



April 16, 2018

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

RE: HLT-07-18-00002-P: Medicaid Reimbursement of Nursing Facility Reserved Bed Days for Hospitalizations

Dear Ms. Ceroalo:

I am writing on behalf of the membership of LeadingAge New York to comment on the proposed amendments to Section 505.9(d) of Title 18 NYCRR and Section 86-2.40 of Title 10 NYCRR relative to reserved bed payments made by Medicaid to nursing homes. We are strongly opposed to the proposed requirement for nursing homes to hold the same room and bed for temporarily hospitalized residents without provision for Medicaid payment, and have other concerns about this rulemaking which are detailed below. Accordingly, we urge the Department of Health (DOH) to withdraw this proposed rulemaking, or substantially revise it to strictly conform to the revision to the enabling statute, Public Health Law Section 2808(25).

LeadingAge NY represents approximately 400 not-for-profit and public providers of long-term and post-acute care and senior services throughout New York State, including nursing homes, home care agencies, adult care and assisted living facilities, managed long term care plans, retirement communities and senior housing facilities.

As noted in the regulatory publication, the proposed regulatory amendments would: (a) limit Medicaid reserved bed payments for recipients age 21 and over who are temporarily hospitalized to only those recipients who are receiving hospice services in the facility; (b) require nursing homes to reserve the same bed in the same room, unless medically contraindicated, for a specified number of days during the resident's temporary absence without a reserved bed payment from Medicaid; and (c) remove language incorrectly stating that Medicaid reserved bed payments for leaves of absence are only available if the leave is for therapeutic purposes.

Elimination of Payments for Certain Temporarily Hospitalized Recipients

Section 2 of Part E of Chapter 57 of the Laws of 2017 revised Public Health Law § 2808(25) to eliminate Medicaid reserved bed payments to nursing homes for Medicaid beneficiaries aged 21+ who are temporarily hospitalized, while maintaining coverage of up to ten days of therapeutic leaves of absence per 12-month period reimbursable at 95 percent of the Medicaid

rate. Accordingly, we do not contest the legal basis for the proposed amendment to 18 NYCRR § 505.9(d)(1) and the addition of 10 NYCRR § 86-2.40(ac)(4)(v) to the degree that they would limit Medicaid reserved bed payments to nursing homes for recipients age 21 and over who are temporarily hospitalized to only those recipients who are receiving hospice services in the facility.

However, we believe that there should be definitive guidance issued if, and when, this amendment is adopted to the effect that this policy will be implemented prospectively only. In this regard, the Department's May 12, 2017 Dear Administrator Letter entitled "2017-'18 Enacted Budget Update-Reserved Bed Days" stated that:

"Chapter 57 of the Laws of 2017 recently amended Public Health Law § 2808(25) relating to Medicaid reimbursement for reserved bed days due to hospitalization leaves. The Department has decided to delay implementation of the recent statutory amendments, and to **continue** to reimburse nursing facilities for reserved bed days pursuant to the law as it existed before April 1, 2017, until the aforementioned emergency regulations are adopted. Further guidance will be issued at that time."

Nursing homes, managed care plans and Medicaid beneficiaries have relied on this May 12, 2017 guidance, and facilities have continued to reserve beds and receive Medicaid payment for temporarily hospitalized residents consistent with the guidance and the Department's existing regulations at 18 NYCRR § 505.9(d) and 10 NYCRR § 86-2.40.

Reduction in Payments for Hospice Patients

We do not agree there is a basis in law for the proposed revision to 18 NYCRR § 505.9(d)(2) and the addition of 10 NYCRR § 86-2.40(ac)(4)(v) to the degree that they would limit Medicaid reserved bed payments to hospices to 50 percent of the rate that would otherwise be payable to the facility. Public Health Law § 2808(25) and the revisions thereto refer expressly to payment to "a residential health care facility to reserve a bed for a person eligible for medical assistance...".

In the case of a nursing home resident who is receiving hospice services, payment is made to the hospice, not to the nursing home [see 18 NYCRR § 505.9(d)(3)(vii)]. Furthermore, the longstanding regulation at 18 NYCRR § 505.9(d)(2) provides that, with the exception of reserved bed payments to nursing homes, "[p]ayments to reserve a bed in any other medical facility listed in paragraph (3) of this subdivision, as permitted by this section, will be at the full rate established for the facility." Consequently, there is no authority in either the Public Health Law or in the current regulations to limit payments to hospices to 50 percent of the Medicaid rate that would otherwise be payable.

Proposed Requirement to Hold Beds in the Absence of Payment

Paragraphs (6) and (7) of 18 NYCRR § 505.9(d) would be amended to add language specifying that nursing homes and other medical institutions are required to reserve the same bed in the

same room, unless medically contraindicated, for a specified number of days during a Medicaid recipient's temporary absence, even when the Medicaid program will not make a payment for this service. We strongly object to this proposed requirement on the basis that it is not authorized by state law or state regulations, is inconsistent with previous state policy and federal law, and would arbitrarily impose a costly unfunded mandate on nursing home providers.

Inconsistency with Law and Policy

According to DOH's Regulatory Impact Statement (RIS):

"The current regulations clearly state that the obligation to reserve a bed for a Medicaid recipient is a condition of the provider's participation in the Medicaid program. However, certain regulated parties mistakenly interpreted the elimination of reserved bed payments, for certain recipients age 21 and over who are temporarily hospitalized, as also eliminating the requirement under section 505.9 to reserve the bed. The proposed amendments would make clear that the obligation to reserve a bed for a Medicaid recipient is not contingent on the availability of reserved bed payments." **[emphasis added]**

In fact, the relevant law, current regulations and recent directives from the Department do not "clearly state" that nursing homes are obliged to reserve beds for Medicaid recipients without payment from Medicaid.

As previously indicated, the revision in Chapter 57 of the Laws of 2017 revised Public Health Law § 2808(25) to eliminate Medicaid reserved bed payments to nursing homes for Medicaid beneficiaries aged 21+ who are temporarily hospitalized, while maintaining coverage of up to ten days of therapeutic leaves of absence per 12-month period reimbursable at 95 percent of the Medicaid rate. This revision in law did not authorize the Department to promulgate regulations or otherwise require nursing homes to hold beds for residents in the absence of Medicaid payment for this service.

Prior to the enactment of Section 2 of Part E of Chapter 57 of the Laws of 2017, Public Health Law § 2808(25) stated that a "...reserved bed day is a day for which a governmental agency pays a residential health care facility to reserve a bed for a person eligible for medical assistance pursuant to title eleven of article five of the social services law while he or she is **temporarily hospitalized or** on leave of absence from the facility."

The current regulation, 18 NYCRR § 505.9(d), is entitled "Reserved Bed Days **Payment,**" and Paragraph (6), which is entitled "**Reserved bed payments** for recipients who are temporarily hospitalized," requires nursing homes and other institutions to reserve beds for Medicaid recipients who are temporarily hospitalized. Clearly, this requirement is imposed in the context of Medicaid payment for the service.

Regarding DOH policy directives on the subject, *DAL/DRS: 10-08: Reserved Bed Day Reimbursement to RHCs for Medicaid Eligible Individuals Aged Twenty-One and Older*, was

issued following the enactment of Chapter 109 of the Laws of 2010, and represents the most recent expansive guidance from the Department on reserved bed days payment. A supplemental DOH document¹ to DAL/DRS: 10-08 includes the following question and answer clarification:

“The law that authorizes the limits on bed hold payments [PHL Section 2808(25)] defines a "reserved bed day" as "a day for which a governmental agency pays a residential health care facility to reserve a bed...". **Is the facility required to reserve a bed only if it is reimbursed for doing so?**

Yes, the provider is only responsible to reserve the specific bed(s) for which payment is being rendered. Residents would be eligible for priority readmission pursuant to existing regulations under 10 NYCRR Section 415.3(h)(2)(v)(4)(iv), "a nursing home shall establish and follow a written policy under which a resident who has resided in the nursing home for 30 days or more and who has been hospitalized or who has been transferred or discharged on therapeutic leave without being given a bed-hold is readmitted to the facility immediately upon the first availability of a bed in a semi-private room if the resident: (a) requires the services provided by the facility; and (b) is eligible for Medicaid nursing home services."
[emphasis added]

Not only is the above statement contained in the RIS inconsistent with DOH’s previous guidance on the subject, it is also inconsistent with existing DOH regulations at 10 NYCRR § 415.3(h)(2)(v)(4)(iv). The relevant federal law, Section 1919(c)(2)(d)(iii) of the Social Security Act [42 U.S.C. 1396r], contemplates the same construct as 10 NYCRR § 415.3(h)(2)(v)(4)(iv):

“(iii) PERMITTING RESIDENT TO RETURN.—A nursing facility must establish and follow a written policy under which a resident—

- (I) who is eligible for medical assistance for nursing facility services under a State plan,
- (II) who is transferred from the facility for hospitalization or therapeutic leave, and
- (III) whose hospitalization or therapeutic leave exceeds a period paid for under the State plan for the holding of a bed in the facility for the resident,**

will be permitted to be readmitted to the facility immediately upon the first availability of a bed in a semiprivate room in the facility if, at the time of readmission, the resident requires the services provided by the facility.” **[emphasis added]**

Potentially Expanded Mandate and Added Cost

The *Costs to Regulated Parties* section of the Department’s RIS states that:

“The elimination of reserved bed day payments for those aged 21 and over in nursing facilities who are not receiving hospice services in the facility, will impose a varying cost to nursing facilities based on the volume and length of reserved bed days within their facilities. For nursing facilities reporting reserved bed days, 481 facilities out of 607 total, the average

¹ Posted on DOH’s website at: https://www.health.ny.gov/professionals/nursing_home_administrator/dal_drs_10-08_supplement_questions_and_answers.htm.

impact is estimated to be \$33,409 annually. For specialty units reporting reserved bed days, 76 out of 89, the average impact is estimated to be \$56,140 annually.”

Although there is no explanation provided on how these impact estimates were arrived at, it appears that they represent the eliminated Medicaid payments for temporarily hospitalized residents aged 21+ who are not enrolled in hospice (i.e., the combined amounts that the state and federal governments will save). If so, the estimate reflects only the elimination of these Medicaid payments and not the added costs associated with the mandate to hold beds in the absence of Medicaid payment, which could be much greater:

1. **Current State policy limits the number of hospitalization bed hold days Medicaid will reimburse.** Medicaid coverage of bed hold is limited to 14 days for hospitalization bed holds per year for each beneficiary. As per the previous DOH guidance in DAL/DRS: 10-08, nursing homes were not required to hold the same bed and room absent Medicaid payment. However, the existing regulations at 18 NYCRR § 505.9(d)(6), which would not be amended by this proposed rulemaking, do not include any such limitations on total temporary hospitalization days for which a facility would be required to hold a bed. This could result in facilities incurring costs and receiving no payment from Medicaid for a significantly greater total number of bed hold days than the number Medicaid was reimbursing for.
2. **The impact of this proposed mandate is not limited to hospitalization bed holds.** Paragraph (7) of 18 NYCRR § 505.9(d) would be amended to add language specifying that nursing homes are required to reserve the same bed in the same room, unless medically contraindicated, for resident leaves of absence, without regard to whether Medicaid pays for the service. As with temporary hospitalizations, the existing regulations at 18 NYCRR § 505.9(d)(7) do not place any limit on leave of absence bed hold days for which a facility would be required to hold a bed, even though Medicaid places a 10-day annual limitation on payment. This too could result in facilities incurring costs and receiving no payment from Medicaid for additional bed hold days above the number that Medicaid covers.
3. **Foregone revenues to facilities could be much greater than the estimated impacts.** The proposed regulations would eliminate Medicaid reserved bed payments to nursing homes for up to 14 days per year for Medicaid beneficiaries aged 21+ who are temporarily hospitalized. These payments are made at 50 percent of the facility’s Medicaid rate. Coverage of therapeutic leaves of absence of up to 10 days per year would remain reimbursable at 95 percent of the Medicaid rate. The opportunity cost to a facility to hold a bed without payment could be far greater than the lost Medicaid reserved bed payment, which is either 50 percent or 95 percent of the full rate. Medicare and private pay rates most often greatly exceed Medicaid rates, and obviously the full Medicaid rate exceeds the amount payable for a bed reservation.
4. **Facilities incur costs to reserve beds.** Besides the revenues that are lost in holding a bed without payment, a facility incurs costs to hold a bed while a resident is temporarily absent. Fixed costs (property, plant and equipment, etc.) and semi-variable costs (e.g., utilities, administration, fiscal services, etc.) do not decrease due to some beds being empty while in reserved status. Even variable costs such as direct care

staffing and patient food do not typically decrease since, as a practical matter, the resource inputs are not changed due to small changes in the number of reserved beds.

The *Costs to Local Government* section asserts that there “...will be no additional costs to local government as a result of the proposed amendment” and the *Local Government Mandate* section states that this rulemaking “will not impose any program, service, duty, additional costs, or responsibility on any county, city, town, village, school district, fire district, or other special district.” In fact, local governments in multiple counties operate nursing homes, and these units of local government will incur additional costs under the proposed amendment.

The RIS also asserts that no regulatory flexibility analysis is required, since the proposed amendment “does not impose an adverse economic impact on small businesses or local governments...” and that no rural area flexibility analysis is required because the proposed rulemaking “does not impose an adverse impact on facilities in rural areas.” We believe these statements are incorrect. As we have demonstrated above, affected nursing homes will experience adverse economic impacts from the proposed rulemaking. Furthermore, there are affected nursing homes considered to be small businesses and operating in rural areas, as such terms are defined in Section 102 of the State Administrative Procedure Act.

Clarification on Leaves of Absence

Paragraph (7) of 18 NYCRR § 505.9(d) would be amended to remove language incorrectly stating that Medicaid reserved bed payments for leaves of absence are only available if the leave is for therapeutic purposes. Prior to its amendment in 2017, Public Health Law § 2808(25) included references to both “therapeutic leave of absences” and “other leaves of absence” as types of non-hospitalization bed holds that are covered by Medicaid. Leaves of absence to visit family or friends are identified as a qualifying purpose for leaves of absence in the existing regulations at 18 NYCRR § 505.9(d)(7)(i), and have qualified for reserved bed payments under DOH policies for many years. Accordingly, we support this modification, which clarifies that Medicaid reserved bed payments are available for leaves of absence regardless of whether they are for therapeutic purposes.

Conclusion

Many of the State’s nursing homes are in vulnerable financial condition, and the elimination of payment for hospitalization bed holds coupled with a significant unfunded mandate to hold beds without Medicaid payment will further impact the service system. The results of a national study show the average nursing home in New York was underpaid by Medicaid by a projected 20.7 percent in 2015 compared to its actual cost of care.² Medicaid is the predominant payer for nursing home care, accounting for 76 percent of all resident care days.³ DOH found that nearly one-quarter of the nursing homes in New York State were in serious financial condition.

² Eljay, LLC & Hansen Hunter & Co., PC. A Report on Shortfalls in Medicaid Funding for Nursing Center Care, April 2016.

³ Ibid.

The average operating margin of these financially-challenged homes was -7.4 percent, versus a national average of +3.6 percent.⁴

In summary, while there are selected elements of the proposed rulemaking which are properly authorized in law to which we do not object, we are greatly concerned about the proposed requirement for nursing homes to hold the same room and bed for temporarily hospitalized residents without provision for Medicaid payment. Based on this concern and others we have raised, we urge the Department to withdraw this proposed rulemaking, or substantially revise it to strictly conform to the revision to Public Health Law § 2808(25).

Thank you for the opportunity to provide input on the proposed regulations. If you have any questions on our comments, please contact me at (518) 867-8383 or dheim@leadingageny.org.

Sincerely,



Daniel J. Heim
Executive Vice President

cc: John Ulberg
Mark Kissinger
Ann Foster
Shelly Glock

⁴ New York State Department of Health, "New York State Medicaid Redesign Team (MRT) Waiver Amendment," 2012.