



STATE OF WASHINGTON
— OFFICE OF GOVERNOR JAY INSLEE —

January 31, 2023

Lisa Brodoff
Ronald A. Peterson Law Clinic
Seattle University School of Law
1112 E. Columbia
Seattle, WA 98122

Re: APA Appeal – WACs 388-76, 388-78A, and 388-107

Dear Professor Brodoff:

On December 29, 2022, the Governor's Office received the appeal you filed following the Washington State Department of Social and Health Services' (DSHS) decision to deny your petition to amend WACs 388-76, 388-78A, and 388-107, all relating to discharge rights for residents in adult family homes, assisted living facilities, and enhanced services facilities (referred to here, collectively as long-term care facilities (LTCs)). Under RCW 34.05.330(3), I may consider appeals from agency denials of petitions to amend existing rules.

Specifically, you request that DSHS amend its existing rules to provide the same discharge rights and requirements that currently apply to nursing homes to all LTCs. The proposed amendment will give notice of hearing appeal rights to all LTC residents and hearing officers.

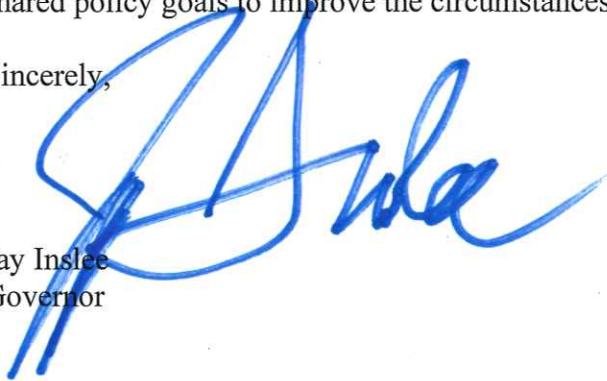
DSHS denied your petition on November 30. Today, I affirm the agency decision and deny your petition-appeal. Though I may share the policy goals you articulate in your petition and appeal, DSHS believes that it lacks the legal authority to promulgate rules relating to the appeal rights of those being discharged. The Legislature purportedly intended to codify for LTC residents the same rights that residents in nursing homes enjoy under 42 C.F.R. part 483, but for whatever reason, it declined to statutorily extend those same appeal rights to residents at LTCs. For this reason, I'm not persuaded that DSHS erred in concluding that it lacked authority to promulgate rules relating to appeal rights for those being discharged from LTCs.

Furthermore, while I understand that some administrative law judges (ALJs) have found that the legal authority exists for DSHS to extend appeal rights to residents being involuntarily discharged from LTCs, other ALJs have reached the opposite conclusion. At best, the law is unclear as to the agency's authority, which further suggests a need for statutory clarity.

Here, if DSHS were to issue rules without clear statutory authority, it would expose itself to lengthy, costly legal challenges. Instead, the Legislature should take up this issue and expressly grant DSHS the authority to extend to residents of LTCs the same protections as residents in nursing home facilities. My staff have already encouraged the Long Term Care Ombuds Office to pursue legislation in this or future sessions to achieve this statutory change, indicating my office's support for a bill that would reach the result you seek here. If the Long Term Care Ombuds Office declines to pursue a legislative fix this session, I would invite DSHS to file agency request legislation in 2024 to make this statutory change. Ultimately, my administration supports the policy outcomes that you seek through this administrative process. But at this time, I am not convinced that DSHS erred in denying your petition.

I hope that your coalition will support any effort to bring about legislative changes to achieve our shared policy goals to improve the circumstances for Washingtonians living in LTCs.

Sincerely,

A handwritten signature in blue ink, appearing to read "Jay Inslee". The signature is fluid and cursive, with a large initial "J" and "I".

Jay Inslee
Governor