A New York Story That May Forecast National Trend
Assisted Living an Option in the Continuum of Long-Term Care

Elder Law attorneys can learn from New York state’s efforts to regulate for-profit assisted-living providers.

Senior housing facilities that include assisted-living options were originally part of a nonprofit network of senior-only complexes or enriched housing projects. These were funded by federal housing subsidy dollars or state-funded low-cost mortgages. These specialized housing arrangements focused on providing older persons with affordable independent living. They provided only limited social supports, such as some congregate meals and minimal housekeeping services.

With the increase in the frail aging population living well into their late 80s and 90s, the demand for housing with on-site personal services and assistance grew. As a result, “for-profit” providers entered this market attracted by potential high revenues. Today some of the larger assisted-living providers list incomes of $1.1 billion with the average listing their income in the $200 million range. Such corporate names as Brookdale, Sunrise, Atria, Hearthstone, Hallmark, Marriott, Manor Care, Emeritus, and Five Star have joined the ranks of assisted-living providers and have named their product assisted-living residences.

A handful of community-based not-for-profit assisted-living facilities remain in some localities, but by and large it has become the world of for-profit and corporate options. These services have higher service costs averaging about $6,650 per month for basic room and board. “Add-on” services, such as medication management, personalized one-on-one care, and toileting and bathing assistance are charged separately. When these services are provided, the assisted-living facilities function as nursing homes “lite.”

The assisted-living residences are often lower cost than a nursing home, which is often the initial attraction. When combined with a hotel or home-like atmosphere, it is seen as an alternative to the medical or institutional environment offered by most nursing homes. As a result, the assisted-living residence option has thrived nationwide.

With the broadening of services that include some nursing care and personal assistance, aging advocates and local and state health departments have placed these facilities under much-needed scrutiny. This article will outline the licensing process that has taken place in New York state as an example of how the assisted-living world has evolved as a forecast of a national trend.

Assisted Living Types and Their Licenses

In order to regulate this growing new industry in New York state, the Assisted Living Reform Act was passed in 2004. (S-778/A11820); Public Health Law 46-B, in response to advocacy by the aging community that contended that the homes were developing without adequate oversight. The frail elder population served by these unlicensed and unregulated facilities was presumed to be at risk. The purpose of the New

Judith Grimaldi, CELA, CAP, is a member of the Steering Committee for the Council of Advanced Practitioners (CAP). This article is provided by members of the NAELA Council of Advanced Practitioners.
York state law, as stated in the law’s preamble, was to regulate facilities that provided congregate residential housing with supportive services in a home-like setting.

The law put forth a philosophy that the assisted-living facility was to emphasize aging in place, personal dignity, autonomy, independence, privacy, and freedom of choice. The intent expressed in the law was to create a clear and flexible statutory structure. It established a license for assisted living that provided a definition of assisted-living residence, required all residents be provided a written residency agreement with consumer protections, a set of residents’ rights, and accurate information for consumers. Assisted-living residences are required to apply and secure a license and be approved by the New York state Department of Health in order to operate in New York state.

**Assisted Living Statutory Requirements**

The law requires all licensed assisted-living residences (ALR) to provide the following services: consumer-directed housing and daily food service; 24-hour, on-site monitoring; case management; and personal home-care services as needed. Certain special certificate programs, such as the Enhanced Assisted Living Residence (EALR) and the Special Needs Assisted Living (SNAL) certificate programs also were developed to allow the facilities to provide a higher level of care as residents aged in place and needed more care.

**Enhanced and Special Needs Residences**

New York state’s Department of Health issues a special license — the EALR to services providing care to frail residents. For example, residents who have become chronically chair-
The licensing of Assisted Living in New York state has brought a much needed clarity and uniformity to the delivery of these services.

fast, unable to transfer without assistance, need the assistance of another person to walk or climb stairs, and/or may be dependent on medical equipment would ordinarily not be able to be served in an ordinary assisted-living residence. New York state regulations state the assisted-living resident must be ambulatory.

The EALR license allows for these disabilities and also provides for those residents who need more than occasional or intermittent assistance from medical personnel, or have chronic or unmanaged toileting needs. In applying for this special license, a facility may request the EALR designation for all the beds in the facility or just a certain number of identified beds. Many facilities use EALR beds when their long-time residents deteriorate but wish to stay in the facility in spite of their diminished abilities. This is often to avoid nursing home placement.

To meet these increased needs of the EALR resident, the operator must provide a care plan for each resident in light of their increased care needs and provide the increased staff. (This staff may be in-house employees or by contract with licensed or certified affiliates or agencies). The EALR license also requires continual staff trainings, facility modifications to meet safety and ambulation needs, stricter medical oversight, and supervised nursing services.

ALRs in New York also may apply for a license to provide for special care for the cognitively impaired resident through the SNAL certificate. This licensure requirement is similar to the Enhanced Care Certificate but must also have special trained and credentialed personnel.

New York State’s License Process Adds Protections

The New York state Department of Health left in place the prior adult home license that predated the Assisted Living License. Thus, the process for securing a New York state assisted-living license requires a dual application under the state’s Public Health Law as well as the Social Service Law. The assisted living facilities first must secure an operating certificate for an adult home or an enriched housing program while simultaneously applying for an ALR license. The license states that each resident must receive an admission agreement that will include the following: disclosures and residents’ rights, a description of services, rates and fees schedules, lists of amenities, complaint procedures, admission and discharge criteria, billing methods, refunds, ownership interests, available services from non-affiliated providers, the right to choose heath care providers, use of Medicare and Medicaid coverage, and long-term care ombudsman. Patient’s rights track those found in the federal Nursing Home Reform Act.

New York state also requires that the ALF provide each resident with an individualized service plan (ISP) updated every six months. An advocate can review the plan and hold the facility accountable to the standards established in the ISP. The New York state statute also addressed many of the potentially deceptive marketing practices used by ALR operators cautioning against their use.

The New York state Department of Health formed a task force to establish standards. The task force was tested on the issue of reductions in nursing staff. Initial regulations required that a registered nurse be on duty at the facility 16 hours a day, seven days a week. Providers objected to the cost of this service. Unfortunately, the New York state Department of Health acquiesced and reduced the requirements to eight hours a day, seven days a week. A further amendment now allows a licensed practical nurse to substitute for the previously required registered nurse. Thus, even with the lofty goals of providing high standards of care, the level of care has been subject to compromise since the law’s implementation.

Rights and Appeals

The New York state Assisted Living license provided for consumer and resident rights that must be prominently posted in the facility and in patient materials. Residents are required to receive written notices of fees and fee changes. If a resident wishes to appeal the actions of the facility, such as discharges or room changes, the matter is initially handled internally by the management.

ALR residents enjoy the same rights as nursing home residents. Complaints about license violations must be brought to the New York state
Department of Health while other claims concerning the services fall under breach of contract claims. Thus, most ALR appeals are contractual and not about the license. As a result, New York state does not have an appeals process for the licensed Assisted Living program.

**Unintended Consequences**

The licensing of Assisted Living in New York state has brought a much needed clarity and uniformity to the delivery of these services. It also has ensured that marketing this type of services is more closely monitored.

ALRs are restricted from making promises as to services that are not within the scope of their license. They cannot promise nor deliver nursing home level of care.

These benefits have come with a marked increase in pricing. The facilities are now stating that as required by the New York state license, the resident must accept and pay for certain care levels as a condition of admission into the facility. Also, they use the required ISP as a tool to further increase the services provided. The ALR management contends the care delineated in its own ISP is required for a safe environment. Thus, the ALRs control the elements of the service plan as well as profit from the delivery of their required services. It has become a “closed-care plan” in which the facility monopolizes the service delivery often presented in a “take-or-leave” fashion.

This is not a conflict-free system. There appears to be little room for negotiation on the admission into the ALR. The resident is required to use the in-house providers and is not permitted to select who provides their care. The ALR management contends that their license requirement controls the levels of service; any deviation from the ISP is violation of their license.

Typical modules of care include medication management, toileting support, nighttime monitoring, one-on-one contact guarding for ambulation, and accompaniment on outside activities. These add-on modules of care are deemed to be non-negotiable under the guise of license requirements. This is contradicted by the New York state regulations that allows for services in an ALR to be provided either by in-house staff or by an outside agency.

Many ALRs limit the choice of “outside agency” to their affiliates with residents being told that if they privately hire, the ALR will still provide and charge the resident for the required in-house service. This double cost for the same service has dramatically increased the cost of care in those facilities when the resident wishes to privately hire.

In the past, ALR residents have been able to apply for Medicaid community-based home care services to provide their personal care. The New York state ALRs take the position that even if the resident receives home-care services from any outside source, even Medicaid, the facility will still provide and charge for modules of care as they are responsible for the care. In some instances, residents who hire private hires at the ALRs could be paying as much as $15,000 a month when the cost to both the ALR and their private hire are considered.

New York state is beginning to address and process this result. Keeping alert to these practices will be part of future advocacy of all Elder Law attorneys nationally.