

To: Judge Jessica Palmer-Denig
Office of Administrative Hearings
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From: Maisie Blaine
Representing: Office of Ombudsman for Long-Term Care
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Date: January 31, 2022

Re: Docket Number 71-9054-37629

Please see below a copy of my written testimony provided on January 31st 2022 in the above matter:

“Good Morning your honor. My name is Maisie Blaine (M-A-I-S-I-E – B-L-A-I-N-E) and I am here today representing the Office of Ombudsman for Long-Term Care. I would like to lead by thanking the Office of Administrative Hearings for the opportunity to speak today.

The Office of Ombudsman for Long-Term Care is a service of the Minnesota Board on Aging, authorized by the federal Older Americans Act. The office of ombudsman has a vested interest in these proposed rules, as we work to enhance the quality of life and services for more than 100,000 individuals receiving long-term services and supports in MN, including those residing in or seeking services in the 5 Minnesota State Veterans Homes.

Representatives from the Office of Ombudsman have a unique perspective as they are out in facilities, on site with residents, advocating alongside them to enhance quality of life, and combat substandard care and rights violations that unfortunately occur all too often in these settings.

Our role is to always keep the resident voice at the center of all that we do. This includes direct advocacy, education and of course systems advocacy, which is why we are here today.

We are grateful that the Veterans of MN have the 5 Minnesota Veterans homes to consider as a placement option when needing long term care services and We understand the importance of the rules to govern operations at these facilities and the weight that they carry. Today we will highlight today some elements of our written comments dated November 19th 2021. We ask for the written comments in their entirety to be considered, but will call particular attention to a few items today – I did take out some of my 9050 rule citation references in the interest of time as they are referenced in our written comments

We would echo the comments of Miss Scheller outlining the lack of detail in the SONAR as well as noncompliance with MN Administrative rules 4658 for Skilled nursing facilities and 4655 for Boarding Care homes

- First we oppose the proposed admission criteria citing that a person must own, maintain or occupy a residence in MN for 90 days in order to be considered for admission to a MN Veterans Home. We

believe, as the MDVA acknowledged this morning that this will certainly exclude homeless veterans from admission and also potentially impact anyone transitioning to MN from another state. *while we appreciate the effort today by MDVA to remedy this with a modification – we still believe that this is not sufficient. As we know veterans as a population are highly mobile and if someone needs long term care and lives in another state and wishes to get to MN and be considered for eligibility this proposed modification would still exclude them. A snowbird with lifelong ties to MN or an aging person wishing to get closer to their family by receiving care in MN would be forced to come here and establish residency for 90 days in order to even be considered for admission.

- We also oppose all language where proposed 9050 changes or existing language is in direct violation with federal or state law that applies in these settings. In addition to protections that exist under MN statute 144A, as now federally certified CMS sites, the MN Veterans Homes are subject to federal conditions of participation, including 42 CFR 483 and 38 CFR 51. We have cited numerous examples in our written comments of where the proposed rules are not in compliance with these regulations and will share a few examples today:
 - First the MDVA proposes **9050.0070 Subp. 3 Item C and 9050.0070 Subp 4 item B** “if a resident has not specified a provider the provider must be a Minnesota Veterans Home staff physician” this language is in direct violation of 42 CFR §483.10 (d), and 38 CFR §51.70 which ensures residents a CHOICE of physician.
 - Another example is **9050.1070 Subpart 11** where The MDVA offers a method for establishing visiting hours, which is prohibited under law for skilled nursing facilities. We propose, the MDVA extend the important protections afforded to Skilled Nursing Facility residents to those living in the Domiciliary, if they do not it will be necessary to separate out the rights and protections afforded to each category of resident based on which part of the building they reside in, as applicable by federal and state law.
- Federal requirements also require that dignity, choice and person centered care are at the core of service delivery in these settings. There are numerous sections of the proposed rules that propose an overly paternalistic approach to assessment or service delivery that is not consistent with supporting, person centered planning, self-directed care and most importantly, resident rights afforded under the law. Examples of these include but are not limited to:
 - Requiring those with mental illness to undergo additional scrutiny for admission **9050.0070 Subp. 3 Item D and Item E**
 - **9050.0070 Subp. 4 Item D** Requiring a demonstrated history of cooperation in care and treatment to be considered for admission which requires the potential waiving of rights
 - **9050.1030 Subpart 1a, Section B** Requiring all care and treatment plans by an external provider be approved by the medical director which is an overreach of the role as defined in statute
 - **9050.1070 Subpart 5** Requiring a signature to acknowledge receipt of a resident handbook which is unnecessary and punitive to be in state law
 - **9050.1070, Subpart 32** Requiring signature to leave campus which both violates rights and is not reasonable or necessary to be enshrined in state law.

- Threatening discharge for failure to report income changes “accurately and timely” as a standalone reason for discharge
- None of these items we just cited are reasonable or necessary to be outlined in the rules, as other rights afforded contradict their necessity.

- Additionally we would argue that restrictive policies that exist for both on site smoking and the work therapy program could be remedied with proposed language contained in our comments which is reasonable and necessary to ensure resident rights are protected.

- Finally Discharge complaints are consistently the most frequent complaint handled by Ombudsman representatives year after year in MN. Discharges, as you may know are immensely disruptive and cause great stress for residents and their families as they consider how and where they might move, expose residents to the risk of transfer trauma and more. This is also one of the areas that we are most concerned with as it relates to inconsistencies between the proposed rules and federal and state statute. For example:
 - To address Mr. Klitzke’s comments today – an immediate DC is not a type of DC recognized either in state or federal law but rather is a timeline for DC. Under MN stat 144A and both 42 CFR 483 and 38 CFR 51 the facility can already expedite a DC to less than 30 days in situations where the health or safety of residents or staff is at risk –which we know because we have had these cases at our office - this addition to the rules is not reasonable or necessary – as this process is already afforded under both state and federal law.
 - **9050.0200, Subp. 2, Section B and C** contains numerous inconsistencies with state and federal law as well as not delineating any separation of rights for residents based on the setting they in which they reside.
 - An inaccurate definition of voluntary discharge is applied in multiple sections of the proposed rules namely **9050.0210 Subpart 1** – **we have proposed a remedy to this in our written comments**
 - In several sections no distinction is offered by MDVA between discharge rights for those in the SNF and those in the Domiciliary, despite skilled nursing facility residents having additional rights under the law.
 - MDVA wishes to add language **9050.0100 Subpart 1** citing that a resident refusing to transfer to another facility or setting upon recommendation of their provider or utilization committee could result in discharge - which would not be a legal reason for discharge supported under the law and violates a residents right to decline care and treatment
 - There are proposed repeals of sections in the rules that cite important federal discharge protections for residents
 - And several proposed amendments do not contain accurate language related to required contents of a discharge notice that complies with state and federal law as we have cited in multiple sections of our written comments.

Lastly, we have repeatedly heard from residents and family members that they had no knowledge of these proposed rule amendments.

We would also echo the comments of Ms. Reher – that we were listed as an involved stakeholder in the SONAR – but were not involved in the drafting of these comments nor invited to our knowledge to give any input. In fact, despite our regional representatives repeatedly asking about the proposed rules and what was contained in them beyond the little found in the public register we were not made aware of any of the proposed changes until public posting of the rules

Mr Klitzke stated that no comments were received in 2016 – and It is no surprise that comments were not received in 2016 as there was little transparency in notifying anyone about these rules through any of the means the MDVA has at their disposal, either in 2016 or 2021 or any of the time between.

We believe that the MDVA’s failure to notify stakeholders in their publications and other means as outlined in our comments is in noncompliance with Minn. Stat. §14.14, which states, “each agency shall make reasonable efforts to notify persons or classes of persons who may be significantly affected by the rule being proposed by giving notice of its intention in newsletters, newspapers, or other publications, or through other means of communication.” We have not seen any evidence that this occurred, either prior to publication of the proposed rules, during the comment period or in the time since the comment period closed and a hearing was scheduled.

We note a significant lack of stakeholder input as it relates to these rules, clear violations of resident rights and lack of adherence to federal and state law in the proposed rules. We hope the MDVA is listening carefully to this stakeholder input and would be happy to partner to with them to bring these rules into compliance to ensure that residents and their families are afforded the autonomy, dignity and choice they deserve in receiving care. If the OAH is moving forward with the adoption of these rules we ask that they ensure MDVA makes the recommended changes to the rules that we outline to protect resident rights and maintain compliance with federal and state laws, either individually as an agency or through the convening of a stakeholder workgroup to assist in this process. We thank you again for the opportunity to speak today.”