



DISABILITY RIGHTS NEW MEXICO

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Gary Housepian, Chief Executive Officer

Promoting and Protecting the Rights of Persons with Disabilities

March 24, 2020

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RE: Comments on 7.8.4 NMAC, “General Requirements for Boarding Homes”

New Mexico Department of Health:

Disability Rights New Mexico (DRNM) is a private, non-profit organization whose mission is to protect, promote, and expand the rights of individuals with disabilities in our state. As a significant part of that mission, DRNM provides legal representation and advocacy services to a number of people who reside in boarding homes throughout New Mexico. Many individuals rely on boarding homes to provide a safe and stable living environment so that they can fully participate in their communities.

In the past, DRNM has visited a number of boarding homes while representing the interests of our clients. While some boarding homes have provided safe and reliable homes for residents, at other homes our agency has encountered unsanitary and dangerous conditions. This variance in conditions led DRNM to conclude that boarding homes needed to be regulated by the state to ensure the safety and well-being of individuals with disabilities in New Mexico. DRNM has been advocating for the regulation of boarding homes for some time, culminating in our filing suit against the New Mexico Department of Health (“the Department”), requesting a Writ of Mandamus that requires regulation. The District Court granted that Writ in 2018, and as a result, the state has advanced these proposed regulations.

DRNM appreciates the diligent work and significant effort that the Department has put into creating these proposed regulations since the Writ was imposed in 2018. DRNM applauds the work that the Department has put into this crucial endeavor, and believes that the licensing of boarding homes helps to safeguard the health and safety of our constituents and other vulnerable New Mexicans. DRNM is hopeful that the following comments will support the goal we all share: the safe and efficient administration of boarding homes in the state of New Mexico.

I. 7.8.4.7 Definition of Boarding Home

The definition of boarding home contained in the proposed regulations appears to require that an entity serve only residents discharged from a mental or behavioral health institution and provide assistance to each resident 24 hours a day in order to fall under these rules. This language is problematic, and will exclude a number of homes that should be monitored or would otherwise choose to provide services. The definition of boarding homes should be significantly changed, with those two elements deleted or rewritten.

First, there is simply no reason to limit boarding home residency to those who have been discharged from a mental health or behavioral health institution. While a number of boarding home occupants begin residing there following discharge from a mental health or behavioral health facility, others enter that living situation under very different circumstances. If a person requires assistance with Instrumental Activities of Daily Living and community coordination, then how that person got to the boarding home should make no difference under these regulations. The licensed boarding home should be available to the individual without regard to whether that person has been discharged from a mental or behavioral health facility or not. Any suggestion or requirement that a boarding home only accepts individuals discharged from a mental or behavioral health program should be deleted.

Second, DRNM is not aware of any current boarding home that provides assistance with instrumental activities of daily living and community coordination 24 hours a day. These proposed regulations do require that someone is on the grounds of a boarding home 24 hours a day to be available to provide assistance, which is clearly essential in case of an emergency. That requirement must always continue in order to ensure the safety of residents. But that availability is different than what this language appears to require: all day, every day assistance with Instrumental Activities of Daily Living and community coordination for each resident. The current language would exclude from compliance every boarding home currently known to DRNM if taken literally. The language should be changed to note the distinction between availability of personnel and required care for each resident.

II. 7.8.4.9 Scope of Services

Under the regulations proposed by the Department, these rules apply “...to individuals seeking assistance with instrumental activities of daily living or assistance with accessing or the coordination of community services who *may have been discharged from any mental or behavioral health care institution* (emphasis added).”

DRNM asserts that the italicized language cited above should be deleted, along with the change in 7.8.4.7 NMAC. As noted above, there is simply no reason to limit boarding home residency to those who have been discharged from a mental health or behavioral health institution, so there is no reason for that language to remain in the proposed regulations. While a number of boarding home occupants begin residing there following discharge from a mental health or behavioral health facility, others enter that living situation under very different circumstances.

This position appears consistent with the later sections of these proposed regulations. For example, 7.8.4.36 outlines Resident Acceptance and Retention Limitations. The text discusses residents who are accepted because of diminished mental or physical capacity and a need for some protective living accommodations; there is no mention of a previous placement being relevant to the issue of boarding home admission.

The proposed language of 7.8.4.9 makes it clear that these rules apply to homes that assist residents with instrumental activities of daily living and access to the community or coordination of community activities. DRNM applauds the recognition that many New Mexicans require these services to safely engage in community life, that boarding homes are a viable method to provide them, and that these boarding homes must be regulated while they do so in order to safeguard individual safety and public health. However, if a person requires assistance with Instrumental Activities of Daily Living and community coordination, then how that person got to the boarding home should make no difference under these regulations. The licensed boarding home should be available to the individual without regard to whether that person has been discharged from a mental or behavioral health facility or not.

If the language concerning discharge written into this section is meant to create a requirement that discharge from a mental health or behavioral program is necessary before residing in a boarding home, it should be deleted for the reasons outlined above. If the word “may” within that language is meant to imply that discharge from a facility is one avenue that could lead to admission to a boarding home, it should be deleted as needlessly confusing and irrelevant. There is no reason for any language concerning the discharge from a mental or behavioral health facility to appear within the section outlining the scope of these regulations. As long as an individual meets the other requirements for admission, the previous residence of that individual is not significant.

III. 7.8.4.10 General Licensing Requirements

-7.8.4.10(A)(3): DRNM suggests deleting the words “judgment against you” and replacing them with “judgment against the applicant”.

-7.8.4.10(C) License Application and fees: DRNM notes that the amount of the licensing fee is not included in this part of the regulation. Our agency suggests that inclusion of the amount would make crucial information more readily available for boarding home providers. It would also make the proposed regulations more informative and less confusing for the general public.

More generally, DRNM takes this opportunity to suggest that the state do everything feasible to keep the required licensing fee as low as possible. The regulation of boarding homes is a significant undertaking that will cost money for the state to maintain—DRNM again commends the Department for its efforts implementing this crucial program. However, as the state is aware, there will also be a burden on boarding home operators to come into compliance with these necessary regulations. The state must do all it can to rigorously uphold and enforce these rules while also ensuring that a robust network of boarding homes remains open to the public. One of the ways for the state to accomplish the latter is by limiting the administrative fees for licensing and renewal to any extent possible.

IV. 7.8.4.36(B)(4)

This proposed section outlines the criteria that would render a person ineligible for boarding home admission. As written, 7.8.4.36(B)(4) mandates that no person with a primary diagnosis of developmental disability can meet the criteria for admission to any licensed boarding home. This restriction is overly broad, and DRNM asserts that it should be deleted.

This rule would unreasonably exclude from admission a number of individuals with developmental disabilities who could derive benefit from the services and community engagement available through a licensed boarding home. At a time when available community based services can be scarce, there is no reason to automatically bar anyone with a primary diagnosis of developmental disability from a potential resource. DRNM urges individualized evaluation of all individuals applying for admission to a boarding home, and the deletion of the overly broad restrictions of 7.8.4.36(B)(4).

V. 7.8.4.38 Needs and Services Plan

This section of the proposed regulation mandates that for every resident who is admitted to a boarding home, the licensee must complete an individualized written needs and services plan for that person. Under 7.8.4.38(B)(1), that plan is to be based on the desires and background of the resident. DRNM strongly supports the provision of an individualized plan for every boarding home resident as a way to maximize opportunity and ensure safety for each person.

However, the language of proposed 7.8.4.38 does not go far enough to ensure that residents will be included in developing their own plan. 7.8.4.38(A)(1) states that “the resident **or** resident’s surrogate decision maker **or** his/her authorized representative” shall be included in the development of the plan. But an individual must be included in the fullest extent possible in the development of their own plan even if they have a guardian or other surrogate decision maker. The best possible way to accurately assess the desires and background of a person is to hear directly from that person. So, either “or” must be changed to “and” in the proposed language, or there must be language added asserting that the person with a disability must be included in the development of their own plan.

Person centered planning is crucial to ensure that all programs and services utilized by individuals with disabilities fit and further the goals and priorities that they set for their own lives. Every regulation put forward by the state must support and emphasize person centered planning to the highest degree possible. The language of this regulation must ensure that each resident is included in developing the plan that will be an essential part of their time at a boarding home.

VI. 7.8.4.40 Resident Rights

-7.8.4.40(A): DRNM suggests changing the word “meet” to “ensure”.

-7.8.4.40(B): This section is another place where the language must be changed to emphasize and support the essential principle of person centered planning. Here, a written copy of the resident's legal rights will be given to the resident or an authorized decision maker or responsible party. This subsection's use of the word "or" must be changed to "and" to ensure that each resident always receives a copy of their rights.

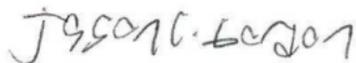
Conclusion

DRNM has listened to the public hearing held during the afternoon today, the date of the deadline for the submission of these comments. DRNM is grateful for the hearing itself, and for the passion of the speakers. Our hope is that the Department will consider that input without diminishing the necessary commitment to maintaining a licensure system, as required by state statute and by the Writ issued by the Court.

A strict interpretation of the rules as written, particularly in 7.8.4.7(I), could void the intention of the licensure system itself. This would therefore risk violating the Court's Writ issued pursuant to state statute. More concerning, this would further risk the health, safety, and lives of the vulnerable population relying on boarding homes.

DRNM appreciates the opportunity to comment on these regulations, and thanks the Department for its time and effort in this matter. Our agency firmly believes that the licensing of boarding homes in this state is an important measure to safeguard the health and safety of our constituents and all New Mexicans.

Sincerely,

A handwritten signature in black ink that reads "Jason C. Logan". The signature is written in a cursive, slightly slanted style.

Litigation Director
Disability Rights New Mexico