

FINAL STATEMENT OF REASONS

- a) Specific Purpose of the Regulations and Factual Basis for Determination that Regulations Are Necessary

Section 80001(a)(5)

Specific Purpose:

This section is amended to remove language from the definition of an “Adult Residential Facility” (ARF) that would appear to exclude elderly persons from care in an ARF.

Factual Basis:

These amendments are necessary to comply with and implement the Settlement Agreement (“Agreement”) of October 27, 2008 between the California Association of Mental Health Patients’ Rights Advocates (CAMHPRA) and the California Department of Social Services (CDSS). CAMHPRA filed a lawsuit against the CDSS on behalf of persons with mental health disabilities who are 60 years of age or older, claiming that the CDSS unlawfully excluded adults over the age of 59 from licensed ARFs. The Agreement was reached between CAMHPRA and the CDSS in *California Association of Mental Health Patients’ Rights Advocates v. Cliff Allenby, et al.*, Santa Clara County Superior Court, No. 106-CV061397. *This Agreement specifies all of the actual regulatory language proposed in this regulation package.*

Under the terms of the Agreement, the CDSS agreed to develop this regulation package, which contains all of the actual regulatory language specified in the Agreement. Under existing regulations, an ARF may *retain* clients over 59 years of age if certain criteria are met; however, an ARF must always obtain an exception in order to *admit* such a client. This regulation package, known as the ARF Age Regulations, will allow an ARF to admit a person 60 years of age or older without the need for an exception if certain criteria, as set forth in proposed Section 85068.4, are met. The proposed regulations will also specify other provisions related to the care of persons 60 years of age or older in ARFs. (An exception is a written authorization by the licensing agency to use alternative means that meet the intent of the regulations and that are based on the unique needs or circumstances of the client for whom the exception is granted, as specified in the California Code of Regulations (CCR), Title 22, Section 80001(e)(6).)

Further, with regard to the specific amendments proposed in this section, the major amendment to the definition of an ARF—the deletion of the phrase “adults except elderly persons,” in reference to the clients that ARFs can accept—is necessary to clarify that “elderly persons” are not necessarily excluded from an ARF. This is consistent with the overall purpose of the proposed regulations. Other minor editorial changes were also made for clarity and consistency. As indicated below, Sections 80001(a)(5)(A) and (a)(5)(B) amplify the provisions of this section.

Section 80001(a)(5)(A)

Specific Purpose:

This section is adopted to establish that an ARF may care for persons 18 years of age through 59 years of age.

Factual Basis:

This section is necessary to comply with and implement the aforementioned Agreement between CAMHPRA and the CDSS. Please also see the justification under Section 80001(a)(5).

This section is also necessary for clarity and consistency. While existing Section 80001(a)(5) states that an ARF may care for “adults,” it does not define the age range that constitutes an “adult.” An “adult” is defined in existing Section 80001(a)(3) simply as “a person who is 18 years of age or older.” However, Health and Safety Code Section 1569.2(l) defines an RCFE in part as “a housing arrangement chosen voluntarily by persons 60 years of age or over.” In addition, the regulations governing RCFEs, contained in CCR, Title 22, Division 6, Chapter 8, do the following: 1) define an “elderly person” as a person 60 years of age or older, in Section 87101(e)(2); and 2) define an RCFE in part as a facility “where 75 percent of the residents are sixty years of age or older,” in Section 87101(r)(5). Thus, the definition for an “adult” in this section, as someone 18 years of age through 59 years of age, is consistent with existing licensing statute and regulations that define an adult as someone 18 years of age or older; and that define an “elderly person” as someone 60 years of age or older.

Section 80001(a)(5)(B)

Specific Purpose:

This section is adopted to establish that an ARF may care for persons 60 years of age or older if certain criteria, as set forth in proposed Section 85068.4, are met.

Factual Basis:

This section is necessary to comply with and implement the aforementioned Agreement between CAMHPRA and the CDSS. Please also see the justification under Section 80001(a)(5).

This section is also necessary for clarity and consistency. As indicated under the justification for Section 80001(a)(5)(A), the age range of “60 years of age or older” is consistent with how an elderly person is defined in existing RCFE statute and licensing regulations. The phrase “only in accordance with Section 85068.4” is necessary to clarify that persons 60 years of age or older may reside in ARFs, but may do so only if certain criteria, as set forth in proposed Section 85068.4, are met. In general, these criteria will help ensure the compatibility and the health and safety of all of the clients residing in an ARF.

Further, this section is consistent with existing licensing practices. Currently, a person 60 years of age or older may be admitted to an ARF if the licensee requests and is granted an exception. Moreover, a person 60 years of age or older may currently be *retained* in an ARF under existing Section 85068.4(b).

Section 85002(a)

Specific Purpose:

This section is adopted to add the form LIC 602 (10/99), Physician's Report for Community Care Facilities, to the list of forms in Section 85002.

Factual Basis:

This section is necessary for clarity, consistency and ease of use. As various regulation packages affecting ARFs are developed and adopted, pertinent forms are being listed in Section 85002. This consolidation of references to forms into a single section – rather than having references to forms scattered throughout the regulations – is gradually being done in the licensing regulations affecting all facility categories. This approach makes it easier for licensees and providers, licensing staff, and the public to access information about which forms affect a particular licensing category. It also makes it substantially easier to update, add or eliminate references to forms in the regulations in the future.

More specifically, the reference to the LIC 602, Physician's Report for Community Care Facilities, is being added to this section now because proposed Section 85068.4(c)(3) references the requirement for a licensee to maintain documentation of a medical assessment for any person 60 years of age or older admitted or retained by an ARF. While the LIC 602 is not a required form, it is widely used to document medical assessments for clients of ARFs.

Please also see the justification under Section 85068.4(e).

Section 85002(b)

Specific Purpose:

This section is adopted to add the form LIC 602A (12/04), Physician's Report for Residential Care Facilities for the Elderly (RCFE), to the list of forms in Section 85002.

Factual Basis:

This section is necessary for clarity, consistency and ease of use. The specific reference to the LIC 602A, Physician's Report for Residential Care Facilities for the Elderly (RCFE), is necessary because proposed Section 85068.4(e) requires that the medical assessment for each client 60 years of age or older be updated annually and in accordance with the RCFE regulations. While the LIC 602A is not a required form, it is widely used to document medical assessments for residents of RCFEs; and it is reasonable to assume that it would be a valuable form for use in updating medical assessments in accordance with proposed Section 85068.4(e).

Please also see the justifications under Sections 85002(a) and 85068.4(e).

Sections 85002(c) through (f) (Renumbered)

Specific Purpose/Factual Basis:

These sections are being renumbered from Sections 85002(a) through (d), respectively, in order to include the forms LIC 602 and LIC 602A in alphabetical order. This is being done for clarity, consistency and ease of use.

Section 85068.4(a)(3)

Specific Purpose:

This section is amended to make minor editorial changes.

Factual Basis:

These amendments are necessary to comply with and implement the aforementioned Agreement between CAMHPRA and the CDSS. Please also see the justification under Section 80001(a)(5).

These amendments are also necessary for clarity, consistency and ease of use.

Section 85068.4(b)

Specific Purpose:

This section is amended to establish that licensees may admit, as well as retain, persons who are 60 years of age or older; and to make minor editorial changes.

Factual Basis:

These amendments are necessary to comply with and implement the aforementioned Agreement between CAMHPRA and the CDSS. Please also see the justification under Section 80001(a)(5).

These amendments are also necessary to change the age range in regulation from “over 59 years of age” to “60 years of age or older,” to conform to the definition of “elderly person” in existing Section 87101(e)(2) of the RCFE regulations. In addition, this age range is consistent with Health and Safety Code Section 1569.2(1); and with existing Section 87101(r)(5) of the RCFE regulations. Please also see the justification under Section 80001(a)(5)(A).

Further, these amendments are necessary to allow ARFs to admit (rather than just retain) persons 60 years of age or older as long as they are compatible with other clients, require the same level of care and supervision as other clients, and the licensee is able to meet their needs. Currently, a person over 59 years of age may be admitted to an ARF, but only if the licensee obtains an exception. With the adoption of this regulation package, a person 60 years of age or older may be admitted to an ARF without an exception as long as certain criteria, as set forth in proposed Section 85068.4, are met. As a result, a person 60 years of age or older with mental health or developmental disabilities should have greater access to care at an ARF that has a program designed to meet his or her mental health and/or developmental needs.

Finally, these amendments are necessary to make minor editorial changes for clarity and consistency.

Section 85068.4(b)(1) (Renumbered)

Specific Purpose/Factual Basis:

The specific purpose/factual basis of this amendment is to renumber Section 85068.4(b)(1) to Section 85068.4(g) in order to consolidate this section with existing Section 85068.4(b)(2), restructure the regulatory language, and add related provisions.

This amendment is also necessary to comply with and implement the aforementioned Agreement between CAMHPRA and the CDSS. Please also see the justification under Section 80001(a)(5).

Section 85068.4(b)(2) (Renumbered)

Specific Purpose/Factual Basis:

The specific purpose/factual basis of this amendment is to renumber Section 85068.4(b)(2) to Section 85068.4(g) in order to consolidate this section with existing Section 85068.4(b)(1), restructure the regulatory language, and add related provisions.

This amendment is also necessary to comply with and implement the aforementioned Agreement between CAMHPRA and the CDSS. Please also see the justification under Section 80001(a)(5).

Section 85068.4(c) et seq.

Specific Purpose:

This section is adopted to require certain information to be in a person's file when a licensee of an ARF admits or retains any person 60 years of age or older.

Factual Basis:

This section is necessary to comply with and implement the aforementioned Agreement between CAMHPRA and the CDSS. Please also see the justification under Section 80001(a)(5).

In addition, this section is necessary to clarify that certain information must be in a person's file in order for a licensee of an ARF to admit or retain any person 60 years of age or older. As indicated below, the required information is consistent with existing requirements. Moreover, its consolidation into the person's file helps ensure that the licensee and other appropriate parties, including the licensing agency, have easy access to documentation that provides information on the person's functional capabilities and medical, mental health and social/emotional needs.

Subsection (c)(1) is necessary to ensure that a completed Functional Capabilities Assessment, required by existing Section 80069.2, is in the person's file. This subsection is consistent with the record-keeping requirements in existing Section 80070(b)(12), Client Records.

Subsection (c)(2) is necessary to ensure that a completed Needs and Services Plan, required by existing Section 85068.2, is in the person's file. This subsection is consistent with the record-keeping requirements in existing Section 85070(a)(3), Client Records. In addition, this subsection is necessary to ensure that the Needs and Services Plan addresses how the facility's program will meet the person's age-related needs, if any.

Subsection (c)(3) is necessary to ensure that a written medical assessment, required by existing Section 80069, is in the person's file. This subsection is consistent with the record-keeping requirements in existing Section 80070(b)(8), Client Records. Please also see the justification under Section 85068.4(e).

Subsection (c)(4) is necessary to ensure that a letter of support from the person's conservator with placement authority, if applicable, is in the person's file. This ensures that there is written evidence documenting that the individual or entity with placement authority, if there is one, supports the person's placement in that ARF. More broadly, it is standard licensing practice to involve individuals with placement authority, or individuals who are otherwise responsible for the person's care and well-being, in decisions regarding the placement and/or care of the person. This subsection is consistent with the spirit and requirements of the following:

- Existing Section 80068(a)(1), Admission Agreements, and Welfare and Institutions Code Section 4803. Both of these require that if a Regional Center recommends that a person with developmental disabilities be admitted to a community care facility, the Regional Center must confirm in writing that none of the persons specified in Welfare and Institutions Code Section 4803, including a conservator with placement authority, objects to the placement recommendation.
- Existing Section 85068.2(d), Needs and Services Plan. This requires the licensee to involve any relative participating in the placement—or the placement or referral agency, if any—to assist in the development of a client's Needs and Services Plan.

Subsection (c)(5) is necessary to ensure that letters of support from the person's placement officer, social worker and/or mental health professional, if applicable, documenting that the ARF is the most appropriate setting for the person, are in the person's file. Similar to Subsection (c)(4), this is necessary to ensure that, if applicable, there is written evidence that the professionals who are in the best position to assess the person's condition and situation concur that the ARF is the most appropriate setting for the person.

Section 85068.4(d)

Specific Purpose:

This section is adopted to establish the requirement that the Needs and Services Plan for each ARF client 60 years of age or older be updated at least annually and in accordance with Section 85068.3.

Factual Basis:

This section is necessary to comply with and implement the aforementioned Agreement between CAMHPRA and the CDSS. Please also see the justification under Section 80001(a)(5).

This section is also necessary to ensure that the Needs and Services Plan for each client of an ARF 60 years of age or older is updated on an annual basis, as a safeguard. Under existing Section 85068.3(a), the Needs and Services Plans of all ARF clients must be updated “as frequently as necessary” to ensure accuracy and to document significant changes in the client’s physical, mental and/or social functioning. However, clients 60 years of age or older are generally at higher risk for experiencing declines in physical health and cognitive/emotional/social functioning than are the younger clients that an ARF traditionally serves. Moreover, licensees of ARFs may be less aware of the problems associated with the aging process than are care providers that primarily serve the elderly population. The licensing agency therefore believes it is necessary to take the extra precaution of requiring that the Needs and Services Plan for an ARF client 60 years of age or older be updated at least annually. This will assist in the early detection of a decline in the client’s health or functioning.

Finally, the requirement that this section be evaluated in accordance with existing Section 85068.3 is necessary for clarity, consistency and ease of use. However, the requirements of existing Section 85068.3, Modifications to Needs and Services Plan, would apply regardless of the adoption of this package.

Section 85068.4(e)

Specific Purpose:

This section is adopted to establish the requirement that the medical assessment for each client 60 years of age or older be updated at least annually and in accordance with the requirements for medical assessments in the RCFE regulations (rather than the ARF regulations).

Factual Basis:

This section is necessary to comply with and implement the aforementioned Agreement between CAMHPRA and the CDSS. Please also see the justification under Section 80001(a)(5).

This section is also necessary to ensure that the medical assessment for each client of an ARF 60 years of age or older is updated on an annual basis, as a safeguard. Existing regulations for both ARFs and RCFEs require that medical assessments be updated when required by the licensing agency. However, because clients 60 years of age or older are generally at higher risk of developing health problems than are the younger clients that an ARF traditionally serves, the licensing agency believes it is necessary to take the extra precaution of requiring that the medical assessments of clients 60 years of age or older be updated at least annually.

Further, this section is necessary to ensure that the medical assessment for each client of an ARF 60 years of age or older is updated in accordance with the regulations for RCFEs. Existing Section 80069 contains the requirements for medical assessments for clients of ARFs; existing Section 87458 contains the requirements for medical assessments for

residents of RCFEs. While the requirements of both of these sections are very similar, the requirements for a medical assessment for an RCFE are more geared to identifying concerns and conditions associated with the aging process.

As an example of the above, the RCFE regulations specifically require identification of a person's physical limitations to determine his or her capability to participate in programs provided by the licensee (Section 87458(b)(4)). In addition, the Physician's Report for Residential Care Facility for the Elderly (RCFE), form LIC 602A (12/04), is more comprehensive in terms of identifying conditions associated with aging, such as dementia, than the Physician's Report for Community Care Facilities, form LIC 602 (10/99), used by ARFs. These forms, while not required, are widely used by licensees and physicians to document client/resident medical assessments.

In summary, this section is necessary to ensure that the medical assessment for each client of an ARF 60 years of age or older is conducted on an annual basis and incorporates information associated with the aging process. This is particularly important because licensees of ARFs may be less aware of the problems associated with the aging process than are care providers that primarily serve the elderly population. Requiring the medical assessment for each client 60 years of age or older to be updated on an annual basis, and in accordance with the RCFE regulations, will help ensure that any changes in the client's health are noted and addressed appropriately within a reasonable period of time.

Section 85068.4(f)

Specific Purpose:

This section is adopted to establish that the licensing agency may require the licensee of an ARF that cares for a client(s) who is 60 years of age or older to comply with various regulations applicable to RCFEs.

Factual Basis:

This section is necessary to comply with and implement the aforementioned Agreement between CAMHPRA and the CDSS. Please also see the justification under Section 80001(a)(5).

This section is also necessary to clarify and to establish in regulation that the licensing agency has the authority to impose RCFE requirements on ARFs when necessary to protect the health and safety of clients 60 years of age or older. Broadly speaking, this is appropriate because the RCFE regulations are designed to address the care needs of the elderly. Moreover, as indicated previously, licensees of ARFs may be less aware of the problems associated with the aging process than are care providers that primarily serve the elderly. This section helps bridge potential gaps involved in the care of clients 60 years of age or older in ARFs by making it clear that the licensing agency has the authority to require ARFs that care for such clients to comply with certain RCFE regulations that are deemed necessary and appropriate.

Section 85068.4(g) (Renumbered)

Specific Purpose:

This section is adopted to do the following: 1) to renumber existing Sections 85068.4(b)(1) and (b)(2) to Section 85068.4(g), thereby consolidating the two sections; 2) to restructure the language in existing Sections 85068.4(b)(1) and (b)(2); and 3) to clarify and establish the requirements for a licensee to request an exception to accept or retain a person 60 years of age or older under this section.

Factual Basis:

This section is necessary to comply with and implement the aforementioned Agreement between CAMHPRA and the CDSS. Please also see the justification under Section 80001(a)(5).

This section is also necessary to consolidate and move the information in existing Sections 85068.4(b)(1) and (b)(2) to Section 85068.4(g) for clarity, consistency and ease of use. As Section 85068.4 is restructured in this regulation package, this information is now more logically located toward the end of the section—after the provisions associated with admitting or retaining a client 60 years of age or older.

In addition, it is necessary to restructure and consolidate the original language in existing Sections 85068.4(b)(1) and (b)(2) for clarity and consistency.

The provision that states that any exception made under this section must be made in accordance with existing Section 80024, Waivers and Exceptions, is necessary for clarity, consistency and ease of use.

Finally, the provision in this section that requires that the documentation specified in proposed Section 85068.4(c) be submitted with the exception request is necessary for clarity, consistency and ease of use. In particular, this section is consistent with existing Section 80024(b)(2), which requires that exception requests be submitted to the licensing agency along with substantiating evidence supporting the request.

Section 85068.4(h)

Specific Purpose:

This section is amended in order to make editorial changes.

Factual Basis:

These amendments are necessary to comply with and implement the aforementioned Agreement between CAMHPRA and the CDSS. Please also see the justification under Section 80001(a)(5).

b) Identification of Documents Upon Which Department Is Relying

Settlement Agreement of October 27, 2008 between the California Association of Mental Health Patients' Rights Advocates and the California Department of Social Services and *California Association of Mental Health Patients' Rights Advocates v. Cliff Allenby, et al.*, Santa Clara County Superior Court, No. 106 CV061397, filed November 9, 2006

c) Local Mandate Statement

These regulations do not impose a mandate on local agencies or school districts. There are no state-mandated local costs in this order that require reimbursement under the laws of California.

d) Statement of Alternatives Considered

CDSS has determined that no reasonable alternative considered or that has otherwise been identified and brought to the attention of CDSS would be more effective in carrying out the purpose for which the regulations are proposed or would be as effective and less burdensome to affected private persons than the proposed action.

e) Statement of Significant Adverse Economic Impact On Business

CDSS has determined that the proposed action will not have a significant, statewide adverse economic impact directly affecting businesses, including the ability of California businesses to compete with businesses in other states.

f) Testimony and Response

These regulations were considered as Item #1 at the public hearing held on April 15, 2009 in Sacramento, California. Written testimony was received from the California Association of Mental Health Patients' Rights Advocates (CAMHPRA), Solutions at Santa Barbara (SSB), Casa De Bonita (CDB), and Disability Rights California (DRC) during the 45-day comment period from February 27, 2009 to 5:00 p.m. on April 15, 2009. No oral testimony was presented at the public hearing. The comments received and the Department's responses to those comments follow.

General Comments

1. Comment:

"The California Association of Mental Health Patients' Rights Advocates (CAMHPRA) writes to express its strong support for the proposed amendments to the regulations governing Adult Residential Facilities (ARFs).

"CAMHPRA is a membership organization working to promote public policy furthering the rights and well-being of mental health consumers. Our members include mandated patients' rights advocates in counties throughout the state. In working with mental health consumers in a variety of settings, we have seen the ways in which the current ARF age regulations effectively deny housing and care to seniors with severe mental health disabilities. Although the regulatory scheme allows facilities to request exceptions to and waivers from the age regulation, the regulation itself, as well as its uneven application in the field, deters-and, in some cases, forbids-ARFs from accepting individuals over 60 as residents. For seniors living in locked psychiatric facilities who are awaiting placement in residential care, not having ARFs as a placement option can mean being forced to stay in an overly-restrictive setting for an indefinite period of time.

"This change to the regulation will allow seniors with mental health disabilities greater access to facilities that are designed to meet their needs, thereby promoting housing stability, effective treatment, and increased quality of life for those seniors. The amended regulation would also provide guidance to them for ensuring that seniors' age-related health needs are met in that context. Because ARFs are often the most appropriate and most affordable housing option for such seniors, these amendments will ensure that seniors with mental health disabilities do not languish in overly restrictive settings or-worse-become homeless.

"These amendments also support the individuals and companies who operate ARFs by giving them greater flexibility in accepting prospective residents. For many ARF operators, the facilities they operate are their only source of income; allowing them to accept individuals over 60 will help them to keep beds filled and, therefore, to stay in business.

"The proposed change in the regulation will have a lasting, positive impact for seniors with mental health disabilities, as well as for those who serve them, and we are delighted to express our support." (CAMHPRA)

Response:

The Department thanks you for your comment and appreciates the support.

2. Comment:

"I am writing in support of the proposed regulatory change for Adult Residential Age Regulations. We are a small six bed facility that often receives requests to admit individuals over the age of 59, whose needs are very compatible with our other clients. We understand and agree with the specified requirements (i.e. letters of support, functional capabilities assessment, Needs and Services Plan, etc) but strongly support the proposed change so that age exceptions would no longer be required. We believe that this will help our older clients get the services they need sooner, while providing support for our aging population to maintain their functional independence as long as possible.

"Thank-you for your time and consideration." (SSB)

Response:

The Department thanks you for your comment and appreciates the support.

3. Comment:

"I have review the ARF Age Regulation, and agree with the change to 60 years, to retain or admit a resident to a ARF facility. I have such resident that is capable and able to stay in this facility. She has a chronic illness that is monitored and our knowledge of care has increased in awareness about her illness, age, and mental health in her senior years.

"The quality of life we are able to give is highly favorable to this resident. I don't think it impacts the industry that this resident stays in the present environment because she has been a resident for years. She has a chronic illness, that need to be addressed, and that is on going. Her needs have been addressed by the San Diego Regional Center, social worker and her care has not changed that much in the last 2 years. A exception exist [*sic*] a family member agreed and now the process of care is depending on the facility, social worker and the resident herself must want to be here and assist in caring for herself [*sic*] in the facility." (CDB)

Response:

The Department thanks you for your comment and appreciates the support.

4. Comment:

"Disability Rights California is a non-profit agency that provides legal advice and advocacy services on disability rights issues in California. We provide services pursuant to the Protection and Advocacy for Individuals with Mental Illness Act, 42 U.S.C. § 10801, PL 106-310; the Developmental Disabilities Assistance and Bill of Rights Act, 42 U.S.C. § 15001, PL 106-402; the Rehabilitation Act, 29 U.S.C. § 794e, PL 106-402; the Assistive Technology Act, 29 U.S.C. § 3011, 3012, PL 105-

394; the Ticket to Work and Work Incentives Improvement Act, 42 U.S.C. § 1320b-20, PL 106-170; the Children's Health Act of 2000, 42 U.S.C. § 300d-53, PL 106-310; and the Help America Vote Act of 2002, 42 U.S.C. § 15461-62, PL 107-252.

"Disability Rights California submits comments on the Proposed Changes to Department of Social Services proposed Adult Residential Facility Age Regulations.

"We strongly support the proposed amendments to the Adult Residential Age Regulations. The regulation as amended will allow older adults with mental health needs more choice in housing as well as allowing older adults currently living in Adult Residential Facilities the opportunity to remain in their homes. The lack of community placement options for older adults with mental health has lead to individuals, who could otherwise be served in the community, languishing in IMDs. These regulations will help prevent the unnecessary placement of older adults in these overly restrictive settings. We applaud the Department's efforts in this area."
(DRC)

Response:

The Department thanks you for your comment and appreciates the support.

g) 15-Day Renotice Statement

A 15-day renotice was not required because there were no changes following the public hearing.