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DQA Memo 15-003
Replaces 13-016

To: [Adult Day Care](#)
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Waivers, Approvals, Variances, and Exceptions Request

The purpose of this memo is to provide information and general guidelines to assisted living providers regarding the process for requesting waivers, approvals, variances and exceptions of Wisconsin Administrative Code requirements. This revision incorporates a new collaboration with the Bureau of Managed Care and with Wisconsin's Directed Supports Program entitled "Include Respect I Self-Direct" (IRIS) for requests involving any restraint devices or practices.

Background

Authority for submission and review of waivers and variances is derived from the Wisconsin Uniform Licensure Chapter 50 statutes section 50.02(3)(c) states, "The department shall promulgate rules to establish a procedure for waivers and variances from standards developed under this section. The department may limit the duration of the waiver or variance."

Providers may make waiver and variance requests based on the language found in the applicable administrative code or certification standard. Department approvals are required for use of devices (i.e., delayed egress in CBRFs) or practices (i.e., nursing hours per week exceeding three hours per resident) as specified by applicable Wisconsin Administrative Code provisions. In addition, any practices contained in an individual treatment program or implemented as a facility-wide practice that limit resident rights in any way are subject to Department approval.

Historically, the promulgation of DHS 89, Wisconsin Administrative Code for RCACs, was accompanied by intent to limit the Department's ability to grant variances. RCAC requirements were considered minimal and provided flexibility for providers in their abilities to meet requirements. As such, variances will not be approved unless the rule specifies that a variance may be permitted. In addition, section DHS 89.295 addresses variance for demonstration projects in Family Care pilots. This subchapter of the rule applied to the original five county pilots and is no longer applicable due to the subsequent expansion of Family Care within the state.

The Bureau of Assisted Living (BAL) has an established Waiver, Approval, Variance and Exception (WAVE) committee that meets on a regular basis. Its function is to approve or deny any request by a regulated assisted living facility that requires department approval. The purpose of the committee is to ensure that all requests are reviewed consistently throughout the state and that the department is in compliance with its statutory and administrative authority.

Separate guidelines and an application process are in place to address the approval and use of physical or mechanical restraints, seclusions, isolation and protective equipment for adults with an intellectual disability or traumatic brain injury who meet the definition of “patient” in Wisconsin Statute 51.61(1) and are subject to the possible use of these protections. These guidelines cover adults funded by the Community Integration Program, the Brain Injury Waiver and persons with an intellectual disability served by Family Care, IRIS, PACE and Partnership programs. Use of restraints for private pay residents of licensed facilities requires department approval by the Bureau of Assisted Living.

Client Rights Limitations

Practices that limit resident rights and are implemented as a facility-wide practice are subject to department approval. Examples include but are not limited to magnetic locking systems, video monitoring and food restrictions. It is also the practice of the Bureau of Assisted Living to review any use of sound or video monitoring devices for individuals when use is initiated by the facility.

Medical or therapeutic indications may involve limitations of individual rights in certain situations. The WAVE committee will not review limitations of individual rights associated with telephone calls, clothing or possessions, storage space, privacy in toileting or bathing, and visitors. Those limitations should be specifically addressed in the resident’s individual service plan.

Submission and Review of Requests

Requests must be submitted in writing to the DQA regional office in which the facility is located. Contact information may be found at: <https://www.dhs.wisconsin.gov/dqa/bal-regionalmap.htm>

A form is available online at: <http://www.dhs.wisconsin.gov/forms1/f6/f62548.pdf>

At a minimum, the request must identify the facility, the resident if applicable, the administrative or statutory code requirement for which action is requested, and all information supporting the request. Requests must contain specific information as indicated in the applicable regulations. Requests must also contain enough information for the department to determine that the proposed action will not adversely affect the health, safety or welfare of residents.

The WAVE committee will review all requests with the exception of those determined by the committee to require only independent review by the regional director. Failure to provide some or all of the necessary information may result in denial or significant delay of the approval process.

Requests for devices or practices assessed to be restraints (bed rails, lap buddies, wheel chair belts, etc.) for use with residents who are Family Care or IRIS members must first be reviewed by the placing agency’s restraint oversight committee. Providers need to seek input from the placing agency prior to submitting a request to the BAL regional office for WAVE determination.

Applicable Wisconsin Administrative Code References

DHS 94.10 Isolation, seclusion and physical restraints. Any service provider using isolation, seclusion or physical restraint shall have written policies that meet the requirements specified under s. 51.61(1)(i), Stats., and this chapter. Isolation, seclusion or physical restraint may be used only in an emergency, when part of a treatment program, or as provided in s. 51.61(1)(i)2., Stats. For a community placement, the use of isolation, seclusion or physical restraint shall be specifically approved by the department on a case-by-case basis and by the county department if the county department has authorized the community placement. In granting approval, a determination shall be made that use is necessary for continued community placement of the individual and that supports and safeguards necessary for the individual are in place.

Note: The use of isolation, seclusion or physical restraint may be further limited or prohibited by licensing or certification standards for that service provider.

Adult Family Homes

DHS 88.01(2)(b) Exception to a requirement. The licensing agency may grant an exception to any requirement in this chapter except a resident right under s. DHS 88.10, if the licensee requests the exception in writing on a form provided by the department, and presents a convincing argument that the proposed exception will not jeopardize the health, safety or welfare of residents, or violate the rights of residents. The licensing agency shall respond in writing to the request within 45 days after receiving it. An exception may be granted only when it would not adversely affect the ability of the licensee to meet the residents' needs and if the exception will not jeopardize the health, safety or welfare of residents or violate the rights of residents. The licensing agency may impose conditions or time limitations on an exception. Violation of a condition under which the exception is granted constitutes a violation of this chapter.

Community-Based Residential Facilities

DHS 83.03(1)(a) "Variance" means the granting of an alternate means of meeting a requirement in this chapter.

DHS 83.03(1)(b) "Waiver" means the granting of an exemption from a requirement of this chapter.

DHS 83.03(2)(a) The department may grant a waiver or variance if the department determines that the proposed waiver or variance will not jeopardize the health, safety, welfare or rights of any resident.

DHS 83.03(2)(b) A written request for a waiver or variance shall be sent to the department and include justification that the waiver or variance will not adversely affect the health, safety or welfare of any resident for the requested action.

DHS 83.03(2)(c) A written request for a variance shall include a description of an alternative means planned to meet the intent of the requirement.

DHS 83.03(3) The department may rescind a waiver or variance if any of the following occurs:

(a) The department determines the waiver or variance has adversely affected the health, safety or welfare of the residents.

(b) The CBRF fails to comply with any of the conditions of the waiver or variance as granted.

DHS 83.27(1)(b)The CBRF may not have more than 4 residents, or 10% of the licensed capacity, whichever is greater, who need more than 3 hours of nursing care per week or care above intermediate

level nursing care for not more than 30 days unless the facility has obtained a waiver from the department or the department has received a request for a waiver from the CBRF and the department's decision is pending.

DHS 83.27(2)(d) A person who needs more than 3 hours of nursing care per week except for a temporary condition needing more than 3 hours of nursing care per week for no more than 30 days. If the CBRF requests a waiver or variance, the department may grant a waiver or variance to this requirement, as described under s. DHS 83.03, if the following conditions are met:

1. The resident's clinical condition is stable and predictable, does not change rapidly, and medical orders are unlikely to involve frequent changes or complex modifications and the resident's clinical condition is one that may be treatable, or the resident has a long-term condition needing more than 3 hours of nursing care per week for more than 30 days.
2. The resident is otherwise appropriate for the level of care provided in the CBRF.
3. The services needed to treat the resident's condition are available in the CBRF.

DHS 83.32(3)(g) *Freedom from physical restraints.* Be free from physical restraints except upon prior review and approval by the department upon written authorization from the resident's primary physician or advanced practice nurse prescriber as defined in s. N 8.02 (2). The department may place conditions on the use of a restraint to protect the health, safety, welfare and rights of the resident.

Residential Care Apartment Complexes

DHS 89.22 Building requirements. (2) APARTMENTS (e) Variances.

1. In this paragraph, "variance" means permission to meet a requirement by an alternative means. A variance granted under this paragraph shall not exempt a facility from any other applicable rule, regulation or ordinance.
2. The department may grant a variance to the minimum floor space requirement under par. (c)1. provided that the variance does not reduce the minimum floor space requirement under par. (c)1. by more than 10%.
3. A variance may be granted only when a building or portion of a building constructed or under construction prior to the effective date of this rule is converted to a residential care apartment complex and the variance does not adversely affect the ability of the residential care apartment complex to meet the tenants' needs and does not jeopardize the health, safety or independence of the tenants.
4. A request for a variance shall be submitted to the department in writing and shall identify the requirement from which the variance is requested, the justification for the variance, and the alternative means by which the facility will meet the intent of the requirement. The department shall respond in writing to a request for a variance.

Adult Day Care

Certification Standard VII. Exceptions/Variations to the Standards

The department may grant an exception or variance to a standard (except IV.B) when it is assured that the health, safety, and welfare of the participants being served will not be jeopardized. A request for an exception or variance shall be in writing, shall be sent to the Department of Health Services and shall include justifications for the requested action and a description of any provisions planned to meet the intent of the standard.