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To: Adult Family Homes
Community-based Residential Facilities
Residential Care Apartment Complexes

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**Electronic Video Monitoring and
Filming in BAL Regulated Facilities**

This memo provides guidance to providers on the impact of electronic video monitoring and filming on residents and tenants' right to privacy in facilities regulated by the Bureau of Assisted Living (BAL). It describes the permissible circumstances and locations for facility-initiated use of electronic video monitoring or filming equipment under existing Wisconsin State Statutes and Administrative Rules.

Background

With the development of equipment and technology to monitor homes and businesses, privacy issues related to filming and monitoring were identified as an emerging concern for assisted living facilities in Wisconsin in 2007. The subject was discussed during the FOCUS 2007 ("Coming Together: Mapping the Journey to Excellence") Assisted Living Panel.

In response to issues raised during the FOCUS panel discussion, as well as questions that have arisen during compliance surveys, the Division of Quality Assurance (DQA), in consultation with the Department's Office of Legal Counsel (OLC), provides guidance on the use of electronic video monitoring and filming equipment in Bureau of Assisted Living regulated facilities. The information presented in this memo recognizes the need to balance the use of emerging technologies with residents and tenants' rights to privacy in their homes.

Definitions

“Electronic video monitoring” is the use of cameras or other equipment to transmit images of residents, visitors, or staff within or around an AFH, CBRF, or RCAC for possible viewing.

“Filming” is the use of cameras or other equipment to record images of residents, visitors, or staff within or around an AFH, CBRF, or RCAC for possible viewing at another location at another time.

Relevant statutes and rules

Following are relevant State Statutes and Administrative Rule language related to privacy, electronic video monitoring, and filming across multiple facility types:

I. Wis. Stat. ch. 50, Uniform Licensure Law.

The following provision is only applicable to CBRFs:

Wis. Stat. § 50.09, Rights of residents in certain facilities, which states:

- (1) RESIDENTS’ RIGHTS. Every resident in a nursing home or community-based residential facility shall, except as provided in sub. (5), have the right to:
 - (a) Private and unrestricted communications with the resident’s family, physician, advanced practice nurse prescriber, attorney, and any other person, unless medically contraindicated as documented by the resident’s physician or advanced practice nurse prescriber in the resident’s medical record, except that communications with public officials or with the resident’s attorney shall not be restricted in any event. The right to private and unrestricted communications shall include, but is not limited to, the right to...
 2. Reasonable access to a telephone for private communications.
 3. Opportunity for private visits.

Wis. Stat. ch. 51, Mental Health Act, applies to CBRFs, AFHs or RCACs **if** the person meets the statutory definition of patient. Wis. Stat. § 51.61(1), defines a patient as "any individual who is receiving services for mental illness, developmental disabilities, alcoholism or drug dependency, including any individual who is admitted to a treatment facility in accordance with this chapter or [ch. 48](#) or [55](#) or who is detained, committed or placed under this chapter or [ch. 48](#), [55](#), [971](#), [975](#) or [980](#), or who is transferred to a treatment facility under [s. 51.35 \(3\)](#) or [51.37](#) or who is receiving care or treatment for those conditions through the department or a county department under [s. 51.42](#) or [51.437](#) or in a private treatment facility."

Wis. Stat. § 51.61, Patients Rights, states that:

- (1) ...each patient shall...
- (o) Except as otherwise provided, have a right not to be filmed or taped, unless the patient signs an informed and voluntary consent that specifically authorizes a named individual or group to film or tape the patient for a particular purpose or project during a specified time period. The patient may specify in the consent periods during which, or situations in which, the patient may not be filmed or taped. If a patient is adjudicated incompetent, the consent shall be granted on behalf of the patient by the patient's guardian.

II. Wisconsin Administrative Code.

Adult Family Homes

Wis. Admin. Code § HFS 88.10, Resident rights.

- (1) LEGAL RIGHTS. A licensee shall comply with all applicable statutes and rules relating to resident rights, including s. 51.61, Stats., chs. 54, 55, and 304, Stats., and chs. HFS 92 and 94.

Wis. Admin. Code § HFS 88.10, Resident rights.

- (3) RIGHTS OF RESIDENTS. A resident shall have all of the following rights...
- (b) *Privacy*. To have physical and emotional privacy in treatment, living arrangements and in caring for personal needs, including toileting, bathing and dressing.
- (t) *Visits*. To have private visitors and have adequate time and private space for visits.

Community Based Residential Facilities

Wis. Admin. Code § HFS 83.21, Rights of residents.

- (4) RIGHTS OF RESIDENTS. ...each resident shall have all of the following rights...
- (d) *Visits*. To have private visitors and adequate time and private space for visits.
- (h) *Privacy*. To have physical and emotional privacy in treatment, living arrangements and in care for personal needs. Persons not directly providing care and treatment or participating in group sessions shall not be present during such care and treatment except with the express spoken or written consent of the resident.

Residential Care Apartment Complexes

Wis. Admin. Code § HFS 89.34, Rights of Tenants.

(2) PRIVACY. To have privacy in his or her independent apartment and when receiving supportive, personal or nursing services.

The following rule applies to individuals receiving mental health services regardless of the setting under Wis. Stat. ch.51.

Wis. Admin. Code § HFS 94.18, Filming and taping.

(1) No patient may be recorded, photographed, or filmed for any purpose except as allowed under s. 51.61 (1) (o), Stats., and this section.

(3) The informed consent document shall specify that the subject patient may view the photograph or film or hear the recording prior to any release and that the patient may withdraw informed consent after viewing or hearing the material.

Analysis

State statutes and administrative rules for AFHs, CBRFs, and RCACs consistently address each resident's right to privacy in care and treatment, accommodations, and communication, namely visitors and phone calls. The use of electronic video monitoring or filming is not consistent with the provider's obligation to protect and promote each resident's right to privacy when engaged in any of these activities. Such equipment installed in living areas (space used for daily activities such as dining, recreation, sleeping, hosting visitors, etc.) is capable of transmitting images of residents receiving care and treatment, engaging in activities of daily living, or visiting with guests, staff, or other residents. Whether done deliberately or inadvertently, transmitting images of residents engaging in these types of activities violates their right to privacy.

Conclusion

State statutes and administrative rules for AFHs, CBRFs, and RCACs uniformly afford each resident and tenant the right to privacy. Resident and tenant rights are not subject to the waiver or variance procedures that allow exceptions from an administrative rule requirement. Accordingly, the following guidelines on the use of electronic video monitoring and filming are applicable in all Bureau of Assisted Living regulated AFHs, CBRFs, and RCACs:

- Electronic video monitoring and filming may be allowed in cooperation with law enforcement on a case-by-case basis, specific to an investigation. Law enforcement may need permissions, waivers, warrants and other authorization to proceed.

- Electronic video monitoring and filming are allowed in the following locations, provided the facility posts signs indicating that monitoring or filming is taking place:
 - Parking areas;
 - Locations where individuals may enter or exit the building;
 - Areas that are marked for employees only;
 - Storage areas;
 - Hallways or corridors that do not lead to resident rooms or activity areas; and
 - Personnel offices that are not accessible to residents.

- The Department interprets the provision of privacy as a resident and tenant right and prohibits the use of electronic video monitoring or filming in locations other than in those areas identified above. Consequently, electronic video monitoring and filming are *not allowed* in the following locations:
 - Resident bedrooms;
 - Facility or resident bathrooms or shower rooms;
 - Dining rooms;
 - Therapy rooms;
 - Visiting areas, lounges, multipurpose rooms, or activity rooms; or
 - Any other space where a resident may be seen meeting with visitors, engaging in an activity (including eating), sleeping, discussing their current condition, or receiving personal care, medical treatment or therapy.

- Mandatory consent to the use of electronic video monitoring or filming equipment is not an acceptable condition of admission to a facility. Facilities cannot prohibit admissions or require residents to give up their rights as part of any admission, service, or risk agreement:

Wis. Admin. Code § HFS 94.06, Assistance in the exercise of rights.

(1) Each service provider shall assist patients in the exercise of rights specified under ch. 51, Stats., and this chapter.

(2) No patient may be required to waive any of his or her rights under ch. 51, Stats., or this chapter as a condition of admission or receipt of treatment and services.

Wis. Admin. Code § HFS 83.16, Admissions agreement.

(3) RESTRICTIONS. No provision of any admissions agreement may...

(c) Purport to waive any right guaranteed to residents by law.

Wis. Admin. Code § HFS 89.27, Service agreement.

(3)(b). A service agreement may not waive any of the provisions of this chapter or other rights of the tenant

Wis. Admin. Code § HFS 89.28, Risk Agreement.

(3) NO WAIVER OF RULES OR RIGHTS. A risk agreement may not waive any provision of this chapter or any other right of the tenant

As described in this memo, electronic video monitoring or filming in resident areas violates residents and tenants' right to privacy. If your facility currently uses electronic video monitoring or filming equipment in areas included in the list of locations in which use is *not allowed*, please discontinue use to comply with state statutes and administrative rules.

The Department recognizes that there may be unique situations not explicitly covered by the guidance offered in this memo:

- Cases in which an individual resident may benefit from, or request the use of electronic video monitoring or filming equipment, *e.g.*, cases where the use is indicated by a therapeutic treatment plan or where a competent resident initiates a request;
- Client groups whose rights are restricted by the Department of Corrections; or
- Religious services, recognition ceremonies, or public speeches that are broadcast to a wider audience than is present in the room.

If you encounter a unique situation similar to those detailed above, please contact your Regional Director in the Bureau of Assisted Living for additional guidance before pursuing installation of electronic video monitoring or filming equipment. The Assisted Living Regional Director contacts can be found at: http://dhs.wisconsin.gov/rl_DSL/Contacts/ALSreglmap.htm