On the Edge in Assisted Living

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I would like to applaud the New York State legislature for having addressed the need for legislation to protect our vulnerable citizens who reside in assisted living facilities. In response to the growing elderly population placing increased demands on long term care facilities New York State passed the Assisted Living Reform Act (ALRA) on February 23, 2005. This legislation helps to fill the legislative gap since unlike nursing homes, there are no federal regulations and/or standards that are applicable to assisted living facilities. There is no indication that the Federal Government has any interest in setting an assisted living national standard. Accordingly, New York State is ahead of the curve because we can expect there to be a greater demand for the services of assisted living facilities to serve our growing elderly population.

Assisted living is the fastest growing form of residential housing for older Americans. Just a glance at recent trends demonstrates why. There has been a 15% increase of persons 65 yrs or older between 2000 and 2010 (General population only increased at 9.7%); over 40 million people 65 years of age or older in 2010; 30% increase of persons 85 yrs or older, between 2000 and 2010. See Source: *US Census Bureau, 2010*. There are approximately 20,000- 30,000 assisted living facilities in the United States Serving approximately 1,000,000 million residents. See: *Critical Issues in Assisted Living National Senior Citizens Law Center May 2005.*

What is Assisted Living:

To the laymen, assisted living is a loosely defined term that broadly defines a lot of arrangements for housing and care. There is no meaningful definition in Federal law. In New York, Public Health Law (PHL) Section 4651 and Title 10 of the New York Codes Rules and Regulations (NYCRR), Chapter X, Section 1001.2 defines assisted living as an assisted living residence (ALR) as, "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 Article 46-b of the Public Health Law and this part 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, autonomy, independence and privacy in the least restrictive and most home-like setting commensurate with the resident's preferences and physical and mental status….". The definition goes on to say that an ALR is not a hospital, nursing home,

continuing care retirement community, mental health facility, independent senior housing, or an adult care facility, etc. The definition can be confusing but the key to the definition is that if a facility uses the term "assisted" in its marketing materials, then such facility is subject to ALRA and Title 10 of the NYCRR if the facility is monitoring the health status of five or more individuals not related to them then it must be licensed as an ALR.

Assisted Living Reform Act (ALRA):

I. Where to look:

i. ALRA is codified in Public Health Law Article 46-B. Social Services Law Section 2(25) has also been amended as well as State Finance Law Section 99-L. The regulatory framework can be found at title 10 Chapter X.

i. ***Practice Point****- Do not look at Article 28 of the Public Health Law since that applies to nursing homes and not assisted living facilities.*

II. Goals of ALRA:

i. In passing ALRA, the legislature stated in part that its intent was to further the, "…philosophy of assisted living emphasizing aging in place, personal dignity, autonomy, independence, privacy and freedom of choice… The intent of this article is to create a clear and flexible statutory structure for assisted living that provides a definition of assisted living residence; that requires licensure of the residence; that requires a written residency agreement that contains consumer protections; that enunciates and protects resident rights; and that provides adequate and accurate information for consumers, which is essential to the continued development of a viable market for assisted living. Entities which hold themselves out as assisted living residences must apply for licensure and be approved by the state to operate as assisted living residences pursuant to this article, and must comply with the requirements of this article." *See PHL Section 4650.*

III. Licensing and Prior Regulatory Scheme: Section 4653

i. Prior to the passage of the ALRA, we had adult homes and enriched housing programs. *See subdivision twenty five of Section Two (2) of the Social Services*

Law and Subdivision Twenty Eight (28). ALRA keeps both in place but requires Assisted Living Residences (ALR) to first be licensed as an adult home or an enriched housing program prior to applying for licensure as an ALR (in certain situations can apply at the same time for both). Once licensed for Assisted Living, then the facility can apply for certification as either enhanced assisted living or special needs. An ALR that has a special needs certificate will be able to maintain a dementia unit. An ALR that has an enhanced assisted living certificate will be permitted to retain those residents that are bedbound and otherwise would not have been permitted to remain in assisted living. The certificates are what allow an Assisted Living Residence to retain a resident whose condition over time declines and needs nursing care or greater supervision. I.E. if a resident came in with mild dementia that progressed to the point where they need greater supervision the resident can simply be moved from the ALR to the dementia unit within that facility.

1. ***Practice Point***- *demand a copy of all certifications and licenses that the facility has obtained from the department of health. I would also demand the applications for any certifications and licensing that were submitted to the Department of Health since the facility has to submit a plan indicating how it is going to care for individuals with dementia and that need twenty four hour nursing care. You should also visit the New York State Department of Health website since it will have a lot of valuable information about the facility you are investigating.*

2. ***Practice Point***- since *ALRs must first be licensed as an adult home or enriched housing the facility, they must comply with the regulations that apply to those facilities as well as the new regulations that apply to ALRs. See Title 18 - Chapter II - Subchapter D, for adult care facilities and Title 18 – Part 488 - for enriched housing. Under Title 10 Chapter X if there is a conflict between to regulatory scheme that is applicable to ALRA then Title 10 Chapter X prevails*. See Section 1001.1.

IV. Residency Admission:

i. Under ALRA prospective residents must be prescreened and approved for admission by a physician, physician assistant or a nurse practitioner. ALRA

also requires that there be an annual certification that resident is appropriate for the facility by either a physician, physician assistant or a nurse practitioner. See Section 4657.

ii. Pursuant to Section 1001.7, an enhanced assisted living facility:

i. Must do a pre-admission evaluation within thirty (30) days prior to admission. Only certain qualified persons can do the admission assessment.
ii. There must be a medical evaluation also done within thirty (30) days of the admission, whenever there is change in the resident's condition and no less than once every twelve months.
iii. Report must include the date of examination, significant medical history and current conditions, known allergies, prescribed medications, ability to self administer, recommendations for diet, exercise, recreation, frequency of medical examinations, cognitive and mental health stats and assistance needed in activities of daily living.
iv. Statement about whether the resident is suited for Assisted Living, Special needs Assisted Living Residence (SNALR) or Enhanced Assisted Living Residence (EALR)
v. Statement whether the resident needs long term medical or nursing care which requires placement in a nursing home.
vi. Statement whether need nursing care.
vii. The home health care agency must also be involved in developing the individualized service plan (ISP) unless doctor says it is not necessary.
viii. The ISP shall be developed in accordance with the medical, nutritional, rehabilitation, functional, cognitive, and other needs of the resident and shall be implemented within thirty (30) days of admission of the resident.
ix. The ISP shall include the services to be provided and how and by whom services will be provided and accessed.
x. The ISP shall be reviewed and revised every six months and whenever ordered by the resident's physician or as frequently as necessary to reflect the changing care needs of the residents. To the extent necessary, such review shall be undertaken in consultation with the resident's physician.
xi. A written individualized service plan must be developed for each resident upon admission. The plan must be developed with the

assistance of the resident's physician and the plan must reflect that in writing.

iii. ***Practice Point-*** *consider naming the physician, nurse practitioner and/or physician assistant as a defendant. You should also obtain all of the documentation referenced above.*

V. Residency Agreement - ALRA sets forth specific provisions that must be included:

i. Name, address & phone number of facility.
ii. The owner & the operator of the facility.
iii. The name of an individual that can accept legal service for the facility.
iv. A statement of the licensure status of the facility and any home health care or personal care service agency that is under an agreement with the facility.
v. The effective period of the residency agreement; and the name of the resident's representatives.
    i. ***Practice Point-*** *The residency agreement must contain the name of the person whom can accept personal service on behalf of the facility. Serve this person as well as anyone else you deem appropriate.*
    ii. ***Practice Point-*** *I would request from the family any marketing materials that they obtained or may have viewed prior to selecting the facility. I would also obtain through discovery all of the marketing materials including but not limited to the facility's general philosophy, staffing philosophy, mission statements, brochures, and paid advertisements,*
    iii. ***Practice Point-*** *Read the agreement carefully to see if the facilitated inserted a "negotiated risk" clause into the agreement.*

VI. Individualized Service Plan (ISP):

i. Pursuant to NY Pub. Health Law, Section 4659, upon admission, an "ISP" must be developed for each resident of an assisted living facility upon admission.
ii. The ISP must be developed "with the resident, the resident's representative, the resident's legal representative, if any, the assisted living operator, and [if appropriate] a home care services agency".
iii. The ISP must be developed in consultation with the resident's physician.
iv. Must be implemented within the first thirty (30) days. Section 1001.7.

v. Must be reviewed and revised every six months and whenever ordered by physician or; as frequently as necessary to reflect the changing care needs of the resident.

vi. To extent necessary such review shall be undertaken in consultation with the resident's physician.

vii. The ISP must be developed in accordance with the medical, nutritional, rehabilitation, functional, cognitive and other needs of the residents.

viii. The ISP must include the services to be provided and how and by whom those services will be provided.

ix. The ISP must be reviewed and revised as frequently as necessary to reflect changes in the resident's needs but not less frequently than once every six months.

i. ***Practice Point****- The ISP is an important document because it is like a care plan but better. It will assist you in determining all potential defendants because you will have the names of all persons/entities that provided care to your client while at the ALR.*

VII. Resident rights:

i. An operator must 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.

ii. Any waiver of the resident's rights is void as against public policy.

iii. Given the right to be fully informed of their medical condition and proposed treatment.

iv. A written statement of the resident's statutory rights must be given to the resident and posted in a public area of the facility.

v. Given the right to receive courteous, fair, and respectful care and treatment.

vi. Given the right to adequate and appropriate assistance with activities of daily living.

vii. Right to refuse treatment or medications but only *"AFTER BEING FULLY INFORMED OF THE CONSEQUENCES OF SUCH ACTIONS"* emphasis added.

viii. Right to have private consultations with your lawyer.

ix. Right to give their version of accident/incident.

x. EALR and SNALR must inform residents monthly of any openings in those programs.

xi. Right to a council to hear a resident's complaints.

xii. Right to request from facility if it is licensed as an ALR and/or has any certifications.

xiii. Every resident must be given a consumer guide with the Department of Health's toll free number for the reporting of complaints. The number is 1.866.893.6772.

i. ***Practice point****- There is no independent measure of damages for a violation of a resident's rights as exists in a nursing home case. A common defense in nursing home cases is that the resident refused care such as turning and position and was basically non-compliant. The regulations under ALRA help to diffuse this defense because if a resident refuses care or is non-compliant in some way the ALR must, by regulation inform the resident of the consequences of such actions.*

ii. ***Practice Point****- I advise every prospective client to file a complaint with the New York State Department of Health (NYDOH or DOH). The NYDOH will investigate the allegations and issue a report.*

VIII. Case Management Services: Section 10 NYCRR 1001.10

i. Oversee and coordinate the ISP.

ii. Identify the facility's ability to meet the resident's needs using the Personal Data Sheet and also Resident Evaluation Form prescribed by the department at the time of admission and at least every twelve months.

iii. Discuss whether the facility can meet the needs of the resident.

iv. Provide referrals on an ongoing basis.

v. Coordinate Services to be provided.

vi. Develop a formal mechanism between the case manager and facility staff who serve the resident to identify abrupt or progressive changes in behavior or appearance which may signify the need for assessment and service, and

vii. Maintain a complete and accurate personal record for each resident as specified in section 1000.12 of this part.

viii. Each resident shall be provided such personal care as is necessary to enable the resident to maintain good personal hygiene, to carry out the activities of daily living, to maintain good health, and to participate in the ongoing activities of the residence, as per the resident's individualized service plan developed pursuant to 1001.7(h) of this part.

ix. Medication management.

i. Must have policies and procedures in place to comply with regulations.

ii. Very specific about medication administration records and what must be in there.

iii. The physician orders for all PRN medications , including prescriptions and over-the-counter, shall identify those resident behaviors or symptoms warranting consideration of need for the mediations.

x. If an EALR is providing the services that would normally be provided by a home health care agency then the operator of the facility shall develop appropriate policies and procedures related to such services including but not limited to

(i) Service specific delivery standards consistent with the current professional standards of practice, including staff supervision, which are reviewed and revised as necessary;

(ii) Documentation of service delivery

xi. Special Needs Assisted Living.

i. Supervision needed in SNALR.

1. The operator shall maintain knowledge of the general whereabouts of each resident.
2. In event that a resident is absent from the facility certain procedures and notifications must be followed that are spelled out in the regulations. I.E. the family and law enforcement must be notified.
3. Sufficient staff to supervise residents and respond to their needs must be available on all shifts.

xii. Case management in SNARL

i. ISP and case management records shall identify when a resident is periodically resistant to care and include a care plan to address it.

ii. Activities- Weather permitting must be permitted to be outdoors everyday

iii. Food should be offered outside of the usual meal times in a manner acceptable to the special needs of the resident and mindful of the resident's functional abilities, preferences and meals. The resident's care plan should reflect these needs and preferences.

iv. To ensure optimal intake at mealtimes, unless contrary to the physician's orders, prescribed nutritional supplements shall be provided between and not at the same time as scheduled meals.

xiii. ***Practice Point****- demand copies of all contractual agreements between health care providers and the facility. I thought it was interesting to see that residents in SNALR (dementia units), should be outside everyday weather permitting.*

xiv. ***Practice Point****- I would consider bringing a claim for breach of contract also under some of the consumer protection laws that you deem applicable. These claims may allow for additional damages as well as broader discovery.*

IX. Records and Reports: Section 1001.12

i. Operator must maintain complete, accurate and current personal records for each resident which must be available for review and inspection by department staff.
ii. Personal data of resident, medical evaluations, health care proxy, pre-admission evaluation, subsequent evaluations, Individualized Service Plans (ISP), medication assistance records, and case management notes, admission and discharge records, records of complaints, actions taken to address resident complaints and complaint resolution outcome and , personnel records for each employee including professional licenses, qualifications for the job, medical examinations, performance examinations, resignations, dismissals, and other pertinent data.
iii. Detailed census report submitted annually.
iv. Detailed financial information annually to the Department of Health.
v. Must submit financial statement including revenues and expenses by categories for the operation of the facility consistent with accounting principles.

Conclusion:

Change is coming to the long term care industry and we must be ready for it. The legal landscape as it relates to Assisted Living has yet to be painted and we are going to be up to us do it. When Assisted Living Facilities needlessly endanger residents it is up to us to ensure that those that have suffered harm receive the appropriate remedy and to help prevent it from happening again.

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