LeadingAge New York

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

Dear Ms. Ceroalo:

I am writing on behalf of the membership of LeadingAge New York -- non-profit and government-sponsored providers of long-term/post-acute care and aging services -- to offer comments on the above-referenced proposed regulation requiring a health equity impact assessment as part of the certificate of need (CON) process.

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 the individuals our members serve on any given day are Medicaid beneficiaries – Medicaid pays for 72 percent of nursing home days delivered in New York. Our members strive every day to ensure equitable access to high-quality care for older adults and people with disabilities.

First, we would like to commend the Department of Health staff who have worked hard to gather input in developing this regulation and to balance a variety of compelling and diverse interests. We are, nevertheless, concerned that the proposed regulation will impede its intended goals as applied to nursing home projects. We believe that the underlying statute was drafted with hospital and ambulatory care center projects in mind, and the unique circumstances of nursing homes and the interests of the residents they serve are not reflected in the statutory text.

As a result, 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 care in facilities that serve as people's homes; and (ii) it may delay and render infeasible projects intended to convert nursing home space to expand community-based services for older adults and/or to preserve the financial viability of non-profit nursing homes. The added costs, delays, and uncertainty likely to result from the HEIA requirements may have a chilling effect on applications that will benefit nursing home residents and preserve access to long-term care services. Accordingly, we recommend that the regulations include exemptions for certain types of nursing home projects, as detailed below.

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Nursing Homes are Both Homes and Health Care Facilities that Serve Older Adults and People with Disabilities Who are Predominantly Medicaid Beneficiaries

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 HEIA statute and the regulation are intended to address disparities in health care access arising from the distribution of health care providers and market competition that draws revenue to or away from certain providers (see A.191/2021, Sponsor Memorandum). We do not believe that the legislature intended to apply the HEIA requirements to nursing home projects of limited scope aimed at improving quality of life, safety, and health 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 Impede Projects Important to the Quality of Life, Health, and Safety of Nursing Home Residents

As background, the HEIA regulation requires most Article 28 providers, including all nursing homes, to engage an independent consultant to conduct an HEIA of major construction projects that require CON approval; minor construction projects that involve the elimination, reduction or expansion of beds or services; and establishment actions that involve the elimination of a service, a 10 percent or greater reduction in beds, services or hours, or a change in location. The elements of the HEIA are detailed in the statute, which states that: "In considering whether and on what terms to approve an application, the commissioner and the council, as the case may be, shall consider the health equity impact statement." PHL §2802-b(2)(b). Neither the statute nor the regulation describes what this consideration will entail or how it will influence CON decisions.

We are concerned that the costs of the HEIA and associated delays, as well as uncertainty arising from the lack of standards for review, may impede or deter projects that would benefit nursing home residents. Both the engagement of the HEIA consultant and any delays resulting from reviews and potential mitigation discussions are likely to drive up the costs of nursing home projects. Delays alone can be costly – prices and interest rates are rising, and contractors and lenders may back out of commitments if projects are postponed.

While the costs associated with an independent HEIA and those associated with delays in approval 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 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 percent in 2019.

Moreover, the costs and potential delays associated with the HEIA are likely to be disproportionate to the impact of the vast majority of nursing home projects, which tend to fall into the limited review category (i.e., projects with a cost of $6 million or less). A search of the NYSE-CON database of CON applications received between January 1, 2018 and March 30, 2023 revealed the volume of each of the following categories of construction applications from nursing homes:

- Full Review: 15
- Administrative Review: 24
- Limited Review- including General, Minor Construction, Service Delivery, and Non-Clinical: 176

Although the overwhelming majority of nursing home applications since 2018 have been in the limited review category for low-cost projects, many of those projects would still be subject to the HEIA requirements because they entail a change in services or bed count. The most common type of limited review application during this time period was the addition of dialysis services for nursing home residents (either at bedside or in a "dialysis den"). Under the proposed regulation, because it would involve the addition of a service, this type of application would require a HEIA by an independent consultant and meaningful input from stakeholders. This would potentially delay the availability of a life-preserving treatment on-site and require residents to continue travel to an off-site facility where they may face a heightened risk of exposures to infectious diseases, while the application is pending.

Other examples of limited review applications that would result in a change in services or beds, but where an HEIA appears disproportionate to the scope of the project, include:

- Decertification of 2 nursing home beds to create a single room for a hospice patient.
- Decertification of 2 beds, reducing overall capacity from 362 beds to 360, by reducing a 22-bed unit to 16 beds and creating 12 single resident rooms and 2 double rooms with fully ADA compliant bathrooms, relocating 4 beds to other floors, and installing a new HVAC system.
- Adding a second shift to an adult day health care program.
- Renovating space to create an expanded rehabilitation therapy suite and decertify diagnostic radiology and clinical lab space (2 services that had not been provided by the facility in over 10 years)
- Decertification of 3 beds and renovation to develop a Geriatric-Psychiatric Skilled Nursing Program.

- Constructing an addition to create a specialty unit for bariatric residents.

Similarly, some limited review applications have sought to expand activity space or dining space and require the decertification of 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 transmission of infectious disease and improve both the quality of life and safety of residents.

Based on our reading of the proposed regulation, all of these applications, if submitted after the effective date of the HEIA regulations, would require independent HEIAs and meaningful stakeholder input. The HEIA would not likely lead to a different outcome than a determination in the absence of an HEIA, but it would increase the expense, delays, and uncertainty associated with projects like these.

Given the strained finances of most nursing homes, if these types of projects become too expensive, they may be abandoned or avoided. We are concerned that the regulation may deter projects that are beneficial to residents, as a result of the added cost and unpredictability of the outcome. As detailed below, we recommend that the regulations include additional exemptions from HEIA requirements for minor changes in bed count or services that will benefit the quality of life, health or safety of residents.

HEIA Requirements May Hinder Projects Intended to Preserve the Viability of Nursing Homes and/or to Develop Alternative Levels of Care

As a result of growing financial distress among not-for-profit nursing homes and rising demand for community-based services, we anticipate that some not-for-profit nursing homes will seek to reconfigure services and/or affiliate with other long-term care providers, in order to address community needs and preserve the viability of their services. They may seek to expand community-based alternatives to nursing home care, such as housing with services, assisted living, or adult day health care, by re-purposing nursing home space for alternative services. Or, they may join with other non-profit organizations under a common parent to create larger systems in order to ensure the ongoing viability of long-term care services in their communities. While these affiliations may also involve decertification of beds and/or relocation of services in order to eliminate duplication and improve efficiencies, their overall impact would be to preserve long-term care services.

We are concerned that the HEIA requirements may delay or impede projects that reconfigure services to expand community-based services and/or preserve the viability of not-for-profit and government-sponsored nursing homes and their sponsoring organizations. 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 – typically to a for-profit operator.

Exemptions for Nursing Home Projects Should be Expanded

We appreciate that the proposed 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 proposed regulation, even limited review projects are subject to the HEIA, if they would result in any reduction, expansion or addition of beds or services. In many cases, the costs and delays associated with the HEIA and the review process will be disproportionate to the nature of the projects in question.

We recommend exempting the following types of limited review 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 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 expansions of services for older adults or the reduction, elimination or relocation of a duplicative service in the same service area.

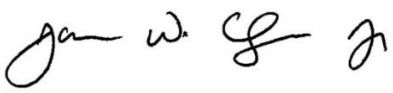
In addition, it is difficult to envision the implementation of the HEIA requirements in relation to nursing homes in Continuing Care Retirement Communities (CCRCs) licensed under Article 46 of the Public Health Law. CCRCs are regulated as hybrid insurance products and health care providers by both the 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 as they age and their needs change, from independent living through assisted living and nursing home care. CCRC nursing homes are generally quite small and 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.

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 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,



James W. Clyne, Jr.
President and CEO