

Pursuant to the authority vested in the Commissioner of Health by Section 461 of the Social Services Law, Sections 487.4, 488.4, and 490.4 of Title 18 (Social Services) of the Official Compilation of Codes, Rules and Regulations of the State of New York (NYCRR) are hereby amended, to be effective upon publication of the Notice of Adoption in the New York State Register, to read as follows:

Subdivisions (b) and (c) of Section 487.4 are amended to read as follows:

(b) An operator shall not exclude an individual on the [sole] basis [that such individual is a person who primarily uses a wheelchair for mobility,] of an individual's mobility impairment, and shall make reasonable accommodations to the extent necessary to admit such individuals, consistent with [the Americans with Disabilities Act of 1990, 42 U.S.C. 12101 et seq. and with the provisions of this section] federal, state, and local laws.

(c) An operator shall not accept nor retain any person who:

(1) is in need of continual medical or nursing care or supervision as provided by facilities licensed pursuant to article 28 of the Public Health Law, or licensed or operated pursuant to articles 19, 23, 29 and 31 of the Mental Hygiene Law;

(2) suffers from a serious and persistent mental disability sufficient to warrant placement in a residential facility licensed pursuant to article 19, 23, 29 or 31 of the Mental Hygiene Law;

(3) requires health or mental health services which are not available or cannot be provided safely and effectively by local service agencies or providers;

(4) causes, or is likely to cause, danger to himself or others;

(5) repeatedly behaves in a manner which directly impairs the well-being, care or safety of the resident or other residents, or which substantially interferes with the orderly operation of the facility;

(6) has a medical condition which is unstable and which requires continual skilled observation of symptoms and reactions or accurate recording of such skilled observations for the purposes of reporting to the resident's physician;

(7) refuses or is unable to comply with a prescribed treatment program, including but not limited to a prescribed medications regimen when such failure causes, or is likely to cause, in the judgment of a physician, life-threatening danger to the resident or others;

(8) is chronically bedfast;

[(9) chronically requires the physical assistance of another person in order to walk;

(10) chronically requires the physical assistance of another person to climb or descend stairs, unless assignment on a floor with ground-level egress can be made;]

[(11)] (9) has chronic unmanaged urinary or bowel incontinence;

[(12)] (10) suffers from a communicable disease or health condition which constitutes a danger to other residents and staff;

[(13)] (11) is dependent on medical equipment, unless it has been demonstrated that:

(i) the equipment presents no safety hazard;

(ii) use of the equipment does not restrict the individual to his room, impede the individual in the event of evacuation, or inhibit participation in the routine activities of the home;

(iii) use of the equipment does not restrict or impede the activities of other residents;

(iv) the individual is able to use and maintain the equipment with only intermittent or occasional assistance from medical personnel;

- (v) such assistance, if needed, is available from approved community resources; and
- (vi) each required medical evaluation attests to the individual's ability to use and maintain the equipment;
- [(14)] (12) engages in alcohol or drug use which results in aggressive or destructive behavior; or
- [(15)] (13) is under 18 years of age; or, in a public adult home, under 16 years of age.

Subdivisions (b) and (c) of Section 488.4 is amended to read as follows:

- (b) An operator shall not exclude an individual on the [sole] basis [that such individual is a person who primarily uses a wheelchair for mobility,] of an individual's mobility impairment, and shall make reasonable accommodations to the extent necessary to admit such individuals, consistent with [the Americans with Disabilities Act of 1990, 42 U.S.C. 12101 et seq. and with the provisions of this section] federal, state and local laws.
- (c) An operator must not accept nor retain any person who:
 - (1) needs continual medical or nursing care or supervision as provided by an acute care facility or a residential health care facility certified by the Department of Health;
 - (2) suffers from a serious and persistent mental disability sufficient to warrant placement in an acute care or residential treatment facility operated or certified by an office of the Department of Mental Hygiene;
 - (3) requires health, mental health, or other services which cannot be provided by local service agencies;
 - (4) causes, or is likely to cause, a danger to himself/herself or others;

(5) repeatedly behaves in a manner which directly impairs the well-being, care, or safety of the resident or other residents or which substantially interferes with the orderly operation of the enriched housing program;

(6) requires continual skilled observation of symptoms and reactions or accurate recording of such skilled observations for the purpose of reporting on a medical condition to the resident's physician;

(7) refuses or is unable to comply with a prescribed treatment program, including but not limited to a prescribed medications regimen when such refusal or inability causes, or is likely to cause, in the judgment of a physician, life-threatening danger to the resident or others;

(8) is chronically bedfast;

[(9) is chronically in need of the physical assistance of another person in order to walk;

(10) is chronically in need of the physical assistance of another person to climb or descend stairs, unless assignment on a floor with ground-level egress can be made;]

[(11)] (9) has chronic unmanaged urinary or bowel incontinence;

[(12)] (10) suffers from a communicable disease or health condition which constitutes a danger to other residents and staff;

[(13)] (11) is dependent on medical equipment unless it has been demonstrated that:

(i) the equipment presents no safety hazard;

(ii) use of the equipment does not restrict the individual to his/her room, impede the individual in the event of evacuation, or inhibit participation in the routine activities of the home;

(iii) use of the equipment does not restrict or impede the activities of other residents;

(iv) the individual is able to use and maintain the equipment with only intermittent or occasional assistance from medical personnel;

- (v) assistance in the use or maintenance of the equipment, if needed, is available from local social services agencies or approved community resources;
- (vi) each required medical evaluation attests to the individual's ability to use and maintain the equipment;
- [(14)] (12) has chronic personal care needs which cannot be met by enriched housing staff or approved community providers;
- [(15)] (13) is not self-directing; i.e., requires continuous supervision and is not capable of making choices about his/her activities of daily living; or
- [(16)] (14) engages in alcohol or drug use which results in aggressive or destructive behavior.

Subdivisions (b) and (c) of Section 490.4 is amended to read as follows:

(b) An operator shall not exclude an individual on the [sole] basis [that such individual is a person who primarily uses a wheelchair for mobility,] of an individual's mobility impairment, and shall make reasonable accommodations to the extent necessary to admit such individuals, consistent with [the Americans with Disabilities Act of 1990, 42 U.S.C. 12101 et seq. and with the provisions of this section] federal, state, and local laws.

(c) An operator must not accept or retain any person who:

- (1) is in need of continual medical or nursing care or supervision as provided by facilities licensed pursuant to article 28 of the Public Health Law or licensed or operated pursuant to articles 19, 23, 29 and 31 of the Mental Hygiene Law;
- (2) suffers from a serious and persistent mental disability sufficient to warrant placement in a residential treatment facility licensed or operated pursuant to articles 19, 23, 29 or 31 of the Mental Hygiene Law;

- (3) requires health or mental health services which are not available or cannot be provided safely and effectively by local social services agencies or providers;
- (4) causes, or is likely to cause, danger to himself/herself or others;
- (5) repeatedly behaves in a manner which directly impairs the well-being, care, or safety of the resident or other residents or which substantially interferes with the orderly operation of the facility;
- (6) has a medical condition which requires continual skilled observation of symptoms or reactions to medications or accurate recording of such skilled observations for the purpose of reporting to the resident's physician;
- (7) refuses or is unable to comply with a prescribed treatment program, including but not limited to a prescribed medications regimen, when such refusal or inability causes, or, in the judgment of a physician, is likely to cause life-threatening danger to the resident or others;
- (8) requires more than supervision and assistance with self-administration of medications in order to maintain a prescribed medication regimen;
- (9) chronically requires physical assistance with the personal activities of daily living, including grooming, bathing, dressing, toileting, or eating;
- (10) is chronically bedfast;
- [(11) chronically requires the physical assistance of another person in order to walk;
- (12) chronically requires the physical assistance of another person to climb or descend stairs, unless assignment on a floor with ground-level egress can be made;]
- [(13)] (11) has chronic unmanaged urinary or bowel incontinence;
- [(14)] (12) suffers from a communicable disease or health condition which constitutes a danger to other residents and staff;

[(15)] (13) is dependent on medical equipment unless it has been demonstrated that:

(i) the equipment presents no safety hazard;

(ii) use of the equipment does not restrict the individual to his/her room, impede the individual in the event of evacuation, or inhibit participation in the routine activities of the facility;

(iii) use of the equipment does not restrict or impede the activities of other residents;

(iv) the individual is able to use and maintain the equipment with only intermittent or occasional assistance from medical personnel, and such assistance is available from local social service agencies or approved community resources; and

(v) each required medical evaluation attests to the individual's ability to use and maintain the equipment;

[(16)] (14) engages in alcohol or drug use which results in aggressive or destructive behavior;

[(17)] (15) is under 18 years of age; or under 16 years of age if such person is to be admitted to a residence for adults operated by a social services district.

REGULATORY IMPACT STATEMENT

Statutory Authority:

Sections 461(1) of the Social Services Law provides authority for the Department to promulgate regulations for adult care facilities: specifically, adult homes, enriched housing, and residences for adults.

Legislative Objectives:

The legislative objective of Social Services Law section 461 is to promote the life, health, safety and comfort of adults residing in adult care facilities (see Social Services Law section 460).

Needs and Benefits:

This regulation is intended to ensure that adult care facilities comply the Americans with Disabilities Act of 1990, 42 U.S.C. 12101 et seq (ADA). The regulation clarifies admission and retention standards to make clear that adult care facilities must make reasonable accommodation for residents who use wheelchairs for mobility. The adult care facility nevertheless must be able to safely accommodate the needs of such individual and must be in compliance with local fire codes. The facility must have an appropriate level of staffing to evacuate any resident who is incapable of self-preservation in the event of an emergency. Persons incapable of self-preservation are those who, because of age, physical limitations, mental limitations, chemical dependency, or medical treatment, cannot respond as an individual in an emergency situation.

This regulation is needed to make sure that the admission and retention standards for adult care facilities are consistent with the ADA.

Costs:

Costs to Regulated Parties:

This regulation imposes no costs on adult care facilities, because adult care facilities should already be in compliance with the ADA. This regulation simply clarifies what is required by the ADA.

Costs to State and Local Governments:

This regulation imposes no costs on State and local governments, because adult care facilities should already be in compliance with the ADA. This regulation simply clarifies what is required by the ADA.

Paperwork:

This regulation creates no new paperwork requirements.

Local Government Mandates:

This amendment does not impose any new programs, services, duties or responsibilities on local government.

Duplication:

These regulations will not conflict with any State or federal rules.

Alternatives:

The alternative is to not make these amendments to the regulations. This alternative was rejected, because the current regulations are arguably not consistent with the ADA.

Federal Standards:

This regulation is consistent with federal standards.

Compliance Schedule:

This regulation is effective upon publication of a Notice of Adoption in the State Register.

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**STATEMENT IN LIEU OF
REGULATORY FLEXIBILITY ANALYSIS**

No regulatory flexibility analysis is required pursuant to section 202-(b)(3)(a) of the State Administrative Procedure Act. The proposed amendment does not impose an adverse economic impact on small businesses or local governments, and it does not impose reporting, record keeping or other compliance requirements on small businesses or local governments.

**STATEMENT IN LIEU OF
RURAL AREA FLEXIBILITY ANALYSIS**

A Rural Area Flexibility Analysis for these amendments is not being submitted because amendments will not impose any adverse impact or significant reporting, record keeping or other compliance requirements on public or private entities in rural areas. There are no professional services, capital, or other compliance costs imposed on public or private entities in rural areas as a result of the proposed amendments.

JOB IMPACT STATEMENT

The Department of Health has determined that these regulatory changes will not have a substantial adverse impact on jobs and employment, based upon its nature and purpose.

ASSESSMENT OF PUBLIC COMMENT

The New York State Department of Health (“Department”) received comments regarding the proposed amendments to Sections 487.4, 488.4, and 490.4 of Title 18 of the New York Codes, Rules, and Regulations. The comments received and the Department’s responses are summarized below.

Comment: Commenters claimed that the proposed regulation impermissibly limits the admission of individuals with mobility disabilities under the Americans with Disabilities Act and other anti-discrimination laws. Any admission restrictions ought to apply equally to individuals with and without mobility disabilities.

Response: The Department agrees that reasonable accommodations are an expectation for all residents and prospective residents and the intent of the proposed regulation was to clearly state such in regulation. Given that commentors may have misinterpreted the proposed regulation, the language in the adopted regulation is clarified to read: “An operator shall not exclude an individual on the basis of an individual’s mobility impairment, and shall make reasonable accommodations to the extent necessary to admit such individuals, consistent with federal, state, and local laws.”

Comment: Adult care facilities were designed to provide a residential alternative for older persons, including those who are incapable of self-preservation. The proposed regulation includes a description of persons incapable of self-preservation that defines the exact persons for which the facilities were designed.

Response: The Department respectfully disagrees. Adult care facility residents are more independent than those who might otherwise qualify for skilled nursing facility care. Facilities that serve residents who require a higher level of care have different life safety features than most adult care facilities and therefore admit more residents who cannot safely self-preserve and are more dependent than those substantially able to live independently in their own homes. A component of safe independence, and the accurate gauging of such, is the ability as an individual to self-preserve in cases of emergency. The definition of self-preservation has not historically been reflected in regulation, as the commenter indicates, but the Department believed it was important to add to prevent an operator's admission or retention of any individuals who are unable to safely navigate an emergency situation, especially one that could result in death or injury. Since all residents must be capable of self-preservation, the adopted regulation eliminates language that might imply that this requirement is only applicable to residents with mobility impairments.

Comment: Adult care facilities are already required to determine during pre-admission whether it can safely meet an individual's physical and social needs. The proposed language should be revised to require the facility to consider whether its current staffing level is appropriate and sustainable.

Response: The Department agrees that adult care facilities must be able to safely meet the physical and social needs of all residents. However, this does not require an amendment to the regulation and no change has been made in response to this comment.

Comment: The language that reads "...An operator shall not exclude..." is ambiguous and should be modified to read: "...An operator shall not refuse to admit or retain..."

Response: As the language in question has been in this section of the regulations for a number of years without inquiry, the Department does not agree that it is ambiguous. No change has been made in response to this comment.

Comment: The proposed regulations continue to perpetuate disability discrimination by specifying that persons experiencing chronic, unmanaged urinary or bowel incontinence are barred from admission or retention in adult care facilities, and they fail to require reasonable accommodations for people with disabilities other than mobility impairments. Similarly, it is rare that incontinence is "unmanaged" and there should be no presumption made to the contrary.

Response: The regulation was updated to address a specific issue whereby persons with mobility impairments were excluded from adult care facilities. Adult care facility residents are more independent than those who might otherwise qualify for skilled nursing facility care. As such, the regulations exclude anyone who has "chronic *unmanaged* urinary or bowel incontinence" (emphasis added). To the extent an individual is able to manage their urinary or bowel incontinence, they would not be barred from admission or retention to an adult care facility. There is no presumption in the regulation that incontinence is managed or unmanaged. Therefore, the regulation does not need to be amended and no change has been made in response to this comment.

Comment: The proposed regulations bar from admission individuals who are dependent on medical equipment but fail to define medical equipment. This could unintentionally ban from

adult care facility admission or retention those individuals with portable blood glucose monitors or supplemental oxygen equipment.

Response: The regulations clearly outline the factors that should be considered by adult care facility operators by stating that adult care facilities shall exclude anyone who is dependent on medical equipment, “*unless it has been demonstrated that:* (i) the equipment presents no safety hazard; (ii) use of the equipment does not restrict the individual to his room, impede the individual in the event of evacuation, or inhibit participation in the routine activities of the home; (iii) use of the equipment does not restrict or impede the activities of other residents; (iv) the individual is able to use and maintain the equipment with only intermittent or occasional assistance from medical personnel; (v) such assistance, if needed, is available from approved community resources; and (vi) each required medical evaluation attests to the individual's ability to use and maintain the equipment.” (emphasis added). No change has been made in response to this comment.

Comment: Some commenters believed that this amendment has the effect of increasing the regulatory requirements for adult care facilities. The proposed regulations eliminate existing provisions that bar an operator from admitting or retaining individuals with chronic assistance needs, thereby raising the potential levels of care for individuals who can be admitted to an adult care facility and driving an associated increase in staffing needs at a time when there is a serious - and likely long term - staffing shortage across the long term care continuum that will undoubtedly impact the ability of an adult care facility to accommodate these new admission and retention requirements. The proposed amendments unrealistically raise consumer's expectations that all adult care facilities will be able to meet their needs and will have an unintended

consequence of broadening the gap between service availability for seniors depending on their primary payer sources. For aging residents, the potential to develop a mobility impairment and need for assistance increases with time. Safely accommodating residents' and prospective residents' needs must be a consideration of fiscal and operational feasibility. The proposed regulation creates an overlap between the enhanced assisted living residence (EALR) and other adult care facility programmatic models. Public Health Law describes a resident that can be served in an EALR as an individual that can age-in-place and may need physical assistance from another person to transfer, walk, and/or navigate stairs. By adopting these proposed regulations, the Department is effectively requiring that all adult care facilities be qualified as EALRs. This blurred line perpetuates consumer confusion and clouds their ability to make an informed decision about the providers best able to meet their individual needs.

Response: The Department believes these comments misinterpret the proposed regulation. The proposed regulation does not eliminate provisions that will otherwise change the level of care expectations of adult care facilities or otherwise undermine the existing long term care continuum. The purpose of this regulation is simply to clarify that adult care facilities are required to comply with State and federal laws requiring reasonable accommodations to be made for residents. No change has been made in response to this comment.

Comment: The Department needs to consult the provider community to determine how best to ensure compliance with the Americans with Disabilities Act so that the providers can understand the expectations and be prepared to safely meet them within the context of law and regulatory interpretation appropriate to their existing licenses and certifications.

Response: It is and remains the operator's responsibility to comply with applicable local, State, and federal laws, and to explore the expectations of such laws and their implications within the confines of the facility's existing licensure. Guidance will continue to be provided as appropriate. No change has been made in response to this comment.