Regulation of Assisted Living Facilities in New York as an Integral Part of the Continuum of Long Term Care

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Assisted Living: a Response to the Challenges of an Aging Population

In the United States, the proportion of the population aged 65 years and older is projected to increase from 12.4% (35 million) in 2000 to 19.6% (71 million) in 2030. (Centers for Disease Control and Prevention, Public Health and Aging: Trends in Aging --- United States and Worldwide, Morbidity and Mortality Weekly Report, February 14, 2003 / 52(06); 101-106). The most populous states have the largest number of older persons, with New York having more than one million persons aged 65+ years. (Ibid.). “The growing number of older adults” will increase “demands on the public health system and on medical and social services.” (Ibid.). Expected medical impacts of the aging population will be significant increases in diabetes, dementia/Alzheimer's disease and injuries due to falls. (Ibid.). The costs of traditional eldercare (nursing homes and in-home services) doubled in the decade of the 1990s, and will continue to proportionately escalate unless alternative prevention and care schemes are developed. (Ibid.)

At the same time that the population of those 65 and older is growing, a greater proportion of this population live alone, without daily help from immediate family members. (See Exhibit L, Steven Ruggles, Living Arrangements and Well-Being of Older Persons in the Past, United Nations ESA Publications, Bulletin 42/43). This is due to several factors, including the decline in intergenerational living arrangements over the last 150 years (Ibid.) and the shrinking proportion of younger family members to older family members, due to declining birth rates. (CDC, Public Health and Aging....).

Living alone puts older persons at risk, to a greater degree than the general population, from disabling falls due to decreasing motor skills, improper self-medication and malnutrition due to memory problems and, most horrific, injury or death due to self-caused accidental fires. (Carrie Roach, Senior Safety Issues - The Dangers of Living Alone, http://ezinearticles.com/? expert=Carrie_Roche; AARP Public Policy Institute, An Overview Of Assisted Living: 2004, October 2004; United States Fire Administration, Fire Risks for Older Adults, October 1999).

Responding to these demographic, medical and financial challenges, advocacy groups such as the nationwide American Association of Retired Persons (AARP) and the New York-based Assisted Living Project began exploring, as the 1990s gave way to the 2000s, alternatives and adjuncts to traditional eldercare services – particularly traditional nursing home care. One such alternative is assisted living. (AARP, Beyond 50 – 2003, 2003; AARP, An Overview Of
Assisted Living: 2004.; Exhibit Q, Assisted Living Project, Assisted Living in New York State: A Summary of Findings, 2001). Assisted living was generically defined at that time as programs that “provide or arrange for personal and supportive services 24 hours a day, some health care, meals, activities, and housing, in a group residential setting.” (AARP, An Overview…. , at 3).

**Assisted Living as Defined and Regulated by New York State**

In New York State, comprehensive legislation defining and regulating Assisted Living Residences was subsequently enacted by Chapter 2 of the Laws of 2004, effective February 23rd, 2005, by adding Article 46-B of the Public Health Law, titled *Assisted Living*. As defined by the Legislature, Assisted Living consists of “congregate residential housing with supportive services in a homelike setting,” which is “an integral part of the continuum of long term care.” (Public Health Law § 4650). Pursuant to Article 46-B, Assisted Living Residences are licensed and closely regulated by the New York State Department of Health.

*Assisted living* and *assisted living residence* means an entity which provides or arranges for housing, on-site monitoring, and personal care services and/or home care services (either directly or indirectly), in a home-like setting to five or more adult residents unrelated to the assisted living provider. An applicant for licensure as assisted living that has been approved in accordance with the provisions of this article must also provide daily food service, twenty-four hour on-site monitoring, case management services, and the development of an individualized service plan for each resident. An operator of assisted living shall provide each resident with considerate and respectful care and promote the resident's dignity, autonomy, independence and privacy in the least restrictive and most home-like setting commensurate with the resident's preferences and physical and mental status. (Public Health Law § 4651(1)).

Subsequent Regulations provided a narrow definition of those who could be served by an Assisted living Residence:

Those persons who qualify for assisted living “(i) are chronically chairfast and unable to transfer, or chronically require the physical assistance of one or more persons to transfer; (ii) chronically require the physical assistance of one or more persons in order to walk; (iii) chronically require the physical assistance of one or more persons to climb or descend stairs; (iv) are dependent on medical equipment and require more than intermittent or occasional assistance from medical personnel; or (v) have chronic unmanaged urinary or bowel incontinence.” (10 NYCRR 1001).
Chapter 2 of the Laws of 2004 (PHL Article 46-B) created three levels of facility licensure: 1) all facilities offering congregate residential housing with supportive services to older residents, with the exception of certain specified health care facilities and housing projects, must be licensed as adult homes or enriched housing programs pursuant to existing Social Services or Public Health Law; 2) those entities wishing to call themselves “assisted living” must additionally seek and obtain licensure from the Department of Health as an assisted living facility; 3) those wishing to serve seniors as they age in place or individuals with special needs, including dementia or cognitive impairment, must obtain additional certification from DOH as an enhanced assisted living facility. (Public Health Law Article 46-B, Titles II and III).

The hallmarks of an assisted living facility operated pursuant to Public Health Law Article 46-B are licensure, a clientele limited to those persons with specific health and disability needs, and individualized care plans; it is an expansion of enriched housing. Such a facility functions in a manner similar to that of a traditional infirmary or long-term stay hospital; providing services much more specialized than a typical senior citizen’s retirement community.

The first tier of senior congregate living, an enriched housing program is “an adult care facility established and operated for the purpose of providing long-term residential care to five or more adults, primarily persons sixty-five years of age or older, in community-integrated settings resembling independent housing units. Such program shall provide or arrange the provision of room, and provide board, housekeeping, personal care and supervision.” Social Services Law § 2; 18 NYCRR § 488.2(a).

The operators of an enriched housing facility are subject to certain age requirements not applicable to mere apartment complexes. Specifically, no more than 25 percent of the residents may be under 65 years of age, and each resident must be at least 55 years of age. 18 NYCRR 488.2(b).

While the facilities may appear to some as merely senior apartments, they are in fact required by statute to “provide each resident with considerate and respectful care and promote the resident's dignity, autonomy, independence and privacy in the least restrictive and most home-like setting commensurate with the resident's preferences and physical and mental status.” PHL § 4651(1). A number of specific services, which consist of physical and social activities, are required by regulations governing enriched housing.
“The operator of an enriched housing program must provide, through its employees and agents, an organized program of supervision, care, and services which:

(1) meets the standards set forth in this Part;
(2) assures the protection of resident rights; and
(3) promotes the social, physical and mental well-being of the residents.”

18 NYCRR 488.3(a)

The facility must “offer an environment conducive to the continuation and strengthening of family ties and friendships, as well as the pursuit of intellectual, social and recreational interests.” 18 NYCRR 488.7(f)(1)

In complying with this regulation, the facility must inform residents of neighborhood programs and events, assist in arranging transportation, assist the residents in organizing desired activities, provide “leisure activity programs”, and offer a schedule of activities for the residents. This schedule “must take into account and reflect the age, sex, physical and mental capabilities, interests and the cultural and social background of the residents.” 18 NYCRR 488.7(f)(2), (3)

The enriched housing facility must establish a food service program to provide, at a minimum, one hot meal served in a congregate setting, per day. 18 NYCRR 488.8(b)(1).

There are also regulations on the nutritional content of the congregate meals, and the quantity of food that must be on hand. 18 NYCRR 488.8(b)

The facility must also “ensure that each resident receives sufficient food for all noncongregate meals plus snacks”, assist residents with shopping, preparation and clean-up of such meals, provide access to kitchen facilities, ensure that noncongregate meals conform with the resident’s dietary regimen and food allergies, and that the resident maintains “a sound dietary regimen”. 18 NYCRR 488.8©)

Expanding on these requirements for the second tier of senior congregate living, an assisted living facility must also have “adequate financial resources to provide such assisted living as proposed”. PHL § 4656(3)(c). This requirement necessarily limits the amount of subsidies the facility can provide to its residents while still maintaining and providing what the Legislature has acknowledged as an “integral part of the continuum of long term care”. PHL § 4650.

If the facility is unable to meet the resident’s needs, it is not permitted to accept that resident. PHL § 4657; 18 NYCRR 488.4(b)
Similarly, if a resident’s status deteriorates beyond the capabilities of the facility, or if the resident develops one or more specified conditions, the facility is unable to retain the resident. 18 NYCRR 488.4(b)

One such condition is the need for “continual medical or nursing care or supervision as provided by an acute care facility or a residential health care facility certified by the Department of Health”, 18 NYCRR 488.4(b)(1). This regulation underlines the role of an assisted living facility as an entity offering care and services to individuals needing a lower standard of care than skilled nursing.

Both the facility and the resident seeking care must agree to a residency agreement. The agreement must set forth, amongst other things, a description of rates and services, the process to amend or modify the agreement, procedures for terminating the agreement, procedures in the event that the individual can no longer afford the services agreed to, and information regarding the “availability of public funds for payment for residential, supportive or home health services including, but not limited to availability of coverage of home health services under title eighteen of the federal social security act (Medicare)” PHL 4568(2)(f)-(l), (m), (o).

Also unlike an ordinary apartment complex, the facility must comply with a particular process for terminating an admission agreement. Residents have the unqualified right to terminate their admission agreements. 18 NYCRR 488.5(e)(1).

The facility itself, however, may only terminate the admission agreement if one of seven authorized conditions is met. 18 NYCRR 488.5(e)(3)(i)-(vii). One condition is failure to make timely payment for charges agreed to under the admission agreement. 18 NYCRR 488.5(e)(3)(iv).

If failure to make the timely payment is the result of interruption in the receipt of any public benefits to which the resident may be entitled, the facility must “assist the resident in obtaining such benefits, or any other available supplemental public benefits.” 18 NYCRR 488.5(e)(4).

Thirty days notice of the termination must be given to the resident, known next of kin and any person designated in the admission agreement as the responsible party. 18 NYCRR 488.5(e)(5). The notice must indicate that the resident not only has the right to object to the termination, but that if they do object, they will remain in the enriched housing program while the facility commences a special proceeding and until the court find in favor of the facility. 18 NYCRR 488.5(e)(6)(iii)-(iv)
Furthermore, the resident must be given a list of agencies providing free legal services and agencies engaged in resident advocacy services, along with names, addresses and telephone numbers of an advocacy program. 18 NYCRR 488.5(e)(7)

The only exceptions to the thirty days notice requirement are in cases of communicable disease, medical or mental conditions, injuries requiring skilled nursing, or behavior of the resident that poses an imminent risk of death or serious physical harm to either the resident or others. 18 NYCRR 488.5(e)(9).

In the third tier of senior congregate living, a residence must comply with additional licensing requirements if it intends to provide for “aging in place,” serving residents with dementia or cognitive impairment. “Aging in place” entails providing “care and services at a facility which possesses an enhanced assisted living certificate which, to the extent practicable, within the scope of services set forth in the written residency agreement executed pursuant to section four thousand six hundred fifty-eight of this article, accommodates a resident's changing needs and preferences in order to allow such resident to remain in the residence as long as the residence is able and authorized to accommodate the resident's current and changing needs.” PHL § 4651(13)

**Assisted Living in the Continuum of Long Term Care in New York State**

The Legislature’s description of assisted living as “an integral part of the continuum of long term care,” (Public Health Law §4650) is best understood in context with other types of regulated care programs in New York: skilled nursing facilities and enriched housing programs

A skilled nursing facility is defined as an institution (or a distinct part of an institution) which is primarily engaged in providing skilled nursing care and related services for residents who require medical or nursing care, or rehabilitation services for the rehabilitation of injured, disabled, or sick persons, and is not primarily for the care and treatment of mental diseases. (Social Security Act, 42 U.S.C. § 1395 et seq.). The hallmark of such facility is that patients require 24-hour a day nursing care, in turn requiring on-site staffing with sufficient registered/licensed nurses to meet patient needs. The requirements for a skilled nursing facility are in turn adopted by reference by each state (including New York) participating in Medicaid and Medicare.

An assisted living facility, as defined by New York Public Health Law Article 46, differs from a skilled nursing facility in that patients, while requiring nursing care, do not need such care 24-hours per day; staffing by registered/licensed nurses is part-time on-site and 24-hours on-call.
In addition to basic regulations for any health-care facility, both skilled nursing facilities and assisted living facilities must abide by detailed patient functional-eligibility requirements, must follow patient care plans supervised by physicians, and must provide plans and agreements for transfer of patients to the next higher level of care. For residents of skilled nursing facilities, the next level of care would be surgical hospitals; for residents of assisted living facilities, the next level of care would be skilled nursing facilities for the long-term, with surgical hospital stays as needed.

An enriched housing program, as noted earlier, means an adult care facility established and operated for the purpose of providing long-term residential care to five or more adults, primarily persons 65 years of age or older, in community-integrated settings resembling independent housing units. Such programs must provide or arrange for the provision of room, and provide board, housekeeping, personal care and supervision. 18 NYCRR 488.2(a). [Social Services]

A general residence, even one targeted at seniors as senior citizens housing, would not need to obtain licensing under Public Health Law.

Plainly put, a skilled nursing facility and an assisted living residence are residential and medical care facilities regulated by the New York State Department of Health. An enriched housing facility is a campus or apartment setting catering to the general needs of persons 65 or older, regulated by the New York State Department of Social Services. A Senior citizens residence is not part of the regulatory scheme.

Some confusion is no doubt created by the fact that an assisted living facility must first be certified as an adult home or enriched housing program in accordance with Article 7 of the Social Services Law. However, the medical-care regulation of an assisted living residence places it much closer to a skilled nursing facility than an enriched housing program in the Legislature’s “continuum of long term care.” (Public Health Law §4650)

Given all of this regulatory structure, it is clear that assisted living facilities in New York, are much more than apartment complexes for senior citizens. Rather, assisted living has been woven into the fabric of our culture as a series of physical way-stations in which we now seek to ensure that our elderly may age with health, security and dignity.