



September 20, 2017

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

RE: I.D. No. HLT-41-16-00002-RP: Residential Health Care Facility Quality Pool

Dear Ms. Ceroalo:

I am writing on behalf of the membership of LeadingAge New York to comment on the revised proposed regulations governing the Nursing Home Quality Pool (NHQP) authorized in Section 2808(2-c) of the Public Health Law. While we offer comments and recommendations on the proposed language, we generally support adoption of the proposed regulations.

General Comments

Major delays in making the associated payment adjustments have created considerable uncertainty for nursing homes and Medicaid managed care plans, and stand in stark contrast to the underlying objective of the program to recognize performance and value in Medicaid rates of payment. As the Department of Health (DOH) is aware, the Centers for Medicare and Medicaid Services (CMS) has granted approvals to the State for NHQP payment adjustments for all rate years at issue to date (i.e., 2013-17).

However, on June 9, 2015, a group of nursing homes filed litigation in New York State Supreme Court, Queens County [*Dry Harbor Nursing Home et al vs. Zucker et al*] challenging the implementation of the NHQP. LeadingAge NY remains hopeful that this litigation can be resolved as quickly as possible, and that the payment adjustments authorized by the enabling statute and accompanying regulations can be made in a timely and orderly manner without imposing undue fiscal or operational burdens on nursing home providers and managed care plans.

In this regard, we reiterate our concern that the regulatory requirement to fund the NHQP by commensurately reducing overall Medicaid payments by \$50 million annually: (1) will add to the negative impacts many facilities are experiencing from the implementation of statewide pricing and the lack of inflationary adjustments to rates; and (2) could have the perverse effect of detracting from quality in an already underfunded system. We maintain that quality funding should instead be derived from shared savings resulting from Medicaid redesign and/or other funding sources.

During the pendency of the aforementioned litigation, NHQP payment adjustments for 2013-16 – totaling \$200 million – have yet to be made, and the current measurement year will soon be over. As with other pay-for-performance and value-driven arrangements, the NHQP payment adjustments should be determined and distributed as close to the end of the reporting year as possible to reinforce the link between the facility's performance and the financial results. From a financial perspective, nursing homes that incurred additional expenses associated with quality improvement efforts are seeing significant cash flow delays and are uncertain as to whether they can even recognize the NHQP adjustment amounts in their financial statements.

Specific Comments

Our specific comments on the revised proposed regulations are as follows:

1. **The annual amount of the pool should be stated definitively.** We recommend striking the words "*or as determined by the Commissioner*" in Section 86-2.42(a) when referring to the amount of the NHQP. The amount of the pool should be set in the regulations at \$50 million per year. Any proposal to revise the total amount should be published as a proposed regulation and be subject to a regulatory impact analysis pursuant to the State Administrative Procedure Act.
2. **The NHQP Workgroup should be specifically referenced in the regulations.** While the Assessment of Public Comment references the Workgroup, the regulations do not. We recommend a revision to Section 86-2.42(a) to reference the NHQP and its role in providing guidance to DOH on the NHQP methodology applicable to each rate year.
3. **The regulation should reference regionalization of survey ratings for health inspections.** The Department notes in the Assessment of Public Comment that facilities' health inspection scores have been calculated by region beginning with the 2014 NHQP on the basis that two different types of survey processes (i.e., traditional and QIS) are being utilized. Regional variations in survey findings have been and remain a longstanding issue that pre-dates implementation of the QIS survey, and can have a major bearing on a facility's NHQP performance. As such, the proposed regulations should refer in Section 86-2.42(a)(1) to the use of a regional adjustment for compliance measures.
4. **The Informal Dispute Resolution (IDR) process should be referenced in the regulations relative to immediate jeopardy citations.** Specifically, Section 86-2.42(d)(1) indicates that if a facility receives a J, K or L deficiency between July 1st of the measurement year and June 30th of the payment year, it will be disqualified from receiving a NHQP distribution. This section should be modified to incorporate wording to the effect that deficiencies will be assessed on October 1st of the reporting year to allow a three-month window for potential IDRs to be processed.

5. **The regulatory impact statement should be modified to acknowledge the costs associated with this program.** Specifically, the statement reads, “There will be no additional costs to private regulated parties. No additional data will be requested from facilities.” According to the Department of State, the costs of a rulemaking include the costs to regulated parties for the implementation of and continuing compliance with the rule. Every nursing home in the state that is eligible to participate in the NHQP will be subject to an annual Medicaid rate reduction calculated in accordance with Section 86-2.42(c)(1), regardless of whether the facility is eligible for a distribution from the NHQP under Section 86-2.42(d)(1). To date, these reductions have not been taken, so facilities will incur costs when the NHQP adjustments are made. Accordingly, the regulatory impact statement should be modified to address the costs associated with the Medicaid rate reductions.

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@leadingagency.org.

Sincerely,



Daniel J. Heim
Executive Vice President

cc: John Ulberg
Anne Schettine
Raina Josberger