March 14, 2019

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-RP: Medicaid Reimbursement of Nursing Facility Reserved Bed Days for Hospitalizations

Dear Ms. Ceroalo:

I am writing on behalf 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 Medicaid reserved bed payments to nursing homes. We strongly opposed the originally proposed regulatory amendments, which would have broadly required nursing homes to hold the same room and bed for residents who are temporarily hospitalized or on leave without provision for Medicaid payment. We urged the Department of Health (DOH) to substantially revise the proposed regulations to conform to the revision to the enabling statute, Public Health Law (PHL) Section 2808(25). It appears that the revised proposed rulemaking has eliminated this substantial unfunded mandate. Even if our understanding is correct, other questions and concerns about the proposal remain.

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.

The proposed regulatory amendments would: (1) conform the regulations to the amendments to the PHL, which limit the availability of Medicaid reserved bed payments to nursing homes to reserve a bed for Medicaid recipients who are 21 years of age or older; and (2) clarify when reserved bed days should be included in the methodology utilized to calculate nursing home rates.

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.

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However, there should be definitive guidance issued if, and when, this amendment is adopted to the effect that this policy will be implemented prospectively only. Our concern stems from proposed Medicaid State Plan Amendment (SPA) #18-0042, which suggests that the changes reflected in this proposed rulemaking would take effect Jan. 1, 2019. 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.

Requirement to Hold Beds

The previous version of the proposed regulations, published in the *New York State Register* as rulemaking HLT-07-18-00002-P, would have amended paragraphs (6) and (7) of 18 NYCRR § 505.9(d) to add language requiring nursing homes and other medical institutions 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 objected 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.

The revised proposed regulation does not include this additional wording, and instead appears to limit the requirement to reserve the same bed in the same room to recipients: (1) who are either under 21 years of age, or are receiving hospice services within the facility and are temporarily hospitalized and

otherwise meet the requirements of 18 NYCRR § 505.9(d)(6); or (2) whose plan of care provides for leaves of absence pursuant to 18 NYCRR § 505.9(d)(7). Based on this interpretation, facilities would be required to reserve the same bed in the same room when the bed reservation qualifies for Medicaid payment. For any other temporary absences due to hospitalization or leave of absence, facilities would ostensibly be required to offer priority readmission to the first available semi-private room pursuant to existing regulations at 10 NYCRR Section 415.3(h)(2)(v)(4)(iv).

If this interpretation is incorrect, we restate the objections raised in our April 16, 2018 comments on the previous proposed rulemaking, HLT-07-18-00002-P.

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 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. We support this modification.

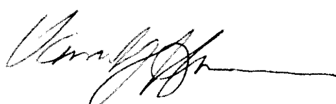
Inclusion of Reserved Bed Days in Specialty Unit Rate Calculations

The revised proposed rulemaking includes a revision to 10 NYCRR § 86-2.40(a), which would apparently include reserved bed days as patient days in the calculation of Medicaid rates for specialty units. We believe such a change in the regulations would be at odds with Public Health Law § 2808 (2-c)(c), which provides that the non-capital component of the rates for specialty facilities and units shall, “…reflect the rates in effect for such facilities on January first, two thousand nine, as adjusted for inflation and rate appeals in accordance with applicable statutes…”. While exceptions are made in this statute for unrelated revisions included in Chapter 58 of the Laws of 2009, there is no authority in Public Health Law § 2808 to make such a revision to the calculation of specialty rates by regulation.

Conclusion

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: Mark Kissinger
Ann Foster
Laura Rosenthal
Sheila McGarvey