January 9, 2022

Jeffrey A. Kraut
Chair, Public Health and Health Planning Council
Angel Gutierrrez, 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: 21-14 Adding Section 2.61 Title 10 NYCRR (Prevention of COVID-19 Transmission by Covered Entities); 20-22 Amendment of Section 405.11 and 415.19 of Title 10 NYCRR (Hospital and Nursing Home Personal Protective Equipment Requirements); 21-06 Addition of Subpart 66-4 to Title 10 NYCRR (COVID-19 Vaccinations of Nursing Home and Adult Care Facility Residents and Personnel)

Via E-Mail

Dear Mr. Kraut, Dr. Gutierrrez, 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 services -- to offer comments on the above-referenced emergency extension and amendment of regulations relating to the COVID-19 public health emergency.

First, I would like to offer some situational awareness of current conditions in our long-term care delivery system. LeadingAge New York appeared before you at your November meeting and described the growing staffing crisis throughout our long-term care sector. Today, with the omicron variant surging and our staff depleted and weary, the situation is much worse, and we fear that the expansion of the vaccination mandate to include boosters will only exacerbate the crisis. While we do not have access to the data collected by the Department daily from nursing homes and adult care facilities on positivity rates and furloughed staff, we know anecdotally that virtually all of our members are struggling to fill shifts and limiting admissions, and most have closed units in order to meet the needs of residents and patients. They have been doing everything within their power to recruit and retain staff and have deployed executives and managers to direct care roles, housekeeping and dining. Many are fearful on a daily basis that they will not be able to meet the essential needs of residents and home care patients with their available staff.

Our members have reached out to the State for support, as have we on their behalf, but the response has been insufficient and often does not fit the need. While we appreciate the recent announcement that the State will be distributing rapid tests and masks to nursing homes, this does not address staffing needs. We also appreciate the deployment of National Guard members to about a dozen nursing homes, but this does not help the residents of approximately 600 other nursing facilities statewide, nor the adult care facility residents and home care patients. When our members contact the Department's Surge and Flex Center for support, they receive only a shrinking list of staffing agencies that charge exorbitant rates for limited staff who leave without warning when they are offered a more lucrative shift in a hospital. Given the dire needs of the long-term care sector, the State should be moving swiftly to use the $19 million dollars in Nursing Home Strike Team and Infrastructure funds awarded to New York State by CDC in October 2021. Those funds could provide a short-term source of support for nursing homes and certain other long-term care facilities. Funding could be used to

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subsidize recruitment and retention and incentivize long-term care staff to get booster shots. To date, we do not know if these funds are being spent yet, or how they will be spent.

We are pleased to see the efforts to better coordinate city and State initiatives. The New York City Department of Health and Mental Hygiene is deploying resources and teams to nursing homes and adult care facilities to conduct testing during outbreaks, and has deployed a contractor to provide vaccinations and booster shots to residents and staff of those facilities as well. These strategies could be deployed statewide.

We have urged the State repeatedly to provide an immediate infusion of Medicaid funds to assist nursing homes in recruiting and retaining staff, but our requests have not been heeded. An increased dialogue between the State and the long-term care provider community could result in the development of additional solutions that better address critical needs. Thoughtful implementation of future initiatives affecting this sector will result in better outcomes.

Meanwhile, as you know, the staffing shortages in the long-term care sector are preventing hospitals from discharging to nursing homes and preventing nursing homes from discharging to home care. As a result, individuals who no longer need acute care are occupying hospital beds that are needed to treat others. Taken together, these factors create an alarming situation not just for long-term care providers and the people they care for, but for all New Yorkers.

I. 21-14 Adding Section 2.61 Title 10 NYCRR (Prevention of COVID-19 Transmission by Covered Entities)

The expansion of the vaccination mandate to include booster shots will only compound the staffing crisis and force our nursing homes, adult care facilities, and home care agencies to further reduce admissions. Our members are working daily with staff to promote booster shots, and they have a real-world understanding of the views of their colleagues. Sadly, there are many healthcare personnel who accepted the primary vaccination series only reluctantly and do not want to be pressured to accept another injection. Given the dire shortages experienced by our members, losing even a few more staff may be disastrous for their patients and residents, resulting in unmet needs and forcing some facilities to transfer dozens of residents to other facilities or hospitals on short notice. We question whether the benefits of mandating the booster outweigh these frightening risks.

The absence of any lead time for implementation of the new requirement will only add to providers' challenges. The Governor has said it is effectively immediately after this meeting. According to the Regulatory Impact Statement, this regulation will become effective "upon filing with the Department of State." We have no way of knowing when a regulation will be filed with the Department of State, but it is typically within a few days of the PHHPC meeting. For example, the emergency regulations considered by the PHPHPC on November 18 were effective on November 24. Long-term care providers, which are already struggling to meet patient and resident needs, will be forced to impose this new employment requirement without any time to plan or make arrangements to transfer residents in the event of staff attrition.

We have all seen how critical vaccination is in this very long fight against COVID. Our non-profit and public long-term care providers have worked tirelessly to encourage residents, patients, and staff to receive booster shots. But, it is misguided to impose this new mandate in the midst of a staffing crisis. Our comments are

offered in the context of the larger situation; this mandate should be delayed until staffing shortages are under control.

II. 21-06 Addition of Subpart 66-4 to Title 10 NYCRR (COVID-19 Vaccinations of Nursing Home and Adult Care Facility Residents and Personnel)

Our members do not object to a requirement to offer the booster shots to existing and new employees and residents. However, the regulation imposes arbitrary timeframes and does not recognize that such residents or personnel may not be eligible for a vaccine or booster due to recent COVID infection, treatment with monoclonal antibodies, or the timing of their initial vaccination series. Similarly, pediatric nursing facilities may serve individuals under age 5 who are ineligible for the vaccine. Thus, it may not make sense for these employees or residents to be offered an opportunity to receive their vaccination or booster within 14 days (or 7 days for adult care facilities) of admission or hiring. Similarly, it may not make sense for these residents and staff to sign an affirmation that they are declining the vaccination or booster, if in fact they are merely waiting until it is clinically indicated.

Finally, the penalty provisions set forth in the regulation seem disproportionately severe, especially given the flaws in the drafting of the regulation and the current staffing crisis. Notably, no other provider type is subject to the requirements set forth in this regulation. For adult care facilities, the "failure to arrange for the vaccination *of every facility resident and personnel* . . . constitutes a "failure in systemic practices and procedures." Yet, "every" resident or member of the staff may not be eligible for the vaccine or booster within the required timeframes. The regulation also mentions referral for criminal investigation as a potential penalty. With staff in such short supply, nursing homes and adult care facilities must focus on meeting essential resident needs. To threaten harsh penalties and criminal prosecution for failure to provide an opportunity for *every* facility resident or staff member to receive a vaccine within an arbitrary timeframe is excessive.

III. 20-22 Amendment of Section 405.11 and 415.19 of Title 10 NYCRR (Hospital and Nursing Home Personal Protective Equipment Requirements)

We understand the importance of maintaining an appropriate stockpile of personal protective equipment (PPE). However, this regulation requires facilities to maintain the specified supply of each category of PPE without allowing them to use their reserves when regular supply chain resources run short. The purpose of maintaining a PPE stockpile is to ensure that facilities have access to necessary equipment in the event of supply chain disruptions. Facilities should not be subject to regulatory citations when, due to circumstances beyond their control, they need to use their PPE reserves and cannot immediately replenish their supply.

In addition, to this overarching concern, there are some technical concerns with the formula for calculating the required stockpile:

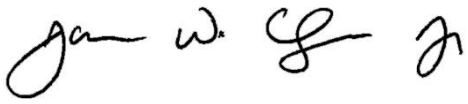
- The regulation does not distinguish between the required number of reusable versus disposable gowns. The required supply of reusable gowns should be lower than the required supply of disposable gowns. The Johns Hopkins study reportedly used as the basis for the regulation does not distinguish between these two types of gowns because it assumes only the need for 1 gown per 4 hours per health care worker and does not provide a formula for projecting a 60-day stockpile. If the gowns used in one day can be laundered and returned to service the next day or the day after, the facility does not need to multiply the daily need by 60 to arrive at the required number of gowns for the stockpile. Instead, it

should calculate the 60-day need by taking into account the wash lifecycle of the gowns and the amount of time it takes to launder them. We've asked the Department several times for guidance on this question, but have not received a response. Notably, the use of reusable gowns reduces environmental impacts and costs.

- The formula relies on the number of licensed beds in a facility, not on staffed beds in operation or average census over a specified period. As noted above, most facilities have closed units and suspended admissions. The stockpile requirements may demand a greater supply than will ever be used by the facility resulting in wasted resources at a time when facilities are struggling with skyrocketing costs and shrinking revenues.

Thank you very much for your consideration of these issues.

Sincerely yours,



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