



January 5, 2020

Ms. Katherine Ceroalo  
New York State Department of Health  
Bureau of Program Counsel, Regulatory Affairs Unit  
Corning Tower Building, Rm 2438  
Empire State Plaza  
Albany, New York 12237

Re: Proposed Rule I.D. No. HLT-45-19-00002-P – Licensed Home Care Services Agencies

Dear Ms. Ceroalo:

On behalf of the membership of LeadingAge New York, thank you for the opportunity to submit comment on the NYS Department of Health proposed rule (I.D. No. HLT-45-19-00002-P) which establishes a need methodology and financial standards for application for licensure for Licensed Home Care Services Agencies (LHCSAs).

LeadingAge New York represents over 400 not-for-profit and public providers of aging services, senior housing, long term and post-acute care, as well as provider-sponsored Managed Long Term Care (MLTC) plans. Our members provide the continuum of long term care providing New Yorkers with ease of access to services while continuing to age in the most appropriate and independent setting as possible. Many of our long term care networks include Licensed Home Care Services Agencies (LHCSAs) that serve the community or assisted living programs (ALPs). We appreciate the opportunity to comment on your proposal.

### **Applications for Licensure – Section 765-1.2, 1.3**

LeadingAge NY is supportive of the Department's inclusion of more thorough financial feasibility vetting for applicants to establish new LHCSAs. While the establishment of a LHCSA does not require the same level of capital investment as the establishment of a new nursing home, for example, we support the implementation of a financial feasibility review as a check against the creation of agencies that lack a sustainable business plan.

The proposed regulations do not appear to make significant changes to the character and competency review, aside from adding authority for the Public Health and Health Planning Council (PHHPC) to consider any matter that the Commissioner deems pertinent. In implementing the character and competence review for a new LHCSA application we recommend that the applicant should: demonstrate financial stability and compliance with audits and surveys and similar information for its owners or sponsors; demonstrate that its facility or agency has provided substantially compliant care; disclose any criminal convictions or disciplinary actions against the operator, directors and key executives; demonstrate that it conducts criminal record checks as required by law; provide evidence of the

cultural/ethnic capability and a plan to address health disparities in the region that relates to the operator's line of service; and submit the operator's plan to provide patient-centered care.

#### **Amendments to Applications - Section 765-1.4**

LeadingAge NY supports Public Health and Health Planning Council (PHHPC) review of various amendments during the application process for licensing of new LHCSAs. LeadingAge New York assumes this section applies only to new LHCSAs seeking licensure that are making changes to a pending application.

#### **Determination of Public Need - Section 765-1.16**

##### Planning Areas - Section 765-1.16 (b)

The proposed regulations establish planning areas in accordance with county boundaries. LeadingAge NY urges the Department to consider granting flexibility along county borders. Strict adherence to county lines can sometimes leave areas immediately adjacent to a border unserved or underserved, especially if the county seat or other more populated areas are located on the opposite side of the county. Currently, there are pockets of unmet need caused by these arbitrary barriers. We believe the overarching goal of the need methodology should be to adequately serve the population, and flexibility should be granted for applicants that demonstrate such need patterns.

Further, as roles and delivery system areas have changed, in particular under managed care and other collaboratives (i.e. Delivery System Reform Incentive Payment (DSRIP) Program, bundled payment arrangements, accountable care organizations, and other integrated models), natural service area alignments are often no longer county-bound. Accordingly, we ask the Department to consider flexibility in service areas aligned with the new realities of service delivery and new models of care and coverage so as to promote the goals of equitable consumer access.

##### Presumption that Establishment of 5 LHCSAs Satisfies Need – Section 765-1.16 (c)(1)

LeadingAge NY opposes the presumption of no need for additional LHCSAs in a planning area if there are 5 or more LHCSAs in a county actively serving patients. The limitation, in many counties, essentially continues the moratorium on licenses put in place by the 2018-19 state budget. We believe new LHCSA license applications should be granted based upon need. A threshold of 5, however, is not an indicator that need is necessarily being met throughout a county, nor does it indicate the availability of services to special populations, capacity, competency or quality.

In determining need, rather than relying on an arbitrary presumption, the Department should look closely at whether the existing LHCSAs are actively serving patients throughout the county. Currently, many agencies are not fully serving the planning areas for which they are authorized and instead serve only portions of counties. To the extent that such a presumption is imposed, we agree that it should be rebuttable and the target year for determining whether five LHCSAs are operating should be updated annually.

##### Change of Ownership - Section 765-1.16 (c)(2)

LeadingAge NY supports the proposed language that change of ownership applications for LHCSAs serving at least 25 patients will not be subject to public need review and will be evaluated only on financial feasibility and the character and competence of the proposed operator, unless the proposed operator seeks to serve patients outside of the approved planning area.

### Exemptions from Need Review – Section 765-1.16 (c)(3)

We support the proposed language exempting need review for proposed LHCSAs affiliated with ALP or PACE applications, except when such LHCSAs would like to serve the broader community beyond the ALP or PACE program. We request that the proposed language defining the term “affiliated” be modified slightly to read:

“For the purpose of this regulation affiliated shall mean common ownership or control.”

In the not-for-profit context, the relationships among related entities are frequently expressed in terms of control (e.g., board appointment powers, authority to make major decisions as set forth in organizational documents, etc.), rather than in terms of property interests.

LeadingAge NY also supports this same relief for LHCSAs that are proposed as part of Continuing Care Retirement Communities (CCRCs). Such a LHCSA patient population would be served by the continuum of care offered by and agreed to via member contract with the CCRC, a setting and structure analogous to the ALP- and PACE-affiliated LHCSAs. A CCRC-affiliated LHCSA would be subject to review if it plans to offer services to the broader community. Generally, LeadingAge NY supports exemptions from need review and exclusions from the need methodology for multi-service level long term care providers seeking to establish a LHCSA to serve their contract holders and residents. This policy would enable the delivery of integrated services in a cost-effective manner to older adults who opt for this model of care. The revised regulation would read as follows:

(3) The determination of need for licensed home care service agencies in accordance with this subdivision does not include Assisted Living Program (ALP) or Program of All-Inclusive Care for the Elderly (PACE) or Continuing Care Retirement Community (CCRC) affiliated licensed home care services agencies. ALP, CCRC, or and PACE affiliated agencies are not subject to the public need review unless the agency seeks to serve patients outside the ALP program or CCRC or who are not PACE members.

### Review and Update of Methodology - Section 765-1.16 (c)(4)

As indicated in our first set of comments, LeadingAge NY supports a review of the need methodology every three years, rather than the proposed six years. The population served by LHCSAs is growing at a rapid pace, payment models and delivery systems are changing, and workforce issues continue to constantly pressure LHCSA providers. We believe the Department should be more proactive in rethinking this process to ensure availability and quality offered by LHCSAs.

### Factors to be Considered When Determining Need - Section 765-1.16 (d)

- **Waiting Lists**

Proposed section 765-1.16 (d)(2) calls for factors to be considered when determining need. Section (d)(2) calls for *“documented evidence of the unduplicated number of patients on waiting lists who are appropriate for and desire admission to a LHCSA but who experience a long wait time for placement and who cannot be served adequately in other settings;”*.

LeadingAge NY believes this evidence is difficult to demonstrate. Having providers ascertain wait times and gauge adequacy of care in other settings is unrealistic and inappropriate and likely unreliable data for consideration in establishing need. Furthermore, the data is likely to change quickly over time; individuals who truly need the service may not be able to wait for any period of time. Providers may be

able to demonstrate their own numbers of unmet need or reduction in hours, but may not be able to ascertain numbers on other waiting lists and if such patient counts are unduplicated. Providers realize this information is important for ascertaining need, but it remains difficult to collect.

- Quality

LeadingAge NY asks the Department to clarify how applicants should demonstrate quality as a factor for consideration. While we support this measure, we ask for more specifics regarding what the Department has in mind for demonstration of quality capacity and quality care.

- Workforce

Long-term care providers across the state are facing unprecedented workforce challenges. While the older adult population is growing, the population of working age adults is declining. The success of this regulatory effort rests on the Department's ability to grant LHCSA licenses that enable new agencies to operate without putting hiring strains on existing agencies. We are concerned that the addition of agencies in many counties will merely result in agencies poaching each other's direct care staff, without adding to the home care workforce in the region.

The proposed regulations require demonstration in (d)(6) of "*personnel and resources dedicated to adding and training additional members of the workforce including committed resources in an organized training program*." We ask that the Department go a step further and require applicants to describe their plans to develop the home care workforce through innovative training and recruitment strategies, community partnerships, and/or other initiatives. This effort requires funding, ingenuity and change if we are to adequately grow our long term care workforce to serve a growing patient population.

- Populations that Have Difficulty Accessing Home Care

The proposed regulations provide that applicants will be approved only if they agree to serve populations that have difficulty accessing home care, due to their minority status, medical history, case complexity, age, or payment sources. We recommend adding geographic location to this list.

Thank you for considering LeadingAge New York's comments. Please contact me at 518 867-8871 if you have any questions or need additional information.

Sincerely,



Meg Carr Everett  
Policy Analyst  
Home and Community Based Services