

November 14, 2021

Jeffrey A. Kraut  
Chair, Public Health and Health Planning Council  
Angel Gutierrez, M.D.  
Chair, Committee on Codes, Regulations, and Legislation  
c/o Executive Secretary, Public Health and Health Planning Council  
Empire State Plaza, Corning Tower, Room 1805  
Albany, New York 12237

Re: 21-07 Amendment of Section 415.3 of Title 10 NYCRR and Addition of Section 485.18 to Title 18 NYCRR (Personal Caregiving and Compassionate Caregiving Visitors in Nursing Homes and Adult Care Facilities); 21-14 Addition of Section 2.61 to Title 10 NYCRR, Amendment of Sections 405.3, 415.19, 751.6, 763.13, 766.11, 794.3 & 1001.11 of Title 10 NYCRR & Sections 487.9, 488.9 and 490.9 of Title 18 NYCRR (Prevention of COVID-19 Transmission by Covered Entities); 21-13 Addition of Section 415.34 to Title 10 NYCRR (Nursing Home Minimum Direct Resident Care Spending) and 21-20 Amendment to Sections 415.2 and 415.13 of Title 10 NYCRR (Minimum Staffing Requirements for Nursing Homes).

Dear Mr. Kraut, Dr. Gutierrez, and members of the Public Health and Health Planning Council:

I am writing on behalf of the members of LeadingAge New York (LANY) -- non-profit and public providers of long-term and post-acute care services -- to offer comments on two proposed regulations on your agenda for November 18: (i) Personal Caregiving and Compassionate Caregiving Visitors in Nursing Homes and Adult Care Facilities; and (ii) Prevention of COVID-19 Transmission by Covered Entities. I would also like to offer additional concerns regarding two regulations considered at your October 7 meeting: (i) 21-13 -- requiring nursing homes to spend a specified percentage of their operating revenue on resident care; and (ii) 21-20 -- imposing minimum nursing hours per day requirements in nursing homes.

As described in more detail below, LeadingAge New York would like to raise the following concerns regarding the above regulations:

- The state's personal/compassionate caregiving regulations conflict with federal nursing home visitation guidance and impose more stringent restrictions on visitation than allowed by new federal guidance; the regulations are no longer necessary due to relaxation of state and federal visitation restrictions for nursing homes and adult care facilities; and the regulations impose administrative requirements that divert precious staff resources from resident care.
- The state's health care personnel vaccination regulations impose requirements that are duplicative of, but slightly inconsistent with, the CMS staff vaccination regulations applicable to hospitals, nursing homes, certified home health agencies, PACE programs, and certain other providers. For providers covered by both federal and state requirements, the state regulations also unnecessarily impose a second layer of penalties for non-compliance at a time when providers are coping with a staffing crisis and cash flow challenges and need to invest all available resources in delivering care.
- We are concerned that the Department may be prepared to publish the draft nursing home minimum hours regulations and minimum spending regulations unchanged, notwithstanding the staffing crisis, the need to invest in capital improvements to support infection prevention, and the various flaws in the drafting that we highlighted in October. Penalizing nursing homes for circumstances beyond their control and depleting their already scarce resources will defeat the aims of the regulations and will not improve quality of care.

## Personal Caregiving and Compassionate Caregiving Visitors in Nursing Homes and Adult Care Facilities

These regulations arise out of legislation aimed at expanding nursing home and adult care facility visitation in the face of draconian limitations on visitation that were imposed in the first 6 months of the pandemic to reduce the risk of COVID transmission in these facilities. LeadingAge New York repeatedly expressed concerns about the negative effects of the visitation restrictions on residents and families and advocated for a more balanced and targeted approach. While we agree with the intent behind the personal/compassionate caregiving legislation and regulations, the new law has been difficult, if not impossible, to implement due to inconsistencies with federal guidance and insufficient direction from the state. Moreover, with the lifting of most restrictions on nursing home visitation by CMS last week and the relaxation of state restrictions on adult care facility visitation earlier this year, these regulations are no longer necessary.

Carrying out the new law and regulations are infeasible for the following reasons:

- **The regulations conflict with federal visitation requirements that are imposed on all nursing homes.** The new CMS visitation guidance issued last week significantly relaxed visitation restrictions at nursing homes. New York's personal/compassionate caregiving regulations now conflict with CMS guidance by *imposing more stringent requirements than the CMS guidance allows*. For example, the new CMS guidance provides that "facilities can no longer limit the frequency and length of visits for residents, the number of visitors, or require advance scheduling of visits." By contrast, New York's personal/compassionate caregiving regulations require facilities to "establish policies and procedures regarding the frequency and duration of personal caregiving visits and limitations on the total number of personal caregiving visitors allowed to visit the resident and the facility at any one time."

Prior to the issuance of the new guidance last week, CMS guidance on visitation *explicitly refused* to recognize state laws that established expanded visitation for "essential caregivers." Thus, notwithstanding New York's desire to ensure enhanced visitation for personal caregiving visitors, nursing homes in New York were never permitted to do so under binding federal guidance. (The federal guidance *does* recognize compassionate caregivers, and our members have made extensive use of that category of visitor).

- The state has not expressly indicated whether it is currently operating under a public health emergency that would trigger the requirement to provide personal caregiving visitors with "immediate access" to personal caregiving visitors, notwithstanding general visitation restrictions. To be fair, we suspect that the state's reluctance to answer that question may be related to the fact that activating the regulations would place the state in conflict with federal visitation guidance.

These regulations are not only unnecessary and infeasible, they divert precious staff resources away from resident care to the collection and quarterly renewal (semiannual in adult care facilities) of personal caregiver and compassionate caregiver designations which are no longer necessary. Given the relaxation of visitation restrictions and ongoing and severe staffing shortages in facilities, the regulations should be allowed to expire, and the Governor should waive compliance with the statute by executive order.

## **Prevention of COVID-19 Transmission by Covered Entities**

These regulations require health care facilities, home care agencies, and other providers subject to regulation under the Public Health Law or Social Services Law to mandate the vaccination of all health care personnel who do not qualify for medical exemptions. Since the initial adoption of these regulations, the federal government has released regulations imposing similar requirements on Medicare- and Medicaid-certified health care facilities, agencies, and programs. For facilities, agencies and programs that are subject to both the CMS and state mandates, we believe that these regulations threaten duplicative fines – state and federal – for the same violation, without contributing to overall compliance. These fines will only deprive them of the resources they need to recruit and retain additional staff.

As the members of the PHHPC are well aware, our long-term care sector is experiencing the most severe staffing shortages in memory; indeed, the Governor has declared the health care staffing shortage a “state of emergency.” Individuals in need of long-term care, by definition, require assistance with activities of daily living, e.g., eating, dressing, bathing, toileting, transferring, even turning in bed, and so much more. These services are essential to the wellbeing of our residents and cannot be delayed. Our members strive to maintain acceptable levels of staffing, while also achieving 100 percent compliance with the vaccine mandates. However, in certain areas of the state accomplishing both goals has been impossible.

Although data presented by the state show a 94 percent staff vaccination rate in nursing homes and adult care facilities, the data do not reflect the full picture. The state data do not show the shrinking denominator of total staff reflected in those percentages. Our members report an exodus of staff that began in mid-2020 and accelerated sharply after the announcement of the state’s health care personnel vaccination mandate in mid-August of this year. This reduction further exacerbated an already existing staffing shortage in many parts of the state. Many providers have been able to maintain acceptable levels of staffing only because they were able to allow staff to work with religious accommodations while the Second Circuit’s temporary injunction was in place. That is no longer permissible under state regulations with the lifting of the temporary injunction. At this point, the approach in the state regulations to religious accommodations appears to be more restrictive than the federal approach.

Facilities and agencies that are forced to deliver care with unvaccinated staff for lack of any other option should not be subject to multiple layers of heavy fines that will only further deplete their ability to hire additional staff. We urge the state to align its regulations as much as possible with the federal rules, to delay any enforcement until the federal regulations take effect, and to eliminate duplicative penalties.

## **Minimum Staffing Requirements for Nursing Homes and Nursing Home Minimum Direct Resident Care Spending**

Last month, LeadingAge New York appeared before the Codes Committee of this Council to highlight the many negative, unintended consequences of these draft regulations for residents and staff and pointed out various flaws in the regulations. LeadingAge New York is concerned that the Department of Health may publish the regulations as presented to the Council without making any changes to reflect the numerous concerns that we raised and that many members of the Council shared.

In particular, we highlighted the negative impacts on residents and staff of a staffing mandate that doesn’t take into account the realities of our labor markets and the inadequacy of our state’s Medicaid rates. Last week, we

polled our nursing home members on their staffing shortages. Two-thirds of those who responded said that they are restricting admissions due to staffing shortages; 49 percent said that they have closed units; and 30 percent have activated their emergency staffing plan.

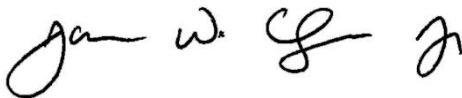
**Notably, the draft regulations would impose penalties of at least \$300 per day for non-compliance, even if extraordinary circumstances prevent the facility from complying. Nothing in the underlying statute requires the state to impose a \$300 per day fine for non-compliance in the face of extraordinary circumstances or labor shortages.** This is a steep penalty for facilities to pay for circumstances beyond their control and will not assist facilities in recruiting and retaining additional staff.

In October, we also noted various flaws in the direct resident care spending regulation. Among other issues, we pointed out that the regulation will discourage capital investments that support infection prevention, such as facility improvements that support cohorting, ventilation, safe visitation, and staff safety. To discourage such investments in the midst of an airborne disease pandemic is shocking.

Draining nursing homes and other long-term care providers of scarce resources in the midst of a pandemic that disproportionately affects older adults and people with disabilities will not improve the quality or accessibility of care for our most vulnerable residents. Most other states have stepped up to support long-term care providers through this very challenging time. To date, New York, unfortunately, has not.

Thank you very much for your consideration of these issues.

Sincerely yours,

A handwritten signature in black ink, appearing to read "James W. Clyne, Jr.", with a stylized flourish at the end.

James W. Clyne, Jr.  
President and CEO

Cc: Colleen Leonard  
Lisa Thomson  
Angela Profeta  
Kristin Proud  
Adam Herbst  
Valerie Deetz  
Mark Furnish  
Sean Doolan