

**Department's Response
to Public Comments to Proposed Rules for Personal Care Homes
Healthcare Facility Regulation
Chapter 111-8-62
December 7, 2012**

Proposed Rule Action:

- Repeal the existing Rules for Personal Care Homes, Chapter 111-8-62 and replace with the proposed the Rules for Personal Care Homes Chapter 111-8-62.

Procedural History:

The Board of Community Health authorized the proposed Rules for Personal Care Homes, Chapter 111-8-62 to be released for public comment on October 11, 2012. A public hearing on the proposed changes to the rules was held November 14, 2012 pursuant to the written notice provided to the public dated October 22, 2012. The public comment period ended November 16, 2012.

Summary of Comments:

The department received a total of 28 public comments concerning the proposed rules during the public comment period. Sixteen oral comments were made at the public hearing and 12 written comments were received. Of the 28 comments, two comments supported passing the rules as proposed. Those comments supporting the proposed rules noted that the rules will better protect vulnerable residents. The remaining 26 comments requested that the proposed rules be modified before being adopted. Thirteen of the 28 comments indicated appreciation for the "open and collaborative process" used by the department in the development of the proposed rules.

Fourteen of the 28 comments objected to the proposed rules prohibiting personal care homes from using the term "assisted living" to describe the personal services these homes are authorized to provide. The providers pointed out that "assisted living" is a term commonly used by the public and providers alike to categorize the services that personal care homes provide and that it would be very confusing to the public trying to find licensed personal care homes. One commenter testified that in the past month that one Internet search engine reported searches for "assisted living" facilities were conducted ten times more often than for "personal care" facilities. It was pointed out that personal care homes have had the flexibility in the past to use this term to describe what they do and that "common sense" requires that they be permitted to continue this practice.

Eight comments voiced concerns that the requirements contained in the personal care home rules, such as the definition of "self-administration" with respect to medications, would require these homes to employ proxy caregivers to provide medication assistance to residents who

are not capable of self-administration. They reasoned that HB 1040, which created the proxy caregiving exception to the definition of nursing, was not intended to restrict personal care homes from continuing to provide health maintenance activities they were authorized to provide, e.g. assistance with self-administration of medications. Moreover, the comments noted that SB 178 , which created assisted living communities, stated expressly that personal care homes should continue to be able to do what they were authorized to do at the time that SB 178 passed. One comment suggested exempting personal care homes from meeting the administrative paperwork requirements involved with the use of proxy caregivers.

Three comments objected to the personal needs allowance being set at \$20 per week. They argued that providing this money weekly presented a bookkeeping and administrative challenge and they could not afford to provide the increased stipend. They noted that many of their clients would not benefit from a weekly disbursement of spending money.

Three comments questioned the removal of specific requirements for the provision of assistance with insulin as contained in the previous rules. They noted that many residents require assistance with insulin administration and that it is a service the homes need to be able to provide.

Three comments noted that the licensure activity fees charged small personal care homes were too high. They noted that for small homes, it represents a very substantial per bed charge as compared to large homes. One of these comments noted that these small home operators are required to pick up the costs of other fees (professional licenses and insurance) and another noted that these homes have gotten no raises in the rates that the State of Georgia reimburses for the care these homes provide to eligible residents in many years.

Three comments raised concerns regarding the definition of "self-preservation". They noted that many residents require some "hands-on" assistance to leave the building.

Two comments questioned whether the rules were in violation of federal laws applicable to disabled individuals that permit disabled individuals to choose where they want to live.

One comment requested that persons with intellectual and developmental disabilities be excluded from the requirements for the provision of memory care services. The comment requested clarifications in a number of areas of the rules as well.

Departmental Response:

Use of the Term, "Assisted Living"

The department believes that providing clear direction in the rules to the operators of personal care homes regarding the use of the term "assisted living" is consistent with its understanding of the law that created assisted living communities.

O.C.G.A. § 10-1-393(b)(26)(B) defines as an unfair or deceptive practice:

" Any personal care home, as defined in subsection (a) of Code Section 31-7-12, or any assisted living community, as defined in Code Section 31-7-12.2, offering, advertising, or soliciting the public to provide services:

- (i) Which are outside the scope of personal care services or assisted living care, respectively and
- (ii) For which it has not been specifically authorized.

The department is also guided by O.C.G.A. §31-7-12.3 which requires the department to

"adopt rules and regulations to implement Code Sections 31-7-12 and 31-7-12.2. Such rules shall establish meaningful distinctions between the levels of care provided by personal care homes, assisted living communities and nursing homes but shall not curtail the scope or levels of services provided by personal care homes or nursing homes as of June 20, 2011 ..."

The providers argue that they have been allowed to use the term "assisted living" to describe themselves prior to June 30, 2011 and that therefore they should be permitted to continue this practice. However, the department takes the position that SB 178's inclusion of provisions making it a deceptive practice to "offer, advertise or solicit" a service which a provider is not authorized to provide requires personal care homes to change the manner in which they market themselves. Personal care homes are only authorized to provide "personal services", which is also defined in Code Section 31-7-12. It should be noted that these homes have always been licensed by the department as personal care homes authorized only to provide "personal services" regardless of what they chose to call themselves. The argument made by some personal care home providers and associations that the legislature did not intend to prohibit personal care homes from using "assisted living" in their titles, etc. is not clearly supported by the Code Sections the legislature adopted and amended, as the department interpret these laws. The department is obligated to apply the laws passed by the legislature as it understands them to be written.

Self-Administration of Medications and Proxy Caregivers

Some providers object to the definition of "self-administration of medications" because it will require them to employ proxy caregivers to provide medication assistance to residents who are not capable of self-administration. These providers are correct. If they choose to serve residents who are not capable of self-administration, then they will need to hire or arrange for

proxy caregivers to provide that service. Residents, who are so impaired by dementia that they cannot tell you their names, don't know where they are and cannot tell the difference between pills and pieces of candy, are not able to make informed choices regarding who assists them or supervises their "self-administration".

The department acknowledges that personal care homes have been authorized in the law to provide "assistance with or supervision of self-administered medications". But the long-standing authorization contained in the personal care home law must now be read in conjunction with the recent amendment to the Nurse Practice Act (HB 1040) which permits unlicensed designated "proxy caregivers" to perform "health maintenance activities". This recent amendment to the Nurse Practice Act makes it clear that the legislature intended to allow disabled individuals to have more control over how their health needs are met. But the legislature was also clear that they wanted disabled individuals to understand that there are risks that are being assumed by the disabled individuals in allowing unlicensed persons to perform these health maintenance activities (informed consent). The legislature also put in place other protections to ensure that the unlicensed staffs are trained and a written plan of care is being followed. The department does not believe that it is appropriate to circumvent the legislature's clear directives by ignoring the important safeguards contained in the proxy caregiver law. These amendments provide a clear route to allow personal care homes to continue to do what they have been doing but in a manner that is more respectful of informed resident choices and other important safeguards.

Personal Needs Allowance

The department understands that the personal needs allowance of \$20 weekly may be problematic for some homes to administer and that the residents may not have funds available to support this allowance. The department believes that the \$20 allowance provides some basic parameters for considering allowances. Some government programs fund the resident to receive personal needs allowances of \$110 per month, other programs fund \$65 per month. While some private pay residents may want the convenience of having weekly spending money that they are more than willing to have billed back to their individual accounts. The rule does not require the home to subsidize this allowance. Since the allowance is to be charged back to the individual resident's account, the rule permits it to be waived as the home and resident agree, either upon admission or at any time thereafter. .

Insulin Administration

Some providers objected to the department removing specific rules regarding how staff may provide assistance with insulin administration. Apparently, the providers mistakenly believe that it means that they will not be able to provide assistance with insulin administration. That is not the case. In updating the rules, the department elected to deal with all medications, in a more generic format, under one rule. Insulin is just one of many medications that a resident may receive. If the resident is capable of self-administration, then the home may use its

personal care aides to provide assistance with insulin. If the resident is not capable of self-administration and requires insulin therapy management, then the home must employ properly trained proxy caregivers to provide this service, assuming that the orders for insulin meet the specific criteria in the rules that are applicable to any medication orders.

Impact of Fees on Small Homes

The department notes that there is no specific rule being proposed that references the amount of the fees being charged and that these fees are contained in another set of rules that are in effect. See Chapter 111-8-25. However, since the department received comments during this public comment period questioning the amount of the fees for small group homes, i.e. personal care homes and community living arrangements, the department will reiterate the rationale for the fees it charges. The department considered and rejected utilizing a licensing fee structure based on a per-bed charge, as previously noted when the rules that set the fee amounts were enacted. The department reasoned that the licensure activities performed in a particular type of licensed facility are very similar, whether the facility is large or small. A professional surveyor travels to the facility and checks compliance with the same set of rules, either in connection with a periodic routine survey or a complaint survey. While it may take somewhat longer to survey the premises and review records in a larger facility for a periodic survey, the department generally utilizes a sampling technique for resident records in the larger facilities. The department reasoned that since it is an individual business decision to operate a licensed facility (either small or large), each facility should pay a fee that correlates more closely to the cost to the state of providing the licensing services involved for that facility type.

Definition of Self-Preservation

The department believes that the definition of self-preservation which requires the residents to move from place-to-place "without physical hands-on assistance from staff" is consistent with the meaningful distinctions that the legislature directed the department to codify in rules for personal care homes, assisted living communities and nursing homes. Personal care homes are not required to meet the same fire safety code standards as nursing homes or assisted living communities. For example, personal care homes are not required to have sprinkler systems, fire walls, etc. Therefore, the residents need to be able to leave the building promptly in the event of a fire emergency. If a majority of the residents were to require "hands-on assistance" to make it to the door, and the home is staffing at the minimum staffing level of 1 staff to 25 residents, it is likely that there would be tragic consequences in a fire.

The definition of self-preservation does recognize that the residents may move from place to place on their own using such devices as a cane, walker, wheel chair or scooter. Given the less stringent fire safety requirements and the likelihood that even residents who are capable of self-preservation will require direction and encouragement to leave the building, the

department believes that it is important for the majority of residents served in a personal care home to be capable of self-preservation without hands-on assistance. It should also be noted that there is a waiver process in place that permits a personal care home to apply for a waiver for an individual resident who may have aged in place in the home and now requires hands-on assistance to leave the building, etc. The department reviews those waivers on a case-by-case and determines whether the home has the capacity to meet the needs of that individual resident, while continuing to manage the environment safely for the other residents.

Housing Choices for Disabled Individuals

The department acknowledges that disabled individuals have been afforded under federal law the right to live in various community settings where reasonable accommodations can be made. The department believes that it must provide a regulatory framework that balances and protects not only the rights of the individual disabled persons to live where they choose, but also the rights of other disabled individuals living in that same setting to have a safe environment. Disabled individuals choosing to live in a particular home should have some assurance that choosing to live in that licensed home means that their most basic needs will be met—being able to be evacuated from a burning building safely. The department believes that the waiver process that may be utilized by licensed providers who desire to serve a disabled individual who does not meet the general admission or retention requirements identified in the rules provides the appropriate vehicle for making reasonable accommodations. The waiver process allows for an analysis on-a-case-by case basis to ensure that there is the proper balance between the disabled individual's right to choose and the disabled group's right to live in a safe environment.

Exemption from Memory Care Requirements

The department believes that it is not in the best interest of developmentally disabled individuals to be exempted from the protections afforded other memory care residents if the disabled individuals are choosing to live in personal care homes. The unsafe behaviors exhibited by the resident with developmental disabilities or dementia trigger the need for the same safeguards, e.g. current pictures of residents of file, alarms on doors, safety plans.

Recommendation:

It is the recommendation of the department that the Board adopt the rules, as proposed. Minor amendments to the rules to further clarify requirements may be proposed at a later date as the department and providers gain experience in implementing the rules. In arriving at this recommendation, the department has considered all the comments that were received whether they are specifically referenced in this report or not.