January 16, 2022

Katherine Ceroalo
NYS Department of Health
Bureau of Program Counsel
Reg. Affairs Unit
Corning Tower, Room 2438
Empire State Plaza
Albany, NY 12237

RE: HLT-46-21-00006-P: Article 28 Nursing Homes; Establishment; Notice and Character and Competence Requirements

Dear Ms. Ceroalo:

I am writing on behalf of the membership of LeadingAge New York to provide input on the proposed amendment of Sections 600.1 and 600.2 of Title 10 NYCRR. This rulemaking would modify the Certificate of Need (CON) establishment application review process, primarily for nursing homes.

General Comments and Context

LeadingAge NY and its not-for-profit (NFP) and publicly-sponsored provider members support the intent of the proposed rulemaking, which is to improve the transparency and consistency of CON establishment decisions and to strengthen the evaluation of the competence and quality of proposed operators. However, we are concerned that certain aspects of the proposed regulations lack clarity and could delay or preclude mergers or sales that would preserve health care access without compromising quality.

In this regard, given the financial distress being experienced by many NFP nursing homes as a result of the COVID-19 pandemic and years of inadequate Medicaid reimbursement, merger or affiliation under an active parent with another NFP nursing home or a hospital may be the only way for a distressed NFP facility to avert outright closure or a sale to a for-profit entity. Merger or affiliation may also be a desirable way for two health care providers to improve the quality and efficiency of their services. Although the regulation is not entirely clear, it appears that the process and standards would apply to a NFP corporation seeking to merge with a NFP nursing home operator or to bring a NFP nursing home under its NFP corporate umbrella.

Some NFP operators may have no other choice but to sell their nursing home. For example, many NFP nursing homes are part of continuing care systems delivering an array of services to older adults and people with disabilities. When the financial distress of the nursing home is compromising the viability of the rest of the system, the system may be forced to sell its nursing home. In these cases, some aspects of the proposed rulemaking could interfere with a timely sale, creating further financial risk for the operator and threatening access to, and quality of, care.

Financial stress is the most significant driver of nursing home sales and consolidations, and the inadequacy of Medicaid reimbursement is the root cause. New York's Medicaid nursing home rates are based on 2007 costs, with no cost-of-living increase provided since 2008. Not only has the State failed to raise rates to keep up with rising labor and other costs; it has actually imposed significant cuts. In fact, even in 2020 during the

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pandemic the State cut nursing home rates by $168 million annually, while most states increased funding for nursing homes.[1] According to the latest update to a report commissioned by the American Health Care Association, New York's nursing home Medicaid rate falls short of costs by $55 per resident, per day, indicating that New York's nursing home Medicaid rates are among the worst in the country in relation to the actual costs of operation.[2] [3]

Whether it is the byproduct of deliberate State policy or of inattention, the inadequacy of New York's Medicaid rates is forcing many providers that are committed to delivering high quality care to leave the market. Since 2014, more than twenty nursing homes have consolidated or closed, and approximately fifty public and NFP nursing homes have been sold to for-profit entities. This trend accelerated during the pandemic, with 7 closures and at least three NFP nursing homes in New York City sold to FP operators in 2020-2021. Several others are in the process of being sold or are in sale negotiations, and several high quality NFP homes are considering significant bed reductions. We fully expect these numbers to grow, leading to diminished quality and more limited choices for consumers.

As the predominant payer of nursing home care, New York's Medicaid program bears significant responsibility for this troubling trend. If the underlying objective of this rulemaking – to ensure high quality care – is to be achieved, the State's Medicaid reimbursement policy must be updated.

Specific Comments

Within the context of our general comments, we provide in this section detailed feedback on the specific elements of the proposed rulemaking together with the applicable regulatory references.

§ 600.1(d)(1): Notification of LTC Ombudsman

New 10 NYCRR § 600.1(d)(1) would require the Department of Health (DOH) to notify the NYS Office of the Long-term Care Ombudsman (LTCO): (1) within thirty days of the acknowledgement of receipt of a nursing home establishment application, and (2) once the application is scheduled for consideration by a committee of the PHHPC. LeadingAge NY has no objection to these notifications, which would make the Office of the LTCO aware of such applications and better enable them to assist residents and families during the timeframe of the establishment process.

The enabling statute, Public Health Law § 2801-a (2-b)(b), also provides that:

> "Thereafter, the state office of the long-term care ombudsman shall submit its recommendation to the department and to the public health and health planning council for consideration about such application."

[1] These cuts include a 1.5 percent across-the-board cut to Medicaid payments and a cut to capital reimbursement. Musumeci, M. State Actions to Sustain Medicaid Long-Term Services and Supports During COVID-19. Kaiser Family Foundation. Aug. 26, 2020.
[2] Hansen Hunter & Company, "Report on Shortfalls in Medicaid Funding for Nursing Center Care – 2018 Update." The brief update estimates that unreimbursed, allowable Medicaid costs in New York in FY 2018 exceeded $1.2 billion, averaging $54.77 per Medicaid resident day. Prior to that, the most recent full "Report on Shortfalls in Medicaid Funding for Nursing Center Care" issued in Nov. 2018 found New York's Medicaid shortfall to be even greater ($64 per day, the largest shortfall of the 28 states the report analyzed.)

We are concerned that the proposed rulemaking does not address the process by which the Office of the LTCO would undertake a review of the proposed establishment action, the content of such a review and the standards it would apply, or the method by which the currently established operator or the proposed new operator would be able to lodge any objection against a recommendation of the Office of the LTC Ombudsman. If this element of the statute will not be addressed in a separate rulemaking, it should be referenced in the instant rulemaking.

§ 600.1(d)(2): Notification of Residents, Staff, and Others

New 10 NYCRR § 600.1(d)(2) would require the current operator of the facility and the applicant to notify the facility's residents and their designated representatives and the facility's staff including any union representatives: (1) within thirty days of DOH's acknowledgement of receipt of an establishment application involving the facility; and (2) within 24 hours of being notified of the scheduling of the application for consideration by a committee of the PHHPC.

To ensure resident, family and staff confidentiality, it would be more practical for the current operator to actually deliver these notices to the noted individuals. The current operator could collaborate with the applicant on the content of the notice.

Proposed § 600.1(d)(1)(ii) requires DOH to notify the Office of the LTCO "…once an application for establishment of a nursing home has been scheduled for consideration by a committee designated by the Public Health and Health Planning Council." Here, the current operator and applicant would specifically have only 24 hours to do so, which could be unduly burdensome. We recommend a more realistic standard of 48-72 hours be permitted, or that the wording of § 600.1(d)(1)(ii) also be used here.

According to proposed 10 NYCRR § 600.1(d)(2), these notifications would be: "…completed by regular mail, email, or the delivery method designated by the resident, their designated representative, the staff, and union representatives." We note that the enabling statute provides only that the notifications be made in writing or electronically and would recommend that the facility be able to designate one or two standard methods for making these notifications to minimize the administrative burden of providing customized, person-specific methods.

§ 600.2(b)(2)(iv): Limited Liability Companies

LeadingAge NY supports the proposed amendment, which would apply the character, experience, competence and standing requirements applicable to other business forms to applicants that are organized as limited liability companies.

§ 600.2(b)(4): Substantially High Level of Care

It is unclear whether the provisions of §600.2(b)(4) apply to nursing homes, as well as other Article 28 facilities, or whether nursing homes are covered exclusively under §600.2(b)(5). This should be specified more clearly in the regulation. Our comments pertain only to the application of these regulations to nursing homes.

Proposed § 600.2(b)(4)(iii)(a) provides the following new definition of recurrent violations:

"A violation is recurrent if it has the same root cause as a violation previously cited within the last ten (10) years."

There is no definition of "root cause" offered in the proposed rulemaking, nor to the best of our knowledge is there an accepted standard definition of this term in the relevant State or Federal regulations. The Centers for Medicare and Medicaid Services (CMS), in its State Operations Manual, recommends that each nursing home undertake a root cause analysis under its Quality Assurance and Performance Improvement program to identify the causes of a problem that led to receiving a survey deficiency. Does "same root cause" as used in this regulation refer to the same survey domain, the same regulatory requirement or the same survey tag? The final rulemaking should clearly define this term, so it is understood by all regulated parties and by the general public, and it is consistently applied by the Department's CON staff and the PHHPC.

In previous contexts, DOH has defined repeat deficiencies as those that are identified on a facility's most current survey and on any survey conducted within the last two calendar years. Notably proposed § 600.2(b)(5) would use both a three-year period and a seven-year period to define repeat deficiencies (see below). Depending on how broadly "root cause" is defined and whether the scope of the deficiency is factored in, ten years is a long timeframe to use in determining recurrence. Federal and State survey regulations and guidance have changed significantly over the last ten years. Two deficiencies cited 10 years apart in the same survey domain may be very different and may not reflect a systemic failure in quality of care.

We understand the intent of a lookback period, but encourage the Department to carefully consider the consequences of a broad definition of root cause, especially in light of such a lengthy lookback. It appears that under the proposed regulation, if a member of the board of an applicant/NFP operator has an affiliation with a facility that has had two violations with the same "root cause" within 10 years, the merger would be prohibited. The existence of these violations may have no bearing on the quality of care delivered by the NFP applicant.

Proposed § 600.2(b)(4)(iii)(b) includes an extraneous "to" on line two after the word "been".

§ 600.2(b)(5): Character and Competence Determination

- **Evaluation of NFP Applicants**

As noted above, it is not clear from the proposed regulations how this process would apply to the merger of two NFP nursing homes or the affiliation of a nursing home with a NFP hospital or other NFP nursing home under an active NFP parent. It could be construed to apply to the board members of a NFP applicant who has affiliated facilities that are unrelated to the NFP applicant. As noted in more detail below, the ratings or survey history of a facility that is otherwise unrelated to the NFP applicant may have little bearing on the quality of care delivered by that applicant. The process of evaluating transactions involving NFP entities should be clarified.

- **Role of Star Ratings in Nursing Home Establishments**

In determining whether a nursing home establishment applicant has demonstrated satisfactory character, competence and standing in the community and rendered a consistently high level of care, proposed §600.2(b)(5)(i)(b) would require the PHHPC to consider whether any facility affiliated with the applicant/ operator earned a two-star rating or less by CMS. It is unclear whether this refers to the rating at the time of the application or at any point in the during the applicant's affiliation. At latest count, approximately 32

percent of all nursing homes in New York State had overall CMS ratings of one or two stars.[4] This is a point in time percentage, suggesting that a potentially much larger percentage of nursing homes has had a two-star rating over the last seven years.

It is important to recognize that the CMS nursing home star ratings are a general indicator of facility quality -- they are based on a complex algorithm with various components, weights and percentage distribution rules. They are heavily driven by survey inspections and place far less emphasis on quality measures and direct care staffing levels. Survey findings – the most influential factor in the rating algorithm -- can be subjective (as indicated by regional variation in citations), and a bad survey will influence a facility's rating for a period of three years. Moreover, star ratings can change on a quarterly basis, or even more frequently. Therefore, a facility's overall star rating should not be viewed in isolation from other factors. For example, a facility may have a two-star overall rating, even though it has a five-star rating on quality measures, simply because it had an unfavorable survey conducted three years earlier that reflected a single incident.

Accordingly, we believe that the star ratings should be considered as just one factor in evaluating the quality of a nursing home or the competence of its operators and not a controlling factor. We interpret the proposed regulation to provide the PHHPC with discretion to evaluate several factors in addition to star ratings. It appears that PHHPC may approve an applicant affiliated with a two-star facility that has otherwise demonstrated "satisfactory character, competence and standing in the community, and a consistently high level of care" in each affiliated nursing home, provided that two-star facilities do not comprise a significant portion of the applicant's nursing home "portfolio" and certain other indicators of poor quality are not present. As a general matter, this is not an unreasonable approach. However, since star ratings can change frequently, the timeframe of the two-star ratings to be considered by PHHPC (e.g., at the time of the application or during a specified period prior to the application) should be clarified in the regulations.

- **Definition of Recurrent Violation and Lookback Period for Nursing Home Applications**

Section 600.2(b)(5) of the regulations, like § 600.2(b)(4), defines a "recurrent" violation as one that has the same root cause as a violation previously cited. However, the process for evaluating recurrent violations and the lookback period(s) that PHHPC will apply are confusing. The section includes two different provisions governing recurrent violations with different lookback periods:

i. Under proposed 600.2(b)(5)(i)(c), in evaluating whether the applicant's facilities delivered a consistently high level of care, PHHPC must consider whether violations of law or regulations threatened the health, safety or welfare of residents and whether any of those violations were recurrent or not promptly corrected, including but not limited to repeat deficiencies for the same or similar violations over a **three-year** period.
ii. Under proposed 600.2(b)(5)(iii)(d), PHHPC is precluded from approving any facility if, in the prior **five years**, violations were found, which either threatened or resulted in harm to patient/resident health, safety or welfare and were recurrent or were not promptly corrected. Under this provision, a violation is recurrent if it has the same root cause as a violation previously cited within the last **seven years**.

Based on these provisions, it is very difficult to understand how PHHPC will proceed to evaluate repeat violations, what lookback period it will apply, and under what circumstances. It seems odd that PHHPC would be instructed to consider repeat violations within the prior three years and then prohibited from

[4] See CMS Nursing Home dataset: https://data.cms.gov/provider-data/topics/nursing-homes. Referenced on Dec. 12, 2021.

approving any applicant with repeat violations in the prior seven years. It is possible that there is a typographical error in this section.

We would also reiterate the concern raised above in relation to §600.2(b)(4) regarding the lack of definition of the term "root cause." As under §600.2(b)(4), it appears that a NFP applicant could not be approved if it had a board member who is affiliated with a facility that had two violations with the same "root cause" in seven years. The existence of these two violations may have no relation to the quality of care delivered by the applicant. Again, we urge the Department to carefully consider the consequences of a broad definition of root cause, especially in the context of a lengthy lookback.

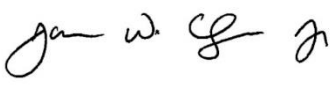
We recommend that this section of the regulation be amended to clarify the review process overall, the process for NFP applicants, the definition of root cause, the duration of the lookback period and treatment of recurrent violations.

Conclusion

LeadingAge NY supports efforts to improve the transparency and consistency of decisions made on nursing home establishment applications and to strengthen the focus on quality in evaluating the character and competence of prospective operators. However, we are concerned that certain aspects of the proposed regulations are unclear and could be counterproductive. The discretion of the Department and the Public Health and Health Planning Council (PHHPC) should be preserved to consider applications in a holistic manner.

Thank you in advance for carefully considering our comments and recommendations.

Sincerely yours,



James W. Clyne, Jr.
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cc: Mark Furnish
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