Testimony for the EOHHS Listening Session – Session 3

Springfield Library, November 4, 2015

Presented by Richard T. Moore, President

Massachusetts Assisted Living Facilities Association

* **Regulatory Reform**

The Massachusetts Assisted Living Facilities Association commends the Baker-Polito Administration for taking time to review and, hopefully, simplify state regulations regarding assisted living as well as other state regulations toward the goal of removing regulations that are “confusing, inconsistent, redundant, or unnecessary. However, whatever streamlining or simplification is ultimately completed will not produce the best results of agencies and their staff are allowed to supplement the regulations by restoring requirements that were cut or by “interpreting” them in such a way that expands the agency’s regulatory authority without following the requirements of Chapter 30A, M.G.L. – the Administrative Procedures Act.

In the past, it is my understanding that the Executive Office of Elder Affairs has issued “FAQ’s” and “Circular Letters” that may have had the impact of expanding or revising regulations that were promulgated through the Chapter 30A process, however, without the benefit of public notice, public input, and discussion with affected parties or advocates. It is our hope that in the spirit of government transparency espoused by the Baker-Polito Administration, that such sub-regulatory requirements or ad hoc, case-by-case interpretations by individual state regulators, with or without the concurrence of their superiors, will no longer be permitted or practiced.

A Circular Letter issued by EOEA on January 30, 2015 noted that in December 5, 2014, proposed changes to the ALR regulations were published in the Massachusetts Register and a public hearing was held on December 15, 2014. Comments were accepted through December 17, 2014. The final version of the regulations was published in the Massachusetts Register on January 30, 2015 and went into effect the same day. The Circular Letter gave Assisted Living Communities until July 1, 2015 to implement the regulations, however, we are concerned that the process allowed inadequate time to react to proposed regulations, to express concerns, and inadequate time to implement as evidenced by the extension provided in the Circular Letter itself. It appears that the out-going Administration was intent on imposing new regulations before they left office.

We are encouraged that Secretary Bonner and her leadership team have, to date, refrained from such policies, and we strongly hope that this positive approach will continue to be the policy of the Executive Office of Elder Affairs.

* **New Assisted Living Regulations 651-CMR 12.00**

The biggest outstanding regulatory issue following the release of the new regulations effective July 1, 2015 are concerns expressed by Assisted Living providers re: staffing and design of memory care units relative to 12.04 (4).

Specifically, certification surveyors are telling providers that they must have a minimum of two trained staff for each Special Care Unit during the 11pm – 7am shift. In addition, they are asking how the units are physically structured and then EOEA appears to be making some behind the scenes determinations on what they believe is appropriate beyond the requirements stated in the regulations. Such a “case by case” approach, if it is actually the process, can lead to impacts that are unevenly applied.

The requirement for a specific minimum number of staff does not appear to be cited in the regulations, although I am willing to have someone with more legal experience point out any error on my part. Staffing in a building should be determined by the acuity of the residents of the Special Care Unit(s) and the ability of other trained staff to respond if needed. Specific design requirements, if they are valid, should have been outlined in the regulation during the C.30A process. We are concerned that staffing and design requests by certification surveyors or by EOEA staff, beyond the requirements specified in the regulations, constitute ad hoc decisions that may vary from residence to residence and that ought to have been proposed a discussed as applying to all assisted living residences during the administrative procedures required by law to promulgate regulations. A consistent rationale on which requirements should be based is difficult to understand when not part of the published regulations, and the ad hoc nature of decisions often has a serious cost implication at a time that the Administration seeks to promote affordability in assisted living.

While Mass-ALFA applauds the Administration’s regulatory simplification order, we are concerned that the benefit of simplified regulations will be lost if state officials, in the guise of “interpretation,” are left free to impose their own regulations without following the deliberative and public provisions of C. 30A.

* **Group Adult Foster Care (GAFC) and Frail Elderly Waiver.**

Mass-ALFA would like to promote affordable assisted living by encouraging assisted living communities to consider serving the Group Adult Foster Care population. We cannot understand why an otherwise income, asset and frailty eligible person is not eligible for the 300% frail elder waiver just because they live in an assisted living (this would be folks with monthly incomes between $982 and about $2,200). In 2010, Massachusetts allowed eligible persons in need of assisted living to receive services under the frail elder waiver, including those with incomes between 100% and 300% of poverty. However, in 2014 CMS established new rules around the qualities of settings that are eligible for reimbursement for Medicaid home and community-based services (HCBS). CMS moved away from defining home and community-based settings by "what they are not," and toward defining them by the nature and quality of individuals' experiences. The changes related to clarification were to maximize the opportunities for participants in the HCBS programs to have access to benefits of community living and provide alternatives to services provided in institutions. Apparently when Massachusetts applied they chose on item C-2-c that waiver services not be furnished in facilities that are subject to 1616(e) of the Social Security Act (Keys Amendment). Assisted Living facilities are subject to the Keys Amendment. The CMS guidance allows for HCBS services to be provided in facilities subject to 1616 (e) so the state gets to decide to include these settings or not to include them. The result of the Patrick Administration’s choice of item C-2-c is that otherwise income, asset and frailty eligible persons are not eligible for the frail elder waiver just because they live in an assisted living residence. Without the HCBS services these individuals may end up in long term care where Medicaid will be paying at least part of a much bigger tab. For providers of affordable assisted living allowing facilities subject to 1616(e) of the Social Security Act to participate in waiver services would greatly enhance alternatives to moving residents to long term care.

Mass-ALFA appreciates the opportunity to comment as provided by Governor Baker’s Executive Order, and we look forward to the opportunity to review regulatory simplification proposed by the Executive Office of Elder Affairs as these changes affect assisted living and senior living in general.

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