

Recommended Section 1135 Waiver Requests

On behalf of the membership of LeadingAge New York, we offer the following recommendations to the Department of Health (DOH) for inclusion in New York's Section 1135 waiver requests to the Centers for Medicare and Medicaid Services (CMS). If any of the flexibilities herein can be granted by New York State without federal waiver authority, we request that the state take these actions as soon as possible.

All Provider Types

1. **Maintain Medicaid eligibility.** In light of the emergency, it is critical to ensure that Medicaid beneficiaries, especially those receiving long term services and supports who are most vulnerable to the virus, maintain their eligibility. On-site work restrictions may cause disruptions or delays in the normal processing timelines for Medicaid recertifications. *The state should be given the flexibility to temporarily suspend the processing of Medicaid recertifications, or at least extend timelines, to ensure that individuals do not inappropriately lose eligibility due to an inability to respond within required timeframes or due to HRA/LDSS processing delays.*
2. **Suspend audit activities:** Federal and state audits consume provider staffing resources, including clinical time, which need to be directed to responding to the emergency. Audit agencies such as MACs, UPICs, RACs, SMERCs, MICs and the NYS OMIG often employ utilization review nurses, who may need to be redeployed. *Similar to the suspension of routine inspections, CMS and the state should suspend audit activities during the duration of the emergency.*

Nursing Home Services

1. **Feeding residents:** Nursing homes are under directives from both CMS and DOH to discontinue communal dining arrangements. This places considerable additional pressure on facilities to provide each resident with the feeding assistance needed, at a time when staffing levels are also under pressure. *The state should seek waiver of regulations to: (1) allow additional types of staff in nursing homes to feed residents, under nursing supervision as needed; and (2) to allow for a greater than 14-hour period between a substantial evening meal and breakfast the following day.*
2. **CNA testing:** Prometric, the certified nurse aide (CNA) testing vendor, has temporarily closed its test centers in the United States and Canada for 30 days, starting March 18th. This is causing a backlog of candidates for CNA positions at a time when these individuals are desperately needed. *The state should seek a waiver to allow individuals who have completed the CNA training sequence to temporarily work as CNAs without having taken the exam until Prometric has resumed testing or until the conclusion of the emergency period, whichever occurs first.*
3. **Criminal history record checks:** There are backups in the criminal history record check (CHRC) program, which affects facilities' ability to timely onboard employees as needed. The state has already provided flexibility on CHRC requirements for child day care providers. In addition, current requirements that would delay redeployment of workers from one provider to a

different provider in need of staffing. *The state, working with CMS as needed, should temporarily allow: (1) providers to hire workers based on self-certification as to criminal history; and (2) suspend the requirement for a CHRC to be conducted for a worker who has been previously checked through the CHRC and changes employers.*

4. **Mask use in dementia units:** State and federal requirements for mask use by health care personnel are leading to instances of residents with dementia not being able to recognize staff, becoming frightened, and experiencing behavioral issues that could be dangerous to themselves and/or others. *State and federal requirements mandating mask usage should be modified to minimize the potential for agitation of residents with dementia.*
5. **Room changes:** State and federal requirements limit the circumstances under which residents' room assignments can be changed. These limitations pose problems in the context of the current pandemic. For example, CMS's March 13, 2020 guidance states that: "Also, if possible, dedicate a unit/wing exclusively for any residents coming or returning from the hospital. This can serve as a step-down unit where they remain for 14 days with no symptoms (instead of integrating as usual on short-term rehab floor, or returning to long-stay original room). This suggests that congregating such residents is a best practice endorsed by CMS. *The state should seek waiver of federal requirements to allow facilities to change resident room assignments as needed to respond to the pandemic.*
6. **Outside vendors/consultants:** Federal and state policies seek to minimize the circumstances under which visitors enter facilities. Current requirements involving physical plant maintenance and other inspections result in additional individuals having to enter facilities, which could pose risks to residents and staff. *CMS and the state should temporarily waive requirements such as inspections and testing for fire alarms, sprinklers, elevators and generators that are interior, and other requirements like monthly pharmacy reviews, requiring outside consultants/vendors to travel through the facility.*
7. **Temporary over-bedding:** As hospitals experience surge demand, more nursing home beds will be needed to care for individuals with COVID-19 diagnoses and other conditions. *CMS and the state should allow nursing homes to temporarily exceed their certified capacities by up to 25 percent in areas of community transmission.*
8. **PASSR requirements:** Current federal requirements for Pre-Admission Screening and Annual Resident Review (PASRR) Level I and Level II Assessments will be difficult to fulfill given practitioner availability and the need to facilitate rapid discharges and transfers among facilities. *CMS should be asked to waive the requirement for Level 1 and Level 2 assessments for 30 days, with all new admissions treated like exempted hospital discharges. After 30 days, new admissions with mental illness or intellectual disability would receive a Resident Review as soon as resources become available.*
9. **Medicare payments:** Under existing federal regulations, skilled nursing facilities (SNFs) may receive periodic interim payments (PIP) for Medicare Part A SNF services under the PIP method in lieu of standard service billing. The regulations also allow an accelerated payment to be made to an SNF that is receiving payment under the prospective payment system but is not receiving PIP, if the SNF is experiencing financial difficulties. *Given all of the financial pressures on nursing homes during the emergency and the limitations of remote location of billing staff, CMS should waive the requirements of 42 CFR § 413.64(h) (PIP) and § 413.350(d) (accelerated payment) as needed to expedite access to these programs for SNFs.*

Home Health Services

1. **Relaxing rules for the OASIS.** The availability of staff to perform Outcome and Assessment Information Set (OASIS) assessments in the community safely and timely is under considerable pressure, and hospitals/other facilities need to be able to discharge rapidly to home care. *Flexibility is needed in the following requirements related to completion and transmission of OASIS assessments: 42 CFR § 484.55: Condition of Participation: Comprehensive assessment of patients; § 484.55(a)(1): time flexibility; § 484.55(b)(1): time flexibility; § 484.55(d). CMS should also be asked to waive all or some of the OASIS assessment for COVID-positive or presumptive COVID-positive patients, as well as the requirement for OASIS to be performed based on in-person observations and instead allow portions to be completed via telephone or video conference.*
2. **Authorizing home care:** Obtaining timely physician authorization for home care is a barrier to rapid discharge to home care. *CMS should relax physician requirements related to ordering and certifying home health services as well as developing the plan of care by non-physician practitioners (NPP) to fulfill physician responsibilities in these aspects of the conditions of participation: 42 CFR § 484.60: Care planning, coordination of services, and quality of care; § 484.60(a)(1): allow NPPs to establish, periodically review, and sign plans of care; and § 484.60(b)(1): allow NPPs to order drugs, services, and treatments.*
3. **Homebound status:** Patients quarantined in their home for a minimum of 14 days due to coronavirus should be presumed to be homebound and in need of skilled intermittent care, rather than requiring physician certification which may be difficult to obtain. *CMS should waive physician certification requirements and allow for a presumption that coronavirus exposure is a condition such that leaving the home is medically contraindicated. If presumptive eligibility is not included, allow nurse practitioners and physician assistants to certify eligibility for home health where permitted by the state.*
4. **Certification/recertification:** A physician certification/recertification of patient eligibility for the Medicare home health benefit is a condition for Medicare payment. In-person requirements are difficult to fulfill given physician availability and current guidance on avoiding transmission. *CMS should allow the face-to-face encounter via telehealth, including the telephone per the CONNECT Act on a permanent basis or at least for the duration of the emergency.*
5. **RAP payments:** CMS is phasing out pre-payments for home health services. Prior to 2020, home health agencies could obtain 50-60 percent of the anticipated Medicare payment at the beginning of a patient's care episode through a Request for Anticipated Payment (RAP). CMS has reduced the RAP to 20 percent. *Given all the pressure on cash flow for agencies in a highly impacted state like New York, CMS should be asked to revert RAP payments to the previous 50-60 percent level during this emergency period to boost New York agencies' cash flow.*
6. **Low Utilization Payment Adjustment (LUPA):** Currently, home health agencies are subject to a Medicare Low Utilization Payment Adjustment (LUPA) claim if they provide four or fewer visits during a 60-day care episode to any category of patient. *CMS should waive LUPA for COVID-19 patients in New York to avoid requiring unnecessary visits. Allowing telehealth visits to count as home health visits would also help, as would a presumption that an appropriate plan of care would include initial visits and remote monitoring.*

Hospice Services

1. **Relaxing rules for the HIS.** The availability of staff to perform Hospice Item Set (HIS) assessments in various settings safely and timely is under considerable pressure. *Flexibility is needed in the following requirements related to completion of HIS assessments: 42 CFR § 418.54: Condition of Participation: Initial Assessment and Comprehensive Assessment; § 418.54(a): time flexibility § • 418.54(b): time flexibility • § 418.54(e): flexibility in updating comprehensive assessment based on ability to evaluate the patient. CMS should also be asked to waive all or some of the assessment for COVID-positive or presumptive COVID-positive patients, as well as the requirement for HIS to be performed based on in-person observations and instead allow portions to be completed via telephone or video conference.*
2. **Certification/recertification:** A physician certification/recertification of patient eligibility for the Medicare home health benefit is a condition for Medicare payment. In-person requirements are difficult to fulfill given physician availability and current guidance on avoiding transmission. *CMS should allow the face-to-face encounter via telehealth, including the telephone per the CONNECT Act on a permanent basis or at least for the duration of the emergency, and allow physician assistants to perform the face-to-face recertification.*
3. **Core services requirement:** Under existing federal regulations, a hospice must routinely provide substantially all core services directly by hospice employees. These services, which include nursing services, medical social services, and counseling, must be provided in a manner consistent with acceptable standards of practice. The emergency is interfering with the availability of staff for in-person services. *CMS should waive 42 CFR § 418.64 requirements to specify that services delivered telephonically/through telehealth meet the definition of acceptable standards of practice and allow contracting for all positions as needed.*
4. **Competency testing:** Hospices are subject to specific federal requirements relative to competency testing of aides. Significant staff shortages are anticipated in a workforce where some healthcare workers, especially aides, are already in short supply. Aides need to focus on provision of care to patients. *The federal regulation at 42 CFR § 418.76(c) should be temporarily waived to: (1) allow hospices to utilize pseudo patients in the competency testing of hospice aides for those tasks that must be observed being performed on a patient; and (2) allow qualified hospice aides to practice in any areas/tasks for which they were evaluated as satisfactory if they have not completed testing in all areas.*
5. **Aide supervision:** Under federal regulations, a registered nurse must make periodic on-site visits to the patient's home for purposes of supervising hospice aides. This is not a productive use of nurse time and could unnecessarily expose the nurse or patient to virus transmission. *CMS should waive 42 CFR § 418.76 and allow supervision visits to be made telephonically.*
6. **Volunteer requirements:** The federal regulations require the use of volunteers for day-to-day administrative and/or direct patient care services for at least 5 percent of the total patient care hours of all paid hospice employees and contract staff. Hospice volunteer availability and use will be reduced related to COVID-19 surge and anticipated quarantine. *CMS should waive 42 CFR §418.78(e), the 5 percent requirement for volunteers, or at least permit volunteer phone calls to count as volunteer visits for purposes of the requirement.*