a large metropolitan area.

H. "Hazard vulnerability assessment" means a systematic approach to identifying hazards or risks that are most likely to have an impact on an assisted living facility and its surrounding community. The facility uses the assessment to assess and document potential hazards that are likely to impact its geographical region, community, facility, and patient population, and identify gaps and challenges that should be considered and addressed in developing the plan.

I. "Table-top exercise" involves key personnel discussing simulated scenarios in an informal setting. A table-top exercise can be used to assess plans, policies, and procedures. A table-top exercise is a discussion-based exercise that involves senior staff, elected or appointed officials, and other key decision making personnel in a group discussion centered on a hypothetical scenario. A table-top exercise can be used to assess plans, policies, and procedures without deploying resources.

Subp 2. Plan; contents.

A facility must develop and maintain a plan that:

A. complies with this part and federal, state, and local laws;

B. has a readily available roster of current residents, their room assignments and emergency contact information along with a facility diagram showing room locations, and
C. contains a facility diagram showing all room locations;
D. includes a facility-based and community-based hazard vulnerability assessment, utilizing an all-hazards approach;
E. addresses the medical needs of the residents, including:
    1) ensuring secured access to resident medical records that are necessary to provide service and treatment. A facility must share data to the extent necessary to ensure resident continuity of care, and it must comply with Minnesota Statutes, chapter 13;
    2) access to pharmaceuticals, medical supplies, and equipment needed during and after an emergency or disaster;
    3) requiring essential provisions and supplies to shelter in place for at least three days without electricity, running water, sewer hookup, or replacement staff. The essential provisions include drinking water, non-non-perishable food including special diets, resident medications, medical supplies, and equipment;
F. identifies a primary sheltering host site and an alternative sheltering host site outside the area of risk and:
    1) has the host sites verified by written agreement or contract;
    2) has the agreement or contract signed and dated by all parties;
    3) has the agreement or contract verified annually in writing by each party; and
    4) when the facility does not own the structure where the residents live, coordinate emergency preparedness and disaster response with the landlord to ensure continuation of resident care if the facility structure and its utilities are impacted.

Subp. 3. Hazard Vulnerability Assessment.

A. A facility's plan must include a hazard vulnerability assessment that addresses the following scenarios:
    1) fires, smoke, bomb threats, and explosions;
    2) prolonged power failures, drinking water loss and wastewater treatment loss;
    3) prolonged loss of facility interior heating and cooling to the extent residents are at heightened risk for heat-related and cold-related illnesses;
    4) structural damage to the facility;
    5) blizzards and tornados;
    6) chemical spills or leaks;
    7) pandemics;
    8) missing residents;
    9) threatened or actual acts of violence; and
    10) other threats and disasters that the facility identifies.

B. A facility may rely on a community-based hazard vulnerability assessment developed by another entity such as a local unit of government, public health agency, emergency agency, or regional health care coalition. A facility may work with another entity listed in this item when conducting the facility's hazard vulnerability assessment.
C. If a facility uses a community-based hazard vulnerability assessment under item B, the facility must keep a copy of the assessment and work with the entity that developed the assessment to ensure that it aligns with the facility's plan.

Supb. 4. Emergency Policies and Procedures

The plan must include emergency policies and procedures that are based on the hazard vulnerability assessment. The policies and procedures must be in writing and updated at least annually. At a minimum, the policies and procedures must address the following:

A. assigning specific tasks and responsibilities to on-duty staff members on each shift that ensure essential care and services to residents is delivered;
B. using a triage system to assess the needs of the most vulnerable residents before assessing other residents;
C. using a system to track the location of on-duty staff and sheltered residents in the facility's care during and after an emergency or disaster;
D. providing continuity of essential care and services to residents according to their respective service plans during the emergency or disaster when the residents are either house in the facility or off-site;
E. procedures for notifying local and state emergency preparedness officials and the Commissioner that the plan is being executed;
F. an executable plan for coordinating transportation services that are sufficient for the resident census and staff that includes how the facility will identify and transport residents who require specialized transportation and medical needs and a written transportation contract or contracts for the evacuation of residents and staff to a safe location outside the area of risk that is signed and dated by all parties;
G. when to shelter in place or when to evacuate the facility using the information in the plan, statute, and this part;
    1) if the facility shelters in place or evacuates, notification to the resident's family, legally authorized representative, or designated contact shall be made in advance as possible, but at least within 24 hours of the determination to shelter in place and 24 hours after evacuation.

Subp. 5. Posting and Availability of Emergency Disaster and Preparedness Information

A. A facility must prominently post a schematic plan of the facility or portions of the facility that:
    1) is placed visibly in a central location on each floor; and

2) shows evacuation routes, smoke stop and fire doors, exit doors, and if applicable, the location of the fire extinguishers and fire-alarm boxes.

B. A facility must post emergency exit diagrams on each floor.

C. A facility must provide a copy of its plan to a resident or resident representative if requested.

1) A facility may satisfy item C by providing a fact sheet or informational brochure that highlights the major sections of the emergency plan and policies and procedures deemed appropriate by the facility.

Subp. 6. Communication Plan

A. The facility must develop and maintain an emergency preparedness communication plan that complies with federal, state, and local laws and must be reviewed and updated at least annually. The communication plan must include all of the following:

1) name and contact information for the following:

a. staff;

b. entities providing assisted living services under arrangements;

c. resident's physicians;

d. other long-term care facilities within the community; and

e. volunteers at the facility.

B. contact information for the following:

1) federal, state, tribal, regional, or local emergency preparedness staff;

2) the Minnesota Department of Health;

3) the Office of the Ombudsman for Long-Term Care; and

4) other sources of assistance.

C. primary and alternate means for communicating with the following:

1) facility's staff; and

2) federal, state, tribal, regional, or local emergency management agencies;

D. a method for contacting emergency services and monitoring emergency broadcasts;

E. a method for sharing information and medical documentation for residents under the facility's care, as necessary with other health care providers to maintain the continuity of care;

F. a means of providing information about the general condition and location of residents to:

1) the resident's families, resident representatives, and/or resident legal representatives;

2) The Office of Ombudsman for Long-Term Care.

3) In the event the facility evacuates, the facility must identify a working telephone number that the family or resident representative may call for information regarding the facility's evacuation.

4) If there is an emergency or disaster that requires the a facility to evacuate, the facility must notify the following individuals:

a. the Commissioner;
b. the Office of Ombudsman for Long-Term Care;
c. local law enforcement; and
d. a resident's family and legal representative.

Subp. 7. Training

A. A facility must do all of the following:
1) consistent with this part and Minnesota Statutes, chapter 144G, provide initial training in emergency preparedness and disaster policies to all new and current staff, individuals providing assisted living services under arrangement, and facility volunteers, consistent with their expected roles.
2) provide emergency preparedness and disaster training at least annually;
3) document and maintain records of the training under this item; and
4) demonstrate staff knowledge of emergency procedures.

B. A facility must conduct exercises to test the emergency plan at least annually, including unannounced staff drills using the emergency procedures. The facility must do the following:
1) participate in one full-scale exercise that is either community based with participating state and local agencies and some regional entities such as health care coalitions, or, if a community based exercise is not accessible, an individual, facility-based.
a. A full-scale exercise does not require actually moving residents; the facility can perform a simulated full-scale exercise.
b. If the facility experiences an actual natural or man-made emergency that requires activation of the emergency plan, the facility is exempt from engaging in a community-based or individual, facility-based full-scale exercise for one year following the onset of the actual event.
2) Conduct an additional exercise that may include, but is not limited to:
a. A table-top exercise that uses clinically relevant emergency scenarios to challenge an emergency plan.
b. Analyze the facility's response to and maintain documentation of all drills, tabletop exercises, and emergency events, and revise the facility's facility emergency plan as needed.

Subp. 8. Mandatory Evacuation

A. If state or local authorities orders a mandatory evacuation of the area in which the facility is located, the facility shall evacuate unless it receives a lawful written exemption from the ordering authority prior to the mandated evacuation.

Subp. 9. Notification During an Emergency or Disaster. If there is an emergency or disaster, the facility must notify the Commissioner, and the Office of Ombudsman for Long Term Care about the decision to shelter in place or evacuate within 24 hours of the decision, including information about how families were notified and the plan and any other information pertinent to the emergency.

Subp. 10. As part of the plan, a facility must include the Missing Person Plan as defined under part 4659.XXXX.

Subp. 11. Emergency Equipment

A. A facility must determine whether it needs an emergency generator through the development of the facility's hazard vulnerability assessment and policies and procedures.
B. Assisted living facilities with emergency generators must be tested and maintained according to NFPA 110 and NFPA 111 in accordance with building/fire codes. Documentation of that maintenance shall be available to any Department inspector or surveyor.
C. A facility must maintain emergency lighting for egress, including a generator or battery lights according to the state building code and state fire code. Emergency lighting must be regularly tested and maintained according to the State Building Code and State Fire Code.
D. There shall be at least one telephone, not powered by household electrical current, in the facility available for immediate emergency use by staff, residents, and visitors. Contact information for police; an ambulance; including 911 if applicable; and the poison control center must be readily accessible to staff.