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To: Adult Family Homes
Community-Based Residential Facilities
Residential Care Apartment Complexes

AFH
CBRF
RCAC

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Division of Quality Assurance

Electronic Video Monitoring and Filming in BAL Regulated Facilities

This memo provides guidance to providers on the impact of electronic video monitoring, recording, photographing and filming on residents' and tenants' right to privacy in facilities regulated by the Division of Quality Assurance, Bureau of Assisted Living (BAL). It describes the permissible and impermissible circumstances and locations for facility-initiated use of such recording equipment under existing Wisconsin State Statutes and Administrative Rules.

Background

Technological advancements in electronic recording and monitoring equipment used to monitor homes and businesses were identified as an emerging concern for assisted living facilities in Wisconsin in 2007. They continue to be a significant concern because implementation of these technologies can create privacy issues that affect resident or tenant rights.

In response to questions that have arisen during compliance surveys, the Division of Quality Assurance (DQA), in consultation with the Department's Office of Legal Counsel (OLC), provides guidance on the use of electronic video monitoring and filming equipment in BAL regulated facilities. The information presented in this memo recognizes the need to balance the use of emerging technologies with residents' and tenants' rights to privacy in their homes.

Definitions

- “Electronic video monitoring” is the use of cameras or other equipment to *transmit* images of residents, visitors, or staff within or around an AFH, CBRF, or RCAC for possible instant viewing at another location or at another time.
- “Filming” is the use of cameras or other equipment to *record or photograph* images of residents, visitors, or staff within or around an AFH, CBRF, or RCAC for possible viewing at another location at another time.

State Statutes and Administrative Rules Related to Privacy, Electronic Video Monitoring, and Filming

State statutes and administrative rules that apply to ALL assisted living facilities (AFHs, CBRFs, and RCACs):

Wis. Stat. ch. 51, Mental Health Act, applies to CBRFs, AFHs, and RCACs **if** the resident or tenant meets the statutory definition of patient.

Wis. Stat. § 51.61 Patient Rights.

- (1) In this section, "patient" means any individual who is receiving services for mental illness, developmental disabilities, alcoholism or drug dependency, including any individual who is admitted to a treatment facility in accordance with this chapter or ch. 48 or 55 or who is detained, committed or placed under this chapter or ch. 48, 55, 971, 975 or 980, or who is transferred to a treatment facility under s. 51.35 (3) or 51.37 or who is receiving care or treatment for those conditions through the department or a county department under s. 51.42 or 51.437 or in a private treatment facility.

....

[E]ach patient shall . . .

- (o) Except as otherwise provided, have a right not to be filmed or taped, unless the patient signs an informed and voluntary consent that specifically authorizes a named individual or group to film or tape the patient for a particular purpose or project during a specified time period. The patient may specify in the consent periods during which, or situations in which, the patient may not be filmed or taped. If a patient is adjudicated incompetent, the consent shall be granted on behalf of the patient by the patient's guardian.

Wis. Admin. Code Ch. DHS 94 applies to CBRFs, AFHs, and RCACs if the resident or tenant meets the definition of patient.

Wis. Admin. Code § DHS 94.02 Definitions. In this chapter:

- (32) "Patient" has the meaning prescribed in s. 51.61 (1) (intro.), Stats.

Wis. Admin. Code § DHS 94.18 Filming and taping.

(1) No patient may be recorded, photographed, or filmed for any purpose except as allowed under s. 51.61 (1) (o), Stats., and this section.

(3) The informed consent document shall specify that the subject patient may view the photograph or film or hear the recording prior to any release and that the patient may withdraw informed consent after viewing or hearing the material.

State statutes and administrative rules that apply to SPECIFIC assisted living facility types:

Adult Family Homes

Wis. Admin. Code § DHS 88.10 Resident rights.

(1) LEGAL RIGHTS. A licensee shall comply with all applicable statutes and rules relating to resident rights, including s. 51.61, Stats., chs. 54, 55, and 304, Stats., and chs. DHS 92 and 94.

(3) RIGHTS OF RESIDENTS. ... A resident shall have all of the following rights: (b) *Privacy*. To have physical and emotional privacy in treatment, living arrangements and in caring for personal needs, including toileting, bathing and dressing.

(t) *Visits*. To have private visitors and have adequate time and private space for visits.

Community Based Residential Facilities

Wis. Stat. § 50.09 Rights of residents in certain facilities:

(1) RESIDENTS' RIGHTS. Every resident in a nursing home or community-based residential facility shall, except as provided in sub. (5), have the right to:

(a) private and unrestricted communications with the resident's family, physician, physician assistant, advanced practice nurse prescriber, attorney, and any other person, unless medically contraindicated as documented by the resident's physician, physician assistant, or advanced practice nurse prescriber in the resident's medical record, except that communications with public officials or with the resident's attorney shall not be restricted in any event. The right to private and unrestricted communications shall include, but is not limited to, the right to:

2. Reasonable access to a telephone for private communications.
3. Opportunity for private visits.

Wis. Stat. § 50.09(1)(f) states "Every resident in a nursing home or community-based residential facility shall ... have the right to:

(f) physical and emotional privacy in treatment, living arrangements and caring for personal needs, including, but not limited to:

1. Privacy for visits by spouse or domestic partner.
2. Privacy concerning health care.
3. Confidentiality of health and personal records

Wis. Admin. Code § DHS 83.01(2).

This chapter is intended to ensure that all CBRFs provide a living environment for residents that is as homelike as possible and is the least restrictive of each resident's freedom; and that care and services a resident needs are provided in a manner that protects the rights and dignity of the resident and that encourages the resident to move toward functional independence in daily living or to maintain independent functioning to the highest possible extent.

Wis. Admin. Code § DHS 83.43(1).

The CBRF shall provide a living environment that is safe, clean, comfortable, and homelike.

Wis. Admin. Code § DHS 83.32 Rights of residents.

(3) RIGHTS OF RESIDENTS. ... In addition to the rights under s. 50.09, Stats., each resident shall have all of the following rights:

(L) *Least restrictive environment*. Have the least restrictive conditions necessary to achieve the purposes of the resident's admission. The CBRF may not impose a curfew, rule or other restriction on a resident's freedom of choice.

(m) *Recording, filming, photographing*. Not be recorded, filmed or photographed without informed, written consent by the resident or resident's legal representative. The CBRF may take a photograph for identification purposes. The department may photograph, record or film a resident pursuant to an inspection or investigation under s. 50.03 (2), Stats., without his or her written informed consent.

Residential Care Apartment Complexes

Wis. Admin. Code § DHS 89.34 Rights of Tenants.

(2) PRIVACY. To have privacy in his or her independent apartment and when receiving supportive, personal or nursing services.

Analysis

Allowable / Disallowable Filming and Video Monitoring Locations in AFHs and CBRFs

State statutes and administrative rules for AFHs and CBRFs consistently address each resident's right to privacy in care and treatment, accommodations, and communications, namely visitors and phone calls. The use of electronic video monitoring or filming is not consistent with the provider's obligation to protect and promote each resident's right to privacy when engaged in

any of these activities. Such equipment installed in living areas (space used for daily activities such as dining, recreation, sleeping, hosting visitors, etc.) is capable of transmitting images of residents receiving care and treatment, engaging in activities of daily living, or visiting with guests, staff, or other residents. Whether done deliberately or inadvertently, transmitting images of residents engaging in these types of activities violates their right to privacy.

Provided that the facility posts signs indicating that monitoring or filming is taking place, BAL has determined that electronic video monitoring and filming in the following locations will not infringe upon resident privacy rights in BAL regulated AFHs and CBRFs:

- Parking areas;
- Locations where individuals may enter or exit the building;
- Areas that are marked for employees only;
- Storage areas;
- Hallways or corridors that do not lead to resident rooms or activity areas; and
- Personnel office that is not accessible to residents.

However, electronic monitoring must **never** be used as a measure to reduce staffing.

Privacy is a resident right. Wis. Stats., § 50.09 and Wis. Admin. Code §§ DHS 88.10(3) applicable to AFHs and DHS 83.32(3) applicable to CBRFs, are specifically related to preserving resident privacy in many areas. Those areas include: health care; treatment (both physical and emotional); living arrangements; caring for personal needs including toileting, bathing and dressing; visits by spouse or domestic partner; confidentiality of health and personal information and records; private and unrestricted communications ; and the right to not be searched when there is a reasonable expectation of privacy. Due to these privacy protections, BAL has determined that electronic video monitoring and filming in the following locations of AFHs and CBRFs would infringe upon resident privacy rights:

- Resident bedrooms;
- Facility or resident bathrooms or shower rooms;
- Dining rooms;
- Therapy rooms;
- Visiting areas, lounges, multipurpose rooms, or activity rooms;
- Hallways that lead to resident rooms; or
- Any other space where a resident may be seen meeting with visitors, engaging in an activity (including eating), sleeping, discussing their current condition, or receiving personal care, medical treatment or therapy.

Due to concern about violating residents' significant privacy concerns, electronic video monitoring or filming in these locations will be viewed by the Department as a violation of resident privacy rights even with the residents' informed, written consent.

Allowable / Disallowable Filming and Video Monitoring Locations in Residential Care Apartment Complexes (RCAC)

Electronic video monitoring and filming are *not allowed* in the following RCAC locations:

- Resident's private apartment; and
- Any other space where a resident may be seen receiving supportive, personal and/or nursing services.

Other Guidelines Regarding the Use of Electronic Video Monitoring or Filming Equipment in Any Assisted Living Facility

State statutes and administrative rules for AFHs, and CBRFs uniformly afford each resident and tenant the right to privacy. Resident and tenant rights are not subject to the waiver or variance procedures that allow exceptions from an administrative rule requirement. Accordingly, the following guidelines on the use of electronic video monitoring and filming are applicable in all BAL regulated AFHs, CBRFs and RCACs:

- Electronic video monitoring and filming may be allowed in cooperation with law enforcement on a case-by-case basis, specific to an investigation. Law enforcement may need permissions, waivers, warrants and other authorization to proceed.
- Mandatory consent to the use of electronic video monitoring or filming equipment is not an acceptable condition of admission to any Department-regulated assisted living facility. Per the following administrative rules, facilities cannot prohibit admissions or require residents or tenants to give up their rights as part of any admission, service, or risk agreement:

Rules Applicable to Patients in any Assisted Living Facility Type:

Wis. Admin. Code § DHS 94.06 Assistance in the exercise of rights.

- (1) Each service provider shall assist patients in the exercise of all rights specified under ch. 51, Stats., and this chapter.
- (2) No patient may be required to waive any of his or her rights under ch. 51, Stats., or this chapter as a condition of admission or receipt of treatment and services.

Rules Applicable to CBRFs:

Wis. Admin. Code § DHS 83.29 Admission agreement.

- (4) CONFLICT WITH THIS CHAPTER. No statement of the admission agreement may be in conflict with any part of this chapter, unless the department has granted a waiver or variance of a provision of this chapter.

Wis. Admin. Code § DHS 83.03 Variance and Waiver

(2) EXCEPTION TO A REQUIREMENT.

(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.

Rules Applicable to RCACs:

Wis. Admin. Code § DHS 89.27 Service agreement.

(3) OTHER SPECIFICATIONS.

(b) A service agreement may not waive any of the provisions of this chapter or other rights of the tenant

Wis. Admin. Code § DHS 89.28 Risk Agreement.

(3) NO WAIVER OF RULES OR RIGHTS. A risk agreement may not waive any provision of this chapter or any other right of the tenant.

Conclusion

As described in this memo, electronic video monitoring or filming in areas of facilities that would infringe upon resident privacy rights will result in violations of the residents' or tenants' right to privacy. If your facility currently uses electronic video monitoring or filming equipment in areas included in the list of locations in which infringe upon resident privacy rights, please discontinue use to comply with state statutes and administrative rules.

The Department recognizes that there may be unique situations not explicitly covered by the guidance offered in this memo:

- Cases in which an individual resident may benefit from, or request the use of electronic video monitoring or filming equipment, *e.g.*, cases where the use is indicated by a therapeutic treatment plan or where a competent resident initiates a request.
- Client groups whose rights are restricted by the Department of Corrections.
- Religious services, recognition ceremonies, or public speeches that are broadcast to a wider audience than is present in the room.

Questions

If you encounter a unique situation similar to those detailed above, or have any other questions about this memo, please contact your Regional Director in the Bureau of Assisted Living for additional guidance before pursuing installation of electronic video monitoring or filming equipment. The Assisted Living Regional Director contacts can be found at: http://dhs.wisconsin.gov/rl_DSL/Contacts/ALSreglmap.htm

Facilities are also encouraged to consult with their own legal counsel regarding these issues.

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