N Y L P I

New York Lawyers
For The Public Interest, Inc.
151 West 30th Street, 11th Floor
New York, NY 10001-4017
Tel 212-244-4664 Fax 212-244-4570
TTD 212-244-3692 www.nylpi.org

December 18, 2018

Susan Milstein, Esq.
NYS Office for People With Developmental Disabilities
44 Holland Avenue 3rd Floor, Albany, NY 12229-0001

Re: Comments of Counsel for the Willowbrook Class and the CAB regarding the Proposed Draft Occupancy Agreement

Dear Ms. Milstein:

This letter expands on some of the concerns I raised in our conference call on January 12, 2018. I sent the draft occupancy agreement to the CAB and my co-counsel at the New York Civil Liberties Union and want to share our thoughts and objections on behalf of the Willowbrook class members (as well as other as individuals with intellectual and/or developmental disabilities). While I understand that you are still refining the agreement, it appears that you are coming close to completion and we could not possibly counsel our class members and their family, guardians, or advocates to sign the agreement as it stands.

General Concerns

It is the consensus amongst the plaintiffs that the contract, in its current form, is a textbook example of a contract of adhesion. It waives many legal rights of the consumers without any concomitant concession from the agencies. As noted by the comment by AHRC in their markup, the agreement is self-serving towards the interest of the party drafting and propounding the contract. In particular, we object to the language towards the end that concedes in advance that the consumer had had free choice and that the setting constitutes the most integrated setting available. In the current environment -- where there is a long waiting list for residential placements and where consumers are not even asked if they are willing to have a roommate, let alone being given a choice of roommates, it is ludicrous to argue that signing this agreement and accepting the placement is the exercise of "choice". We would never allow any class member to sign a contract that includes the language in this document.

We also have significant concerns about the propriety of having many of our class members sign a document like this. There does not appear to be a requirement that the agency document the capacity to contract of the individual. In addition, as I stated during the conference call, I have some general concerns having to do with the readability of the form. There are many Willowbrook class members and individuals with intellectual and/or developmental disabilities who have limited reading abilities who do not have guardians and do not retain the capability to

sign such a document. And, many guardians or other family members who sign for individuals would probably find this form confusing as there is a lot of jargon and references to regulations whose import is not clear. We appreciate your expressed willingness to create a plain language explanation of the form and its consequences. To that end, the agreement should incorporate by reference the explanatory document, which should be attached to every agreement. I would also suggest a script and training for the care coordinators (currently MSCs) who go over these documents with class members. We would want to review and comment on that script prior to the authorization of the use of this form.

We also object both to the substance and the imprecise drafting in the section relating to a resident's rights and responsibilities, which states that "Unless otherwise specified in my Individual Support Plan or other 'person centered service plan' for me, which Plan or plans will supersede the provisions hereof, I have the right to…". The language relating to the relationship between an individual's rights under their service plan and the "rights" conferred by this agreement is not clear and does not explain the consequences in language a class member could understand. For example, an ISP might give an individual rights which are greater than those conferred under the bare-bones agreement – it must be made clear that the ISP supersedes the occupancy agreement and either the occupancy agreement or whatever explanatory form is developed needs to give examples. This would also relate to situations where a service plan spelled out restrictions in rights (such as having a lock on the door or not having access to food at all times) which are otherwise guaranteed under the contract.

Due process issues

The Willowbrook parties are very concerned by the repeated vague references to the rules of the provider and the duty of the consumer to abide by them. For example, paragraph 3 of "my responsibilities" as well as paragraph 4 in the section below relating to visitors both indicate that tenants are required to follow the rules of the provider and that their guests must do so as well. Presumably, the agency will be required to spell out these rules, but there is no requirement that the tenant has the right to go over the rules in detail and be required to initial every paragraph. Even assuming that the class member is given a copy of the rules, these references to rules of conduct give far too much leeway to providers and are in no way equivalent to what you might see in a lease. In fact, because this is a contract, it should be drafted so all ambiguity runs *against* the agency. We therefore believe that any behavior that would constitute a breach of the contract\agreement should be spelled out in the agreement itself so that class members or those signing on their behalf can make an informed choice and, in the event of a disagreement, be given notice of what provision they have violated and what evidence supports that finding.

Given the many examples of deficient notices we have seen under Title 14 New York Codes, Rules and Regulations 633, we also ask that you develop a form notice for agencies to use when they are alleging that an individual has either violated the agreement or the agency is no longer willing to serve them. That notice must require the agency to detail all the steps they took to avoid discharging the individual and also summarize the facts on which the decision to terminate the agreement is based. The Commissioner should routinely dismiss any attempt to discharge individuals when these requirements are not met.

Reasons for Termination of the Agreement

In addition to our general concerns relating to notice and due process, we have some specific objections to the paragraph enumerating reasons why a resident could be forced out. Specifically, we object to the language stating that a consumer could be moved or his services terminated because of "Allegations of abuse or neglect". We understand why this would apply if the tenant was a perpetrator of abuse but strongly object to any language that would allow an agency to move a victim of abuse or neglect.

With regard to termination or relocation due to "medical reasons, we believe that this provision is only acceptable if it also spells out that an agency is required to exhaust all possible means of accommodating the individuals' medical needs (such as hiring additional staff or making physical accommodations) and that the agency is responsible for finding an appropriate and integrated new setting for the individual.

We believe that the term "other emergencies" needs to be defined further and the phrase "closure of the residence" should be qualified by involuntary closure or something else to indicate that the closure must be for reasons beyond the control of the agency.

Discharge planning

One of the most striking deficits in the agreement, especially when read in conjunction with 14 NYCRR 633 is the abrogation of class members' rights to discharge planning. Both the regulations and the agreement fail to require the agency, even if it is found to be justified in terminating someone's tenancy, ensures that there is a safe discharge plan in place. Safe discharge would not include discharge to a shelter, nursing home, adult home, a psychiatric facility or some other restrictive setting. If class members are denied the same the rights of tenants, including eviction only for cause, then they must have the right to discharge planning and a Medicaid fair hearing to contest a discharge.[1]

During our phone call, I also pointed out that the reference in the section dealing with termination of the agreement by the agency is very unclear. On the one hand, it references 14 NYCRR 633 and steers individuals into that system – a dispute resolution system that is not on the record and denies individuals access to Medicaid fair hearing rights. On the other hand, it makes reference to "any applicable landlord-tenant laws". As you know from my discussion on the call, I believe that consumers should have the right to landlord-tenant court procedures. In addition to anything else, the agreement as it stands forces individuals into an administrative system where

[1] It is our understanding that some agencies believe that the reference to NYCRR 633 is somehow protective of the rights of consumers and would somehow or other guarantee discharge planning. In that regard, we would point out that general principles of drafting and contract interpretation would argue that the more specific document, i.e., the agreement, would control. And, this would argue against reading a requirement for discharge planning into this contract.

the consumer explicitly bears the burden of proof[2] and subjects them to termination of the tenancy after 14 days unless the class member/tenant files an objection (633.12 (a) (8) (ii)). Contrast this with the procedures under the N.Y. Real Property Law which does not permit eviction absent the filing of an action by the landlord and, even assuming no response by the tenant, a court order allowing eviction in 30 days.[3] Furthermore, while 14 NYCRR 633 generally provides that services must continue while the objection is pending, the regulations also provide that: " in order to protect a person's health, safety, or welfare or the health, safety, or welfare of others**, nothing herein shall preclude a change in programming for, or the relocation or discharge of a person.** However, while an objection to placement or discharge is undergoing administrative review, relocation or discharge shall only take place with the commissioner's approval." 14 CRR 633.12 (a) (8)(i) (emphasis added). This is substantially less protective than landlord-tenant law.

For these reasons, we strongly feel that class members should have the right to landlord-tenant review. However, if the agency has determined that class members in supported apartments do not have that right and 14 NYCRR 633 is the only remedy available, you should not confuse the issue by including this language in the agreement. You must explicitly warn class members that the normal protections of landlord-tenant law do not apply to them, including a notice that spells out the vastly different standards for termination and the lesser level of protection.

Failure to Require Compliance by Agencies with Applicable Law

The agreement does not specifically alert class members or agencies to the agency's duty to make ongoing accommodations to the accessibility needs of the resident under the Americans with Disabilities Act ("ADA"), Section 504 of the Rehabilitation Act, and New York state law. Rather, it only requires that the provider ensure that the setting "is physically accessible to the individual at the time of initial occupancy". Class members have the right to ongoing physical modifications necessary to allow them to remain in their homes and the agreement should make that clear. Class members also have the right to modifications to their services beyond modifications of the physical environment. And, the agency needs to provide additional staffing or modification of rules in order to allow the class member to continue to live there. Finally, the agreement should provide notice to the class member of his/her rights under the ADA, Section 504 of the Rehabilitation Act, and the New York State Human Rights Law (and where applicable, the New York City Human Rights Law).

We are happy to discuss with you as a group our concerns. I also renew my suggestion that you discuss this with Mental Hygiene Legal Service since MHLS would presumably be charged with providing legal representation to all non—class members. Please be aware that

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[2] The agreement specifically states in paragraph G of the section dealing with termination by the agency: *"at the hearing, I can present written or oral evidence to show why this agreement should not be terminated, including having people speak on my behalf"*.

[3] In addition, assuming that the commissioner rules in favor of the agency and allows discontinuing of services, judicial review is difficult to pursue without legal assistance. Even assuming the class member is able to pursue an Article 78 proceeding, the Commissioner enjoys judicial deference in those proceedings and therefore the class member is forced into bearing the burden of proof once again.

unless substantial changes are made in this agreement and our concerns are addressed, we will not allow any class members to be subjected to or sign this agreement.

Thank you very much for the opportunity to participate in the review process and the discussions. Please let me know if you would like to schedule a phone call with my co-counsel and the CAB.

Sincerely,

Roberta Mueller
Senior Supervising Attorney

Cc: Beth Haroules, Esq. NYCLU
Lisa Laplace, Esq. NYCLU
Antonia Ferguson, CAB