May 9, 2022

New York State Department of Health
Bureau of Program Counsel, Regulatory Affairs Unit
Corning Tower, Empire State Plaza, Rm. 2438
Albany, New York 12237-0031
Phone: (518) 473-7488
FAX: (518) 473-2019
regsqna@health.ny.gov
Attention: Katherine Ceroalo

Re: Amendment of Sections 487.4, 488.4 and 490.4 of Title 18 NYCRR (Updated Retention Standards for Adult Care Facilities)
I.D. No. HLT-10-22-00009-P

Via E-Mail

Dear Ms. Ceroalo,

I am writing on behalf of LeadingAge New York's non-profit adult care facility (ACF) members to offer comments proposed regulations regarding retention standards for ACFs. According to the Regulatory Impact Statement, the proposed amendments are intended to ensure that ACFs comply the Americans with Disabilities Act of 1990, 42 U.S.C. 12101 et seq (ADA). The proposed regulation seeks to clarify admission and retention standards to make clear that ACFs must make reasonable accommodation for residents who use wheelchairs for mobility. It also indicates that the ACF nevertheless must be able to safely accommodate the needs of such individual, must be in compliance with local fire codes, and must have an appropriate level of staffing to evacuate such individual; or the operator must determine that such individual is capable of self-preservation in the event of an emergency. Persons incapable of self-preservation are those who, because of age, physical limitations, mental limitations, chemical dependency, or medical treatment, cannot respond as an individual in an emergency situation.

LeadingAge New York and our members certainly embrace the spirit and objectives of the ADA, and the need to comply with its requirements. ACFs are a critical aspect of the long-term care continuum designed to promote independence in a home-like setting. It is surprising, however, to see such significant regulatory changes proposed without any advanced discussion with the provider community -- changes which seem to go beyond ADA compliance and accommodating residents who use wheelchairs for mobility. The proposed changes would have sweeping implications and fundamentally change the existing ACF and assisted living residence (ALR) models and raise questions about the enhanced assisted living residence (EALR) model.

Specifically, the proposed regulations would eliminate the existing provisions that bar an operator from admitting or retaining individuals who chronically require the physical assistance of another person in order to walk, or chronically require the physical assistance of another person to climb or descend stairs,

regardless of whether assignment on a floor with ground-level egress can be made. This significantly raises the potential level of need of individuals who can be admitted or retained in an ACF. In order to serve residents with higher needs, ACFs will have to dramatically increase their staffing. Unfortunately, there is a serious staffing shortage, with no indication that it will improve soon. ACFs were largely overlooked in the recently enacted state budget which afforded health care worker bonuses and targeted wage increases for other health care sectors. The minimum staffing requirements now being enforced for nursing homes forces them to fight even harder to attract aide level staff to avoid significant penalties. These factors will only exacerbate the ACF's ability to recruit and retain needed staff.

The proposed amendments to the regulations will also raise the expectation of the consumer that all ACFs will be able to meet their needs, when many will not be able to do so. For example, enriched housing programs are not required to have 24-hour staffing. Further, this will potentially widen the gap between what is available to low-income seniors versus those with means. ACFs that serve a low-income population that is reliant on the Supplemental Security Income (SSI) rate of approximately $43 dollars per day will have no ability to hire the staff needed to accommodate the needs of people who consistently require the assistance of another to walk or climb stairs. Additionally, these regulations would require Medicaid-funded assisted living programs (ALPs) to provide more services and serve resident with higher levels of need, with potential implications to feasibility of the ALP Medicaid rate, and/or to the New York State Medicaid program.

Even those ACFs that are equipped with staff to serve a resident with higher needs may not be able to do so as the resident's conditions declines, or if *all* their residents develop these needs. What is reasonable today for one or two residents, may become infeasible over time, as more residents are reliant on another person to ambulate and enjoy day to day activities. Indeed, with aging residents, many with multiple chronic conditions, the potential to develop mobility impairments and need assistance with ambulation and navigating stairs is likely. *Safely* accommodating all residents may become financially and operationally impossible.

The enhanced assisted living residence (EALR) model was developed with these factors in mind --allowing EALR residents to age in place, permitting the EALR to designate only a portion of their units as enhanced, and permitting nurses to practice nursing in EALRs. The proposed regulation creates overlap between the EALR and the other ACF models. New York State Public Health Law 4651, subdivision 15, describes the type of resident that may be served in an enhanced assisted living residence, indicating that the enhanced certificate:

> *"…authorizes an assisted living residence to provide aging in place by either admitting or retaining residents who desire to age in place and who: (a) are chronically chairfast and unable to transfer, or chronically require the physical assistance of another person to transfer; (b) chronically require the physical assistance of another person in order to walk; (c) chronically require the physical assistance of another person to climb or descend stairs…"*

Does this mean, then, that according to state law, ACFs which, by virtue of this proposed regulation change, serve a higher needs resident, must become licensed as an EALR? And what does this change mean for existing EALRs that already serve this level of resident?

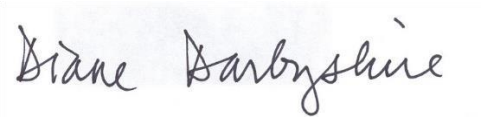
Again, LeadingAge NY understands the importance of complying with ADA, supports the objectives of the law, and acknowledges that ACFs have been operating under outdated state laws and regulations (including the prohibition on nurses practicing nursing in most ACF models). These sweeping changes, however, have much broader implications. It is critical to give careful thought to how to make these transitions in *service delivery* associated with these changes, for the benefit of providers and residents alike. Failing to do so could result in poor outcomes for residents and failures of the model itself. It may encourage the closure and decertification of ACFs. Hastening closure of providers that serve low-income seniors fundamentally undermines the objectives of this regulation change.

Additionally, the ACF and assisted living world is extraordinarily confusing to all, particularly consumers. This proposed regulation blurs the line between the EALR and other ACF models and will further confound the ability to identify a provider to meet one's needs.

For these reasons, we urge the state to work with the provider community to determine how best to ensure compliance with ADA, while addressing the aforementioned questions and concerns, and identify what regulatory and possibly statutory changes need to be made. It is critical that the provider community understand the expectations and be prepared to safely meet them.

Thank you very much for your consideration of these issues.

Sincerely,



Diane Darbyshire, LCSW
Vice President for Advocacy and Public Policy

Cc: Heidi Hayes
Valerie Deetz