

INSPECTIONS AND APPEALS DEPARTMENT[481]

Adopted and Filed

Pursuant to the authority of Iowa Code section 231C.3(1), the Department of Inspections and Appeals hereby amends Chapter 67, “General Provisions for Elder Group Homes, Assisted Living Programs and Adult Day Services,” Iowa Administrative Code.

This rule making implements changes resulting from legislation in 2013 Iowa Acts, Senate File 394, which establishes an informal conference process for assisted living programs and becomes effective January 1, 2014. The legislation gives programs the opportunity to contest the Department’s final findings in an informal conference with an independent reviewer.

The Department does not believe that these amendments pose a financial hardship on any regulated entity or individual.

Notice of Intended Action was published in the Iowa Administrative Bulletin on August 7, 2013, as **ARC 0941C**. Comments were received from the Iowa Health Care Association and LeadingAge Iowa. After consideration of the comments, subparagraph 67.14(2)“b”(2) was amended to allow programs to submit supporting documentation for the informal conference after the established deadline, but only as permitted by the independent reviewer with good cause shown.

One commenter suggested amending subrule 67.10(2) relating to accessibility of records to add “unless such records are otherwise privileged or protected by law.” Iowa Code section 231C.3(5)“a” allows the Department “full access at reasonable times to all records, materials and common areas pertaining to the provision of services and care to the tenants....” The subrule conforms with the statutory language and therefore was not changed.

One commenter suggested that the definition of “preponderance of the evidence” be added to subrule 67.10(3). This definition is already in rule 481—67.1(231B,231C,231D) and need not be repeated.

One commenter suggested that subrules 67.13(4) and 67.12(7) be amended to add that the Department should notify the program that it has elected not to conduct a monitoring revisit and has determined that, based on the submission of an accepted plan of correction, the program has corrected the cited regulatory insufficiencies. The Department finds the suggested language unnecessary.

After analysis and review of this rule making, no impact on jobs has been found.

These amendments are intended to implement Iowa Code section 231C.3(1) and 2013 Iowa Acts, Senate File 394.

These amendments shall become effective on January 1, 2014.

The following amendments are adopted.

ITEM 1. Adopt the following **new** definition in rule **481—67.1(231B,231C,231D)**:

“*Independent reviewer*” means an attorney licensed in the state of Iowa who is not currently and has not been employed by the department in the past eight years, or has not appeared in front of the department on behalf of a health care facility in the past eight years. Preference shall be given to an attorney with background knowledge, experience or training in long-term care.

ITEM 2. Rescind rule 481—67.10(17A,231B,231C,231D) and adopt the following **new** rule in lieu thereof:

481—67.10(17A,231B,231C,231D) Monitoring.

67.10(1) Frequency of monitoring. The department shall monitor a certified program at least once during the program’s certification period.

67.10(2) Accessibility of records and program areas. All records and areas of the program deemed necessary to determine compliance with the applicable requirements shall be accessible to the department for purposes of monitoring.

67.10(3) Standard for determining whether a regulatory insufficiency exists. The department shall use a preponderance-of-the-evidence standard when determining whether a regulatory insufficiency

exists. A preponderance-of-the-evidence standard does not require that the monitor shall have personally witnessed the alleged violation.

ITEM 3. Amend paragraph **67.11(1)“b”** as follows:

b. When the nature of the complaint is outside the department’s authority, the department shall forward the complaint or refer the complainant, if known, to the appropriate investigatory entity.

ITEM 4. Amend subrule 67.11(5) as follows:

67.11(5) Notification of program and complainant. The department shall notify the program and, if known, the complainant of the final report regarding the complaint investigation. ~~The department and the program shall follow the procedures outlined in subrules 67.10(2) through 67.10(7).~~

ITEM 5. Rescind rule 481—67.12(17A,231B,231C,231D) and adopt the following new rule in lieu thereof:

481—67.12(17A,231B,231D) Adult day services and elder group homes—preliminary report, plan of correction and request for reconsideration.

67.12(1) Preliminary report. When a regulatory insufficiency is found, a preliminary report detailing the insufficiency shall be sent by the department to the adult day services program or elder group home within 10 working days. The department may send the report electronically or by certified mail.

67.12(2) Plan of correction. Within 10 working days following receipt of the preliminary report, the adult day services program or elder group home shall submit a plan of correction to the department.

a. Contents of plan. The plan of correction shall include:

- (1) Elements detailing how the program will correct each regulatory insufficiency;
- (2) The date by which the regulatory insufficiency will be corrected;
- (3) What measures will be taken to ensure the problem does not recur;
- (4) How the program plans to monitor performance to ensure compliance; and
- (5) Any other required information.

The date by which the regulatory insufficiency will be corrected shall not exceed 30 days following the date of the exit interview without approval of the department.

b. Review of plan. The department shall review the plan of correction within 10 working days of receipt. The department may request additional information or suggest revisions to the plan. Once an acceptable plan of correction has been received, the department shall issue a final report within 10 working days and shall determine whether any enforcement action related to the program’s continued certification is necessary.

67.12(3) Request for reconsideration. Within 10 working days of receiving the preliminary report, the adult day services program or elder group home may submit a request for reconsideration in response to a regulatory insufficiency. Regardless of whether a request for reconsideration is submitted, a plan of correction must be submitted.

a. The request may include additional information to support the request for reconsideration.

b. The department shall review the request for reconsideration and additional information and determine whether to withdraw or modify the regulatory insufficiency.

c. The department shall accept a request for reconsideration if the additional information submitted by the program shows by a preponderance of the evidence that the regulatory insufficiency did not exist at the time of the monitoring.

d. The department’s decision regarding a request for reconsideration shall be reflected in the final report.

67.12(4) Final report. The final report shall be issued after the plan of correction and request for reconsideration have been considered. The department shall issue a final report regarding a monitoring whether or not any regulatory insufficiency is found. The final report may be delivered to the applicant or certificate holder by electronic or certified mail, or by personal service.

67.12(5) Appeal of final report. The final report and the civil penalty, if assessed, may be appealed. A written notice of appeal and request for hearing shall be delivered to the department within 30 days after the mailing or service of notice.

67.12(6) Hearings. Hearings shall be conducted by the administrative hearings division of the department pursuant to Iowa Code chapter 17A and 481—Chapter 10.

67.12(7) Monitoring revisit. The department may conduct a monitoring revisit to ensure that the plan of correction has been implemented and the regulatory insufficiency has been corrected. The department may issue a regulatory insufficiency for failure to implement the plan of correction. A monitoring revisit by the department shall review the program prospectively from the date of the plan of correction to determine compliance.

ITEM 6. Rescind rule 481—67.13(17A,231B,231C,231D) and adopt the following new rule in lieu thereof:

481—67.13(17A,231C,85GA,SF394) Assisted living programs—exit interview, final report, plan of correction.

67.13(1) Exit interview. The department shall provide an exit interview in person or by telephone at the conclusion of a monitoring, during which the department shall inform the assisted living program’s representative of all issues and areas of concern related to insufficient practices. A second exit interview shall be provided if the department identifies additional issues or areas of concern. The program shall have 2 working days from the date of the exit interview to submit additional or rebuttal information to the department.

67.13(2) Final report. The department shall issue the final report of a monitoring within 10 working days after completion of the on-site monitoring or the receipt by the department of additional or rebuttal information, by personal service, electronically or by certified mail. The department shall issue a final report regarding a monitoring whether or not any regulatory insufficiency is found.

67.13(3) Plan of correction. Within 10 working days following receipt of the final report, the program shall submit a plan of correction to the department.

a. Contents of plan. The plan of correction shall include:

- (1) Elements detailing how the program will correct each regulatory insufficiency;
- (2) The date by which the regulatory insufficiency will be corrected;
- (3) What measures will be taken to ensure the problem does not recur;
- (4) How the program plans to monitor performance to ensure compliance; and
- (5) Any other required information.

The date by which the regulatory insufficiency will be corrected shall not exceed 30 days from receipt of the final report pursuant to subrule 67.13(2) without approval of the department.

b. Review of plan. The department shall review the plan of correction within 10 working days. The department may request additional information or suggest revisions to the plan.

67.13(4) Monitoring revisit. The department may conduct a monitoring revisit to ensure that the plan of correction has been implemented and the regulatory insufficiency has been corrected. The department may issue a regulatory insufficiency for failure to implement the plan of correction. A monitoring revisit by the department shall review the program prospectively from the date of the plan of correction to determine compliance.

ITEM 7. Rescind rule 481—67.14(17A,231B,231C,231D) and adopt the following new rule in lieu thereof:

481—67.14(17A,231C,85GA,SF394) Assisted living programs—response to final report. Within 20 working days after the issuance of the final report and assessment of civil penalty, if any, the assisted living program shall respond in the following manner.

67.14(1) If not contesting final report. If the program does not desire to seek an informal conference or contest the final report and civil penalty, if assessed, the program shall remit to the department of inspections and appeals the amount of the civil penalty, if assessed. If an assisted living program has been assessed a civil penalty, the civil penalty shall be reduced by 35 percent if the requirements of subrule 67.17(5) are met.

67.14(2) Informal conference. If the assisted living program desires to contest the final report and civil penalty, if assessed, and request an informal conference, the assisted living program shall notify the department of inspections and appeals in writing that it desires to contest the final report and civil penalty and request in writing an informal conference with an independent reviewer.

a. Request for informal conference. The request for an informal conference must be in writing and include the following:

- (1) Identification of the regulatory insufficiency(ies) being disputed;
- (2) The type of informal conference requested: face-to-face or telephone conference; and
- (3) A request for monitor's notes for the regulatory insufficiencies being disputed, if desired.

b. Submission of documentation. The program shall submit the following within 10 working days from the date of the program's written request for an informal conference:

- (1) The names of those who will be attending the informal conference, including legal counsel; and
- (2) Documentation supporting the assisted living program's position. The assisted living program must highlight or use some other means to identify written information pertinent to the disputed regulatory insufficiency(ies). Supporting documentation that is not submitted with the request for an informal conference will not be considered, except as otherwise permitted by the independent reviewer upon good cause shown. "Good cause" means substantial or adequate grounds for failing to submit documentation in a timely manner. In determining whether the program has shown good cause, the independent reviewer shall consider what circumstances kept the program from submitting the supporting documentation within the required time frame.

c. Face-to-face or telephone conference. A face-to-face or telephone conference, if requested, will be scheduled to occur within 10 working days of the receipt of the written request, all supporting documentation and the plan of correction required by subrule 67.13(3).

- (1) Failure to submit supporting documentation will not delay scheduling.
- (2) The conference will be scheduled for one hour. The assisted living program will informally present information and explanation concerning the contested regulatory insufficiency(ies). The department will have time to respond to the assisted living program's presentation. Due to the confidential nature of the conference, attendance may be limited.

(3) If additional information is requested by the independent reviewer during the informal conference, the assisted living program will have 2 working days to deliver the additional materials to the independent reviewer.

(4) When extenuating circumstances preclude a face-to-face conference, a telephone conference will be held or the assisted living program may be given one opportunity to reschedule the face-to-face conference.

d. Results. The results of the informal conference will generally be sent within 10 working days after the date of the informal conference, or within 10 working days after the receipt of additional information, if requested.

(1) The independent reviewer may affirm or may modify or dismiss the regulatory insufficiency and civil penalty. The independent reviewer shall state in writing the specific reasons for the affirmation, modification or dismissal of the regulatory insufficiency.

(2) The department will issue an amended (changes in factual content) or corrected (changes in typographical/data errors) final report if changes result from the informal conference.

(3) The assisted living program must submit to the department a new plan of correction for the amended or corrected report within 10 calendar days from the date of the letter conveying the results of the conference.

(4) If the informal conference results in dismissal of a regulatory insufficiency for which a civil penalty was assessed, the corresponding civil penalty will be rescinded.

67.14(3) Procedure after informal conference. After the conclusion of an informal conference:

a. If the assisted living program does not desire to further contest an affirmed or modified final report, the assisted living program shall, within 5 working days after receipt of the written decision of the independent reviewer, remit to the department of inspections and appeals the civil penalty, if assessed.

b. If the assisted living program does desire to further contest an affirmed or modified final report, the assisted living program shall, within 5 working days after receipt of the written decision of the independent reviewer, notify the department of inspections and appeals in writing that it desires to formally contest the final report.

67.14(4) Appeals. Formal hearings shall be conducted by the administrative hearings division pursuant to Iowa Code chapter 17A and 481—Chapter 10.

ITEM 8. Renumber rules **481—67.15(17A,231C,231D)** to **481—67.18(231B,231C,231D)** as **481—67.20(17A,231C,231D)** to **481—67.23(231B,231C,231D)**.

ITEM 9. Adopt the following **new** rules 481—67.15(17A,231B,231C,231D) to 481—67.18(17A,231B,231C,231D):

481—67.15(17A,231B,231C,231D) Denial, suspension or revocation of a certificate.

67.15(1) Notice and request for hearing. The denial, suspension or revocation of a certificate shall be effected by delivering to the applicant or certificate holder by restricted certified mail or by personal service a notice setting forth the particular reasons for such actions. A denial, suspension or revocation shall be effective 30 days after certified mailing or personal service of the notice, unless the applicant or certificate holder gives the department written notice requesting a hearing within the 30-day period. If a timely request for hearing is made, the notice shall be deemed suspended pending the outcome of the hearing, unless subrule 67.15(3) or 67.15(4) applies. If an enforcement action has been implemented immediately in accordance with subrule 67.15(3) or 67.15(4), the enforcement action remains in effect regardless of a request for hearing.

67.15(2) Hearings. Hearings shall be conducted by the administrative hearings division of the department of inspections and appeals pursuant to Iowa Code chapter 17A and 481—Chapter 10.

67.15(3) Immediate suspension of a certificate. When the department finds that an imminent danger to the health or safety of tenants of a program exists which requires action on an emergency basis, the department may direct removal of all tenants from the program and suspend the certificate or require additional remedies to ensure the ongoing safety of the program's tenants prior to a hearing.

67.15(4) Immediate imposition of enforcement action. When the department finds that an imminent danger to the health or safety of tenants exists which requires action on an emergency basis, the department may immediately impose a conditional certificate and accompanying conditions upon the program in lieu of immediate suspension of the certificate and removal of the tenants from the program if the department finds that tenants' health and safety would still be protected. The program may request a hearing, but the immediate enforcement action remains in effect regardless of the request for hearing.

481—67.16(17A,231B,231C,231D) Conditional certification.

67.16(1) Conditional certification. In lieu of denial, suspension or revocation of a certificate, the department may issue a conditional certificate for a period of up to one year. Notwithstanding subrule 67.15(4), a conditional certificate shall be issued only when regulatory insufficiencies pose no greater risk to tenant health or safety than the potential for causing minimal harm.

a. The department shall specify the reasons for the conditional certificate in the notice issuing the conditional certificate.

b. The department may place conditions upon a certificate, such as requiring additional training; restriction of the program from accepting additional tenants for a period of time; or any other action or combination of actions deemed appropriate by the department.

c. Failure by the program to adhere to the plan of correction or conditions placed on the certificate may result in suspension or revocation of the conditional certification and may result in further enforcement action as available under applicable requirements.

d. A program must be in substantial compliance with applicable requirements before the removal of a conditional certificate by the department. Prior to lifting a conditional certificate, the department may conduct a monitoring to verify substantial compliance. Once the program is in substantial compliance with applicable requirements, the department shall lift the conditional certificate.

67.16(2) Appeal of conditional certificate. A written request for hearing must be received by the department within 30 days after the mailing or service of notice. The conditional certificate shall not be suspended pending the hearing. Hearings shall be conducted by the administrative hearings division of the department of inspections and appeals pursuant to Iowa Code chapter 17A and 481—Chapter 10.

481—67.17(17A,231B,231C,231D) Civil penalties.

67.17(1) When civil penalties may be issued. Civil penalties may be issued when the director finds that any of the following has occurred:

a. A program that does not comply with applicable requirements and the noncompliance results in imminent danger or a substantial probability of resultant death or physical harm to a tenant may be assessed a civil penalty of not more than \$10,000.

b. A program that continues to fail or refuses to comply with applicable requirements within prescribed time frames established by the department or approved by the department in the program's plan of correction and the noncompliance has a direct relationship to the health, safety, or security of tenants may be assessed a civil penalty of not more than \$5,000.

c. A program that prevents, interferes with or attempts to impede in any way any duly authorized representative of the department in the lawful enforcement of applicable requirements may be assessed a civil penalty of not more than \$1,000.

d. A program that discriminates or retaliates in any way against a tenant, tenant's family, or an employee of the program who has initiated or participated in any proceeding authorized by Iowa Code chapter 231B, 231C or 231D and the corresponding administrative rules may be assessed a civil penalty of not more than \$5,000.

67.17(2) Duplicate civil penalties prohibited. The department shall not impose duplicate civil penalties on a program for the same set of facts and circumstances.

67.17(3) Factors in determining the amount of a civil penalty. The department shall consider the following factors when determining the amount of a civil penalty:

a. The frequency and length of time the regulatory insufficiency occurred (i.e., whether the regulatory insufficiency was an isolated or a widespread occurrence, practice, or condition);

b. The past history of the program as it relates to the nature of the regulatory insufficiency (the department shall not consider more than the current certification period and the immediately previous certification period);

c. The culpability of the program as it relates to the reasons the regulatory insufficiency occurred;

d. The extent of any harm to the tenants or the effect on the health, safety, or security of the tenants which resulted from the regulatory insufficiency;

e. The relationship of the regulatory insufficiency to any other types of regulatory insufficiencies which have occurred in the program;

f. The actions of the program after the occurrence of the regulatory insufficiency, including when corrective measures, if any, were implemented and whether the program notified the director as required;

g. The accuracy and extent of records kept by the program which relate to the regulatory insufficiency, and the availability of such records to the department;

h. The rights of tenants to make informed decisions;

i. Whether the program made a good-faith effort to address a high-risk tenant's specific needs and whether the evidence substantiates this effort.

67.17(4) Civil penalties due. The civil penalty shall be paid to the department within 30 days following the program's receipt of the final report and demand letter. The program may appeal in accordance with rule 481—67.12(17A,231B,231D) or 481—67.14(17A,231C,85GA,SF394). If the program appeals, the civil penalty shall be deemed suspended until the appeal is resolved.

67.17(5) Reduction of civil penalty amount by 35 percent. If an assisted living program has been assessed a civil penalty, the civil penalty shall be reduced by 35 percent if both of the following requirements are met:

a. The program does not request a formal hearing pursuant to rule 481—67.12(17A,231B,231D) or 481—67.14(17A,231C,85GA,SF394), or withdraws its request for formal hearing within 30 calendar days of the date that the civil penalty was assessed; and

b. The civil penalty is paid and payment is received by the department within 30 calendar days of receipt of the final report.

481—67.18(17A,231B,231C,231D) Judicial review. Judicial review shall be conducted pursuant to Iowa Code chapter 17A and 481—Chapter 10.

ITEM 10. Amend **481—Chapter 67**, implementation sentence, as follows:

These rules are intended to implement Iowa Code chapters 231B, 231C as amended by 2013 Iowa Acts, Senate File 394, and 231D.

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EDITOR’S NOTE: For replacement pages for IAC, see IAC Supplement 10/2/13.