



March 26, 2023

Jeffrey A. Kraut
Chair, Public Health and Health Planning Council
Thomas Holt
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: Addition of Section 400.26 to Title 10 NYCRR & Amendment of Sections 600.1 & 710.2 of Title 10 NYCRR (Inclusion of a Health Equity Impact Assessment as Part of the Certificate of Need (CON) Process)

Via E-Mail

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

I am writing on behalf of the members of LeadingAge New York -- non-profit and public providers of long-term and post-acute care and aging services -- to offer comments on the above-referenced regulation relating to the Health Equity Impact Assessment (HEIA) of CON applications.

LeadingAge New York supports the goals of this regulation and the underlying statute – to promote health equity and combat disparities in health care access and health outcomes. Our members serve individuals who are adversely affected by health disparities based on advanced age and disability, which are too often compounded by race, ethnicity, socioeconomic status, gender identity, sexuality, limited English proficiency and/or geography. The vast majority of individuals our members serve on any given day are Medicaid beneficiaries – Medicaid pays for **72** percent of nursing home days and most of the home care services delivered in New York. Our members strive every day to ensure access to high-quality care for older adults and people with disabilities.

We are, nevertheless, concerned that the draft regulation will impede its intended goals as applied to nursing home projects. We are concerned that the proposed regulation have may have two unintended impacts: (i) it may hinder projects aimed at quality of life, safety, and the physical improvement of facilities that serve as people's homes; and (ii) it may delay and render infeasible projects intended to preserve the financial viability of not-for-profit and public nursing homes, resulting in their closure or their sale to for-profit entities. Further, the draft regulation does not clearly indicate how the HEIAs will inform CON decisions and the standards that will be applied.

Nursing Homes are Both Homes and Health Care Facilities, Serving Predominantly Medicaid Beneficiaries, Older Adults, and People with Disabilities

We would like to stress, as an initial matter, that nursing homes are both health care facilities and homes for individuals with complex medical conditions and disabilities. The statute and the regulation are intended to address disparities in *health care* access (*see* A.191/2021, Sponsor Memorandum). We do not believe that the legislature intended to apply these requirements to projects that would improve the quality of life and safety of nursing home residents. We would also note that the statute and regulation exempt from HEIA requirements

applications “by a diagnostic and treatment center whose patient population is over 50 percent enrolled in Medicaid or uninsured,” unless the application involves a change in controlling person. Given that nursing homes provide care exclusively for older adults and people with complex medical conditions and disabilities, and the vast majority of nursing home residents on any given day are Medicaid beneficiaries, nursing homes should have been exempt from these requirements as well. We recognize that the Department is constrained by the statute, but as described in more detail below, we ask that the regulations recognize the unique circumstances of nursing homes as homes for individuals with complex health care needs and disabilities who are typically Medicaid beneficiaries.

HEIA Requirements May Hinder Projects Intended to Preserve the Viability of Nursing Homes

The regulation requires nursing homes (and certain other Article 28 providers) to engage an independent consultant to conduct a health equity impact assessment. It does not, however, describe how these assessments will inform CON decisions or the standards and factors that will trigger an approval or a disapproval.

While costs associated with an independent HEIA and those associated with delays that may result from negotiations over mitigation of potential equity impacts may seem minimal for a general hospital or ambulatory surgery center undertaking a \$100 million project, any increase in project costs or delay may place a nursing home project, or potentially even the viability of the facility, at risk. The majority of New York’s not-for-profit and government-sponsored nursing homes are truly in severe financial distress and fighting for their survival. Among not-for-profit and government sponsored homes, 72 percent reported operating losses in 2020. A recent LeadingAge New York/Greater New York Hospital Association joint financial survey of members (all of which are not-for-profit or public) found that the median operating loss for not-for-profit and public nursing homes in 2022 was -18.6 percent, down from a median of -3.8 in 2019. This is not due to mismanagement -- Medicaid pays for 72% of nursing home days in New York, and the federal MACPAC recently reported that New York’s nursing home Medicaid rates are among the worst in the nation when compared to costs.

When inadequate Medicaid rates prevent not-for-profit and public nursing homes from carrying out their missions, our members’ boards or government sponsors bear a fiduciary duty to preserve and provide for proper stewardship of their remaining resources. This generally entails reconfiguring services, closing, or selling their nursing homes, in order to redirect resources to other types of aging or disability services. Many of our members operate systems of aging and disability services, and the extraordinary financial losses in their nursing homes are jeopardizing the viability of entire continuums of care. These organizations may be forced to make the difficult choice of converting a portion of their nursing home beds to other uses that would enable the home and/or the system to stabilize its finances. In addition to reconfiguring a single facility’s services, some of our not-for-profit members are coming together under common parents to create regional continuing care systems. These affiliations often create economies of scale that enable the ongoing viability of services, but may also involve decertification of beds and relocation of services in order to improve efficiencies and eliminate duplication of services. We are concerned that the HEIA requirements may delay or impede projects that reconfigure services to preserve the viability of not-for-profit and government-sponsored nursing homes. If that path is blocked or rendered infeasible by regulatory delays and additional costs, the only remaining option may be to close or sell the nursing homes.

HEIA Requirements May Impede Projects Important to the Quality of Life and Safety of Nursing Home Residents

In addition to hindering projects aimed at preserving the viability of nursing homes that are trying to avoid a sale or closure, the regulation may impede projects to improve the quality of life or infection prevention posture of nursing homes. For example, a quick scan of CON applications submitted in the previous two to three years shows that many nursing homes are seeking to convert double-bedded rooms to single-bedded rooms. This is important for resident privacy and for infection prevention. Often, these projects are accompanied by a request to decertify beds.

Similarly, many nursing home applications over the past several years have sought to bring dialysis services on-site, to expand rehabilitation therapy space, and to expand activity space and dining spaces. Sometimes these types of applications are accompanied by a request to decertify beds in order to make space available for the new configuration. In the age of COVID, providing services on-site, providing therapies and activities in larger spaces that enable physical distancing, and creating dining areas within units reduce the risk of exposure to infectious disease and improve both the quality of life and safety of residents. We are concerned that beneficial projects like these may be deterred as a result of the HEIA requirements.

Exemptions for Nursing Home Projects Should be Expanded

We appreciate that the draft regulation exempts from HEIA requirements CON projects that are subject only to a notice requirement and exempts many types of projects that are subject to a limited review under 10 NYCRR Part 710. Unfortunately, the exemptions, as drafted, are too limited to avoid the unintended consequences discussed above. Under the draft regulation, even limited review projects are subject to the HEIA, if they would result in the elimination, reduction, expansion or addition of beds or services.

We recommend exempting the following types of nursing home projects from HEIA requirements, even if they involve decertifying beds or expanding or reducing a service:

1. Projects that involve upgrading, reconfiguring, or expanding space to improve the quality or safety of care, infection prevention and control, or quality of life of nursing home residents.
2. Projects that would decertify nursing home beds or services if:
 - the Department's need methodology for nursing home beds in the county reflects a determination that there is no public need for the beds; or
 - the number of beds to be decertified represents 25 percent or less of the facility's certified beds; or
 - the project involves reconfiguring or expanding space to improve the quality or safety of care, infection prevention and control, or quality of life of patients or residents; or
 - the resulting space will be used to provide housing or community-based services for older adults or people with disabilities.
3. Projects that add services that will support the health care or social care needs of older adults or people with disabilities;
4. Projects that involve the establishment of a not-for-profit parent and the elimination or relocation of a duplicative service in the same services area.

In addition, it is difficult to envision the implementation of the HEIA requirements in relation to nursing homes in Continuing Care Retirement Communities (CCRCs) licensed under Article 46 of the Public Health Law. CCRCs are regulated as hybrid insurance products and health care providers by both the Department of Health and the Department of Financial Services. Individuals purchase homes in these communities as a way of planning for their eventual long-term care needs, by paying an entry fee and a monthly fee that assures access to a continuum of services on the campus through assisted living and nursing home care. CCRC nursing homes are not permitted to accept admissions of individuals who do not own a home at the CCRC, except under very limited circumstances. This policy is intended to protect the availability of services for those who have purchased the continuum of care and to preserve the financial viability of the CCRC. CCRCs also serve a policy goal of the State, by providing an option for long-term care coverage that does not involve sheltering assets from consideration in Medicaid eligibility determinations and/or spending down to achieve Medicaid eligibility. CCRC projects should also be exempt from HEIA requirements.

The Regulation Should Describe the Role of the HEIAs in CON Decisions and the Standards to be Applied

The draft regulation does not indicate whether and how the HEIAs will influence the Department's decisions on CON applications. The Regulatory Impact Statement indicates that the HEIA is intended to "allow the Department and PHHPC to consider how proposed projects will impact medically underserved groups when approving and denying applications." The Regulatory Impact Statement also indicates that the Department will be hiring staff to review and analyze the HEIAs submitted.

However, the regulation does not indicate whether this information will influence CON decisions, and if so how the HEIA will be evaluated, what standards will be applied to that evaluation, what weight it will be given in making CON decisions, or how mitigation proposals will be evaluated. If the HEIA is to be a factor in the CON decision-making process, the regulations should elaborate on its role. The regulation otherwise runs the risk of being vague, and the review process subjective.

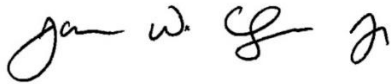
Definitions Should be Expanded and Modified

We recommend that the definition of "Stakeholders" include not only "patients," but also "residents" of the facility and their representatives. Residents of nursing homes are often unable to speak for themselves, and their representatives should be recognized as stakeholders.

In addition, we recommend that the regulation include the statutory definitions or, at a minimum, a statement indicating that any term that is defined in Public Health Law § 2802-b will have the same meaning in 10 NYCRR 400.26.

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
Johanne Morne
Tina Kim
Adam Herbst
Jason Riegert
Karen Madden