



October 20, 2021

Brett Friedman
Acting Medicaid Director
NYS Department of Health
One Commerce Plaza
Suite 211
Albany, NY 12110

RE: Capital Cost Reimbursement for Nursing Homes

Dear Mr. Friedman:

We write on behalf of our respective memberships to seek immediate relief from a state regulatory provision that could unintentionally severely impact Medicaid capital cost reimbursement to many, if not most, nursing homes in New York State. The negative impact is a direct consequence of the COVID-19 global pandemic and could adversely affect facilities' ability to meet mortgage and rental obligations and even their solvency.

At issue is a regulation found at 10 NYCRR § 86-2.8(c), which states that:

“[f]or reimbursement purposes residential health care facility days shall be determined by using the higher of the minimum utilization factor of 90 percent of certified beds or the actual patient days of care as furnished by the facility.”

In determining the capital component of Medicaid rates for 2022, the Department of Health (DOH) is prepared to divide reimbursable rate year capital costs¹ by facility reported 2020 patient days. Due to a variety of pandemic-related factors – dramatically reduced referrals from hospitals and the community, increased resident morbidity and mortality, cohorting requirements, staffing challenges and others – nursing home occupancy fell precipitously during 2020 to unprecedented levels in the 70th and 80th percentiles. Facilities have experienced continued pressure on their censuses during 2021 and expect slow recoveries to previous levels. With capital costs (i.e., mortgage loans, capital lease and rental payments) being fixed in amount, lower occupancies and reduced Medicaid patient days billed during 2020 and 2021 have resulted in substantial financial gaps and impacted facilities' ability to meet these payment obligations.

Although nursing home occupancy rates have shown some modest recovery, the 90 percent imputation rule found in 10 NYCRR § 86-2.8(c) is expected to again result in a significant gap

¹ See 10 NYCRR §§ 86-2.19-2.22.

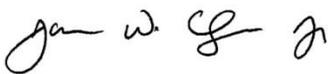
between Medicaid capital reimbursement and facilities' capital costs during 2022. In effect, any nursing home that does not realize 90 percent occupancy from a Medicaid perspective in 2022 will incur a cut to its capital reimbursement. This would be on top of the 5 percent cut in capital reimbursement authorized by Public Health Law § 2808(2-b)(b)(iv), which took effect April 1, 2020. With Medicaid rates of payment most often failing to cover facilities' actual operating costs, we are concerned that shortfalls in capital reimbursement could result in failures to meet mortgage obligations to both private and governmental lenders/guarantors, as well as to lessors.

Accordingly, we are asking DOH to waive, or at least modify, the application of 10 NYCRR § 86-2.8(c) to nursing home Medicaid capital cost reimbursement during the 2022 rate year. We believe this imputed occupancy rule could be temporarily waived/modified based on one or more of the following justifications:

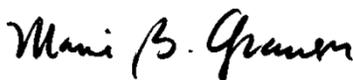
1. **Statutory adequacy requirements:** Public Health Law § 2803(2)(a) requires that “[t]he schedules established shall be reasonable and adequate to meet the costs which must be incurred by efficiently and economically operated facilities.”
2. **Reduced capacity due to the pandemic:** Due to the imposition of Executive Orders and other authorities, nursing homes were unable to operate all their “certified beds” [as contemplated by 10 NYCRR § 86-2.8(c)] during 2020. Infection prevention measures which required the conversion of many double rooms to single rooms and other resident “cohorting” strategies effectively reduced facilities’ certified bed capacities.
3. **Rate appeal authority:** 10 NYCRR § 86-2.14 permits facilities to file rate appeals based on significant increases in costs resulting from “...implementation of additional programs or services specifically mandated for the facility by the commissioner” and “...capital renovation, expansion, replacement or the inclusion of new programs or services approved for the facility by the commissioner.” While 10 NYCRR § 86-2.8(c) relates to patient days, its imposition would result in additional unreimbursed costs.

With the publication of initial 2022 rates rapidly approaching, time is of the essence on addressing this issue. We look forward to your timely response and stand ready to work with DOH on resolving this issue efficiently and effectively.

Sincerely,



James W. Clyne, Jr.
President & CEO



M. Bea Grause
President



Stephen B. Hanse
President & CEO

cc: Michael Ogborn
Ann Foster
Jillian Kirby