September 14, 2020

Michael T. D'Allaird, Esq.
Office of the Medicaid Inspector General
800 North Pearl Street, 2nd Floor
Albany, New York 12204

RE: MED-28-20-00029-P: Monetary Penalties
Sent via email to rulemaking@omig.ny.gov

Dear Mr. D'Allaird:

I am writing on behalf of LeadingAge New York to express serious concerns about the proposed repeal and replacement of regulations at 18 NYCRR Part 516 relative to the imposition of monetary penalties on Medicaid providers and managed care plans. LeadingAge NY represents approximately 400 not-for-profit and public providers of long-term and post-acute care and senior services throughout New York State, including nursing homes, home care agencies, adult care and assisted living facilities, retirement communities and managed long term care (MLTC) plans.

According to the notice of proposed rulemaking in the *State Register*, the proposed regulatory amendments would update State regulations governing the imposition of monetary penalties by the Office of the Medicaid Inspector General (OMIG) and ensure that individuals and entities against whom such monetary penalties are imposed have the due process protections granted under the NYS Social Services Law. While much of the substance of the regulatory revisions reflects revisions to underlying statutes [Social Services Law §§ 145-b(4), 363-d and 364-j(38)] made earlier this year, we are most concerned about certain proposed regulatory changes that may not be required by the statute and by OMIG's plans for enforcement of these new requirements.

Our specific concerns with the proposed rulemaking follow:

1. ***The proposed regulations define "failure to grant timely access to records and facilities" but do not define "reasonable notice" or "deadline".*** Failure to grant timely access to records and facilities exposes a provider to major penalties of up to $15,000 for each day of the failure to produce or make available for review, copying, and inspection requested material, or to provide access to facilities upon reasonable notice by the deadline specified in a written request from OMIG, the Department of Health (DOH), or the deputy attorney general for Medicaid Fraud Control. Reasonable notice, which is not very clearly defined in Social Services Law § 145-b(4), is contextual and means different things to different people. Our member providers, which are often smaller facilities and agencies, do not have dedicated compliance departments like larger providers such as acute care hospitals. They have reported to us instances of having received written requests from OMIG for large volumes of documentation which must be fulfilled within unreasonably short timeframes by the very same staff that are needed for Medicaid billing and

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other financial/administrative functions. The regulations should provide further specifics around the terms "reasonable notice" and "deadline" to properly balance the OMIG's interest in having timely access to needed information with the scope of the information requested; the administrative capacity of the provider; extraordinary circumstances which may be affecting the provider (e.g., a public health emergency); and the state's public policy, which has been to place stringent limitations on provider's administrative costs [see NYS Executive Order #38].

2. ***The proposed regulations broaden the definition of "standards of the MA program."*** Existing 18 NYCRR § 516.1(b)(5) references DOH regulations, while the proposed regulations add the terms "rules" and "official directives" of the Department. These terms are not further defined in the proposed regulations. What constitutes an official directive? In the context of the current public health emergency, our member providers have encountered a multitude of DOH memos, "Dear Administrator" letters, guidance documents and individual e-mails from Department officials. The rules and interpretations are constantly changing and may conflict with each other or with guidance from other state and federal agencies. We are also concerned that broadening the definition in this way will expose providers to monetary penalties based on alleged violations of DOH policies and interpretations that should have been properly promulgated as regulations.

3. ***The definition of "substantial number of cases" significantly lowers the threshold for imposing monetary penalties.*** Under existing regulations [18 NYCRR § 516.1(b)(6)], a substantial number of cases means five percent or more of a sample of cases which were audited. The proposed rulemaking adds the wording "five percent or more of those claims, encounters, or cases identified in any audit, investigation or review." Five percent of claims that are targeted for review based on certain characteristics is a much lower threshold than 5 percent of a random sample of claims, making the proposed new standard an inappropriate low bar. This broadening of the definition has major implications for providers and plans, inasmuch as if OMIG discovers a violation of a Medicaid program requirement during a routine audit that occurs in five percent or more of claims included in the audit, and determines that the plan or provider either knew of the error or should have known of the error, OMIG can impose major penalties of up to $10,000 per claim or up to $30,000 per claim if prior penalties were imposed.

4. ***The proposed regulations would remove provisions governing the determination of the amount of monetary penalties.*** Existing regulations at 18 NYCRR § 516.3 identify five key considerations that DOH must take into account when determining the penalty to be imposed. Existing Social Services Law § 145-b(4) includes these considerations, but they are omitted in the proposed rule. Given the major importance of these provisions, particularly since the Legislature has broadened the circumstances under which penalties may be imposed, we believe they should be included in the updated regulations and elaborated upon to give providers and plans the guidance they need to assess and potentially challenge the reasonableness of any proposed penalty.

5. ***These regulations and associated OMIG enforcement should demonstrate a reasonable approach towards provider and plan compliance programs.*** The Legislature amended Social Services Law § 363-d(2) earlier this year to make adoption and implementation of a provider compliance program "a condition of payment from the medical assistance program." Consequently, OMIG could seek to recoup all of a provider's Medicaid payments received during a period for which OMIG determined

the provider did not have an effective compliance program in place. Social Services Law § 363-d was also amended to authorize OMIG to impose a monetary penalty of $5,000 per month, up to twelve months, for failure to adopt and implement a compliance program meeting statutory requirements (and up to $10,000 per month, for up to twelve months, if a penalty was previously imposed in the past five years). Effective compliance programs incorporate several elements and require numerous policies, procedures and processes on the part of providers and plans. Given these realities and the limited administrative capacities of smaller providers (see point #1 above), OMIG should exercise reasonableness and restraint in its determinations on whether compliance plans are "effective." If, for example, a provider's plan meets 95 percent of the requirements, will OMIG seek to recoup all of the provider's Medicaid payments (for services that were rendered in compliance with program requirements) and/or impose large monetary penalties? This would be inequitable and unfair. Consistent with our recommendation under point #4 above, OMIG should articulate considerations that it will follow in determining the amount of monetary penalties and any other financial remedies it would impose in connection with adverse findings on compliance programs. Given the major implications of this new policy, OMIG should offer further education and other resources to providers on the elements of an effective compliance program.

Conclusion

LeadingAge NY is cognizant of the fact that these regulatory revisions are predominantly a reflection of underlying revisions to Social Services Law. However, OMIG has been granted considerable authority and discretion in its enforcement of these requirements. We believe it is important to provide the same context to OMIG as we have to state lawmakers relative to the impact of additional monetary penalties on an already beleaguered long term care provider sector:

- New York's nursing home Medicaid rates cover only 80 percent of the daily cost of care, creating a $64.00 per day shortfall. A majority of not-for-profit and public nursing homes were already losing money on operations even before the pandemic.
- 72 percent of certified home health agencies have negative margins, and the median margin is minus 12 percent.
- 50 percent of hospice programs have negative margins.
- One-third of partially-capitated MLTC plans, which represent the vast majority of MLTC enrollment, reported that Medicaid expenditures exceeded Medicaid premiums received from the state in 2018.

These financial realities have led to closures and sales of not-for-profit nursing homes, adult day health care programs, and provider-sponsored MLTC plans:

- Since 2014, a dozen nursing homes have closed and nearly 50 public and not-for-profit homes have been sold.
- Between 2017 and 2019, 16 medical model Adult Day Health Care programs have closed.
- In 2019, three MLTC plans closed, forcing the transfer of thousands of beneficiaries to new plans and disrupting relationships with aides and care managers.

We respectfully urge OMIG to take this context into account when finalizing these regulations and determining how they are to be enforced. To do otherwise will further destabilize provider and plan finances and threaten Medicaid beneficiary access to high quality long-term care services.

Thank you for the opportunity to provide input on the proposed regulations. If you have any questions on our comments, please contact me at (518) 867-8383 or dheim@leadingageny.org.

Sincerely,

Daniel J. Heim
Executive Vice President