



September 21, 2012

Ms. Katherine Ceroalo
Bureau of House Counsel
Reg. Affairs Unit
NYS Department of Health
Corning Tower Building, Room 2438
Empire State Plaza
Albany, NY 12237

RE: I.D. No. HLT-32-12-00020-P: Adult Homes

Dear Ms. Ceroalo:

I am writing on behalf of LeadingAge New York to provide comments on the proposed changes to Part 486 and 487 of Title 18 NYCRR. LeadingAge NY represents nearly 500 not-for-profit and public providers of long term care and senior services throughout the state, including adult homes and assisted living.

LeadingAge NY supports efforts to enable people to live in the most integrated setting possible, and to create more community-based resources for people with serious mental illness and the frail elderly. LeadingAge NY does have concerns; however, about the proposed regulations and the impact they may have on not only the provider community, but also the people they seek to help. These regulations also appear to exceed statutory authority and contradict federal statute, and proper steps should be taken to address these issues.

General Comments

Despite investments made by the state over the past few years, LeadingAge NY continues to hear from providers in the New York City area that there are not enough appropriate housing options for people leaving the adult home or nursing home setting. Of the housing stock that is available, the homeless population has been a higher priority. The state must be careful about moving a population out of one setting, without ensuring that sufficient community based service options and living arrangements are first available to receive these individuals. We cannot recreate the circumstances that made people with serious mental illness move into adult homes in the first place. Is New York really ready to move people with serious mental illnesses en masse out of adult homes?

In addition, the nature of some psychiatric disabilities is such that people may require flexibility to move in and out of settings—sometimes being able to function well in the community, and other times requiring more structure and support than the community setting may provide. If the policy is to discourage use of the adult home setting for individuals with serious mental illness, the state needs to develop an alternative model (or increase existing resources) to support people during their time of increased need.

Lastly, these regulations operate under an assumption that all individuals with serious mental illness residing in adult homes do not want to be there. While this may be the case for some, it is surely not the case for all of the individuals with serious mental illness that LeadingAge NY members serve. We have members that have developed considerable expertise in serving special populations, including people with serious mental illness. In addition, many of these individuals have associated physical ailments or frailties which make the adult home setting appropriate. In some rural areas, an adult home might be the only or most appropriate option. Consumer choice must be introduced into these regulations.

Specific Comments

The new subdivision (c) of Section 487.2, which provides a definition of serious mental illness, remains too broad. This definition is likely to encompass people who have dementia or Alzheimer's disease, as well as those who suffer from depression and anxiety secondary to the losses associated with the aging process. It may possibly include people with developmental disabilities as well. We believe that the state does not intend to capture such individuals in this definition and it must somehow be narrowed. Refinements to the definition could reference the chronicity of the condition and explicitly exempt certain conditions such as dementia and Alzheimer's disease.

We also recommend changes to the second part of this definition, which indicates that someone would meet the criteria for having a serious mental illness if they received services within the past five years. We suggest that if an individual received services a few years ago and is currently stable, they should not meet the criteria for serious mental illness. Again, this points to a need to revise the definition to capture only the intended population.

Also of concern is that this definition (as well as other terms used throughout the proposed changes) is written using mental health terms. Adult homes are not regulated by the Office of Mental Health (OMH) and adult home professionals may not be familiar with the terms and resources discussed. For example, the definition of serious mental illness—upon which all else is built—requires a strong knowledge of the DMS-IV-TR. In addition, adult home professionals may not know which providers are “mental hygiene providers....licensed, operated or funded by the Office of Mental Health.” If the adult home operator is expected to make such determinations, the state should then supply adult homes with resources, including a directory of such providers.

LeadingAge NY is also concerned about the proposed amendments to subdivision (c) of Section 487.4, which state that “no operator of an adult home with a certified capacity of eighty or more and a mental health census.....of 25 percent or more of the resident population shall admit any person whose admission will increase the mental health census of the facility.” First, it is unclear where these specific parameters stem from and why limiting the mental health census to those numbers and percentages would lead to better outcomes. How were these limits determined?

We also have considerable concerns about the state requiring an adult home operator to deny housing to someone based on their disability. This type of discrimination may violate the federal Fair Housing Act. We also question whether or not the Department of Health (DOH) has the authority to promulgate such specific standards in regulation under the current statutory authority. Such specific

changes in regulation, which will have considerable impact on the provider and consumer community, should be vetted through the legislative process.

Mental Health Evaluation

The proposed amendments to Subdivision (g) of Section 487.4, requiring that the professional who signs the mental health evaluation be approved by DOH in consultation with OMH is concerning, given that it is clearly stated that no additional resources will be provided to DOH (and, presumably, OMH). The number of staff working on adult home and assisted living issues at DOH has been dwindling over the years as experienced individuals retire or transition to other roles. Many of those positions remain vacant. At a time when the health care environment is changing so dramatically, we question how this and other responsibilities can be fulfilled in a timely manner, without delaying access to necessary services. Also of concern is that the regulations provide no standards or guidance regarding how DOH and OMH would deem an evaluator as appropriate. Adult home operators should be aware of these standards.

The additional proposed amendments to the mental health evaluation raise concern. The regulations require the evaluator to provide a mental health history, which, while important information, may not be available. The regulations should be amended to clarify that the adult home operator is not responsible for the depth of information or lack thereof contained in the mental health evaluation. Currently, adult home operators struggle to get medical evaluations completed by physicians, and they are held responsible for a physician's failure to do so. One can see how the vague nature of these regulations could further exacerbate this phenomenon.

The proposed regulations also require the evaluator to report on whether the resident is receiving or has ever received services from a mental hygiene provider licensed, operated or funded by OMH, and if so, a description of these services including their dates. This information will be available to the degree that it is reported on or accessed through records. As mentioned above, while the information is helpful to have, there remain concerns that the regulations ultimately hold the adult home responsible for obtaining information (through the mental health evaluation) that they have little control over. Again, the regulations should be revised accordingly.

The proposed changes to the mental health evaluation also require the evaluator to report on the medication regimen. The mental health professional may not be aware of the medications the individual is prescribed that are unrelated to the serious mental illness. LeadingAge NY questions whether this person should therefore be responsible for reporting on all medications, and whether or not that is likely to be accurate. We recommend that while the evaluator should be made aware of all of the medications the individual is taking, they need only comment on those medications prescribed to treat symptoms associated with the serious mental illness, or any other medication that may somehow be contradictory to the mental health treatment plan. Such clarifications are likely to ensure the most accurate information and eliminate confusion.

Records and Reports

LeadingAge NY is concerned about the proposed changes to Section 487.10 (e) that require additional recordkeeping for all adult homes that serve anyone with a serious mental illness. Maintaining a weekly roster of individuals with serious mental illness seems unnecessary and overly burdensome. In

addition, DOH has not required a quarterly statistical report for years, and the regulation should be changed to reflect that only an annual report is required. We have significant concerns about these reports—with or without the proposed changes—being required on a quarterly basis given how challenging operators find the reports to complete on the Health Commerce System. Facilities collect the data necessary as a matter of course, but the online reporting system has posed so many unnecessary challenges to operators—without additional DOH resources it will be disastrous. We also question what would be done with this data, given that DOH does not have resources available to analyze the currently required annual census data in a timely manner.

Transitional Adult Homes

Given the significant impact and radical changes proposed regarding transitional adult homes (Section 487.13), we believe this aspect requires specific (new) statutory authority.

Further, as mentioned above, we are unclear of where these specific parameters included in the definition of transitional adult home stem from, and why those numbers and percentages would lead to better outcomes.

The alternative community settings outlined in 487.13(b)(2) list entities that the adult home provider may not be familiar with. As noted above, throughout the regulations, OMH terms are used which may not be known to a DOH regulated provider. In this case, steps must be taken to ensure that adequate information is available so that providers can be compliant with the regulations. Additionally, this section allows for an alternative community setting to be “...other housing alternatives as are clinically appropriate.” Who determines the clinical appropriateness of a setting, and how does individual choice factor in?

Section 487.13(c)(d)(e) and(f), which requires transitional adult homes to submit a compliance plan to DOH within 60 days of the effective date of this regulation, are also of concern. From a public policy perspective, LeadingAge NY wants thoughtful plans to be implemented to ensure smooth transitions for people with serious mental illness that take into account individual unique needs and preferences. Sixty days would not allow adult homes to put together an overly thoughtful plan. We also raise similar concerns for the short timeframe providers are given to respond to DOH’s comments and recommendations on the compliance plan—which if exceeded, result in an automatic adoption of DOH’s plan. We must also bear in mind that for some adult homes, these plans involve a radical change in their business model, which will likely put some out of business. Given these extremely complex factors, LeadingAge NY recommends that additional time be given. We also recommend that the state provide *resources and assistance* in developing these compliance plans to ensure the most positive outcomes for all.

Interestingly, despite the aggressive timeframes proposed in regulation for providers, there are no timeframes for DOH’s review of the plans. This is particularly concerning because DOH has not been given any additional resources for this review, and are already contending with a wealth of responsibilities. While we appreciate the considerable resource limitations that DOH is currently operating under, we also are concerned that providers will be left without clarity about how to proceed and the future of their residents and organization while awaiting approval. We recommend that the regulations provide timeframes for plan reviews to assist providers in their planning efforts.

In addition, the compliance plan requires the operator to predict when they will achieve the stated limits for the percentage of people with a serious mental illness. Adult homes will not be able to predict with any real accuracy how this can occur if ensuring an appropriate and lawful discharge. This aspect of the compliance plan should be eliminated.

LeadingAge NY is also concerned about the requirement for an adult home to conduct all of the responsibilities outlined in 487.13(d) if they are not appropriate. For example, residents of Assisted Living Programs (ALPs) that are licensed as adult homes are likely in those facilities for reasons beyond their mental health needs. In order to qualify for the ALP, one must be assessed as nursing home eligible, which suggests that they may be frail or have co-occurring health conditions that require a higher level of care. In that case, independent living skills development may not be appropriate. In fact, for this very reason, *ALPs should be exempt from these proposed requirements*.

Lastly, we raise concern about the substantial fees levied for violations of these new regulations in Section 487.13. Simply put, \$1,000 per day is exorbitant, particularly for a provider group that is likely to experience significant financial losses as they change their business model and practice.

Regulatory Analysis

We were puzzled by the analysis of the costs for the implementation of these regulations. All adult home providers who serve *any* number of individuals with serious mental illness will have to dedicate additional resources to manage the additional paperwork and reporting requirements. The transitional adult homes face the threat of going out of business altogether. The state's estimation that the loss of revenue, which is only one financial strain they will experience, will be between four and five dollars per discharged resident per day is grossly inaccurate. These proposed regulations will have a financial impact on *all* adult homes; and for some transitional adult homes, a devastating impact.

Other Concerns

Finally, LeadingAge NY is concerned to hear that OMH providers had already received directives regarding referrals to transitional adult homes before these and the associated OMH regulations have been finalized. While we understand that this is being issued as a "clinical advisory", this seems to inappropriately direct providers before these regulations are formalized through the process established by the State Administrative Procedure Act.

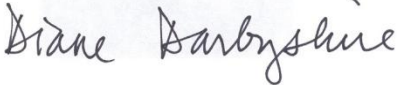
Conclusion

While LeadingAge NY appreciates the spirit in which these regulations were proposed, we believe that further work needs to be done to:

- ensure thoughtful implementation of such critical public policy;
- ensure consumer choice;
- follow proper legislative and administrative procedures;
- avoid potential violations of federal law; and
- stop imposing additional mandates on providers and further requirements on state administrative agencies without financial support, particularly in these challenging economic times.

If you have any questions regarding these comments, you may contact me at ddarbyshire@leadingageny.org or 518-867-8828.

Sincerely,

A handwritten signature in cursive script that reads "Diane Darbyshire". The signature is written in black ink on a white background.

Diane Darbyshire, LCSW
Senior Policy Analyst