LeadingAge New York CONCERN

SENIOR HOUSING | ASSISTED LIVING | ADULT CARE FACILITIES | HOME CARE | RETIREMENT COMMUNITIES
ADULT DAY HEALTH CARE | PACE/MLTC | NURSING HOMES

MEMORANDUM

A.10394-A (Lentol)/S.8289-B (Salazar)

AN ACT to amend the public health law, in relation to requiring residential health care facilities to prepare an annual pandemic emergency plan

This legislation is intended to require nursing homes to prepare an annual pandemic emergency plan. LeadingAge New York understands the underlying intent of the bill and appreciates that amendments have been made to address a few of our concerns. However, we remain concerned about the potential consequences – most notably the lack of financial support – of implementing the legislation as drafted.

An earlier version of the bill required each nursing home to submit its initial pandemic emergency plan by Jan. 1, 2021, which would have given reasonable time to do so in consideration of the continuing current pandemic. This version would potentially require facilities to not only prepare this plan more quickly (i.e., within 90 days of effective date) but also annually "or more frequently as may be directed by the commissioner." These requirements will only add to a plethora of state and federal directives currently in effect under the current emergency that address the intended elements of the bill and divert limited facility resources from current compliance efforts. Any final legislation should not require preparation of such a plan prior to Jan. 1, 2021.

Initially, the legislation would have required nursing homes to submit their plans to the Commissioner for approval. In this version, facilities would be required to make their plans, "…available to the public on the facility's website, and immediately upon request, in a form acceptable to the commissioner". Unless the Legislature intends to act on requirements for other types of health and human services providers to similarly prepare and make publicly available such plans, we believe that this requirement would further stigmatize nursing home care and could make such facilities more vulnerable to liability claims during a pandemic. We have less objection to making copies of such plans available to residents and resident families upon request.

Section (a)(i) of the proposed law would require a communication plan to: (1) update authorized families and guardians of infected residents once per day on resident's condition (or more frequently if the condition changes); and (2) provide all residents with daily access, at no cost, to remote videoconference or equivalent communication methods with family members. Communication with family members is critically important but updates every day and every time condition changes in the middle of a pandemic may be infeasible and divert staff from urgent caregiving needs. This requirement should be modified to update families when a resident's condition changes and on a less than daily basis to balance notification with the realities of staffing during an emergency. We are also concerned with the potential cost to a facility of providing remote videoconference or similar methods daily. Would this require the facility to purchase tablets or other devices, or pay for enhanced internet/Wi-Fi access? If so, the bill makes no provision for financial support for this mandate. There is also the question of staff time involved in assisting residents in these communications, time that could also divert from essential caregiving.

Section (a)(ii)(A) would require the facility to have a plan to readmit hospitalized residents after treatment, in accordance with applicable laws and regulations. Section (a)(iii) further requires, "…a plan for preserving a resident's place in a residential health care facility if such resident is hospitalized, in accordance with all applicable laws and regulations." Existing federal [42 CFR § 483.15(e)] and state [10 NYCRR § 415.3(i)] regulations require a facility to have and follow a written policy on allowing residents to return after they are hospitalized. Such a plan allows the resident, if the hospitalization exceeds any bed hold benefit covered in the state's Medicaid Plan, to return to their previous room if available or immediately to the first available semi-private room if the individual requires the services the facility provides. New York Medicaid does not pay nursing homes to reserve beds for temporarily hospitalized residents, except for residents under age 21 or enrolled in a hospice program. We seek to clarify that the bill would not create any unfunded mandate for a nursing home to reserve a resident's same room and bed without limitation during any period of hospitalization.

Section (a)(ii)(B) would require a facility, "to maintain or contract to have at least a two-month supply of personal protective equipment." This requirement may be infeasible and expensive. Does this mean that the equipment must be readily available, given that there could be major supply shortages out of the facility's control as there have been under the current emergency? Does this mean the facility would have to rent offsite storage at its cost for the equipment if onsite storage is insufficient? These supplies have expiration dates, which means they would have to be periodically replaced if not utilized, at the facility's expense.

Section (b) would require a facility to prepare and comply with the pandemic emergency plan or be subject to civil penalties and criminal liability for willful violation under Sections 12 and 12-b of the Public Health Law. It is patently unfair to subject a nursing home to these penalties when its compliance may be compromised by pandemic-related staffing shortages (e.g., due to state/federal quarantine and other requirements) or other conditions outside of its control (e.g., shortages of personal protective equipment). To promote compliance in a good faith manner, the bill should also reserve any such penalties for those instances when a facility fails to submit and adhere to a plan of correction under Section (c).

More broadly, this legislation would impose added requirements that will increase facility staffing, supplies and equipment costs with no explicit requirement for the state to reimburse these costs. According to a national study, New York's nursing homes were already losing $64 per day on average caring for each Medicaid beneficiary. The COVID-19 pandemic has resulted in major increases in facility staffing and supplies costs, as well as major disruptions in facility occupancy and revenue. While the federal government has provided nursing homes with limited funding under the CARES Act, these provider relief payments were largely based on Medicare billings, not on the proportion of Medicaid residents in facilities, and do not come close to covering the COVID-related cost increases and revenue reductions. New York State has not provided any direct financial support to nursing homes during this time but has instead made additional Medicaid cuts. By creating added unfunded mandates, this legislation will add to the financial stress that our not-for-profit and public nursing homes are experiencing. We appreciate that some helpful amendments were made to this bill to address certain of our concerns, but several concerns remain.

LeadingAge New York represents nearly 400 not-for-profit and public long term care providers including nursing homes, home care, senior housing, retirement communities, assisted living, adult care facilities, adult day health care and managed long term care.