



May 17, 2018

Dan Sheppard  
Deputy Commissioner  
New York State Department of Health  
Office of Primary Care and Health Systems Management  
Empire State Plaza, Corning Tower, 14th Floor  
Albany NY 12237

Re: LHCSA Moratorium Guidance

Dear Dan:

I am writing on behalf of LeadingAge New York (LANY) regarding the recently published guidance on the licensed home care agency (LHCSA) establishment moratorium (the Guidance). We are concerned that the Guidance narrowly interprets the exceptions to the moratorium in a manner that is unsupported by the statute and inconsistent with other policy initiatives.

## **I. Exception for Establishment of ALP-Related LHCSAs**

The statute provides for a moratorium on the processing and approval of applications seeking licensure of a licensed home care services agency (LHCSA), but provides an exception for a LHCSA application “that is submitted with an application for approval as an assisted living program.” The Guidance, by contrast, imposes certain conditions on that exception, including: “The ALP application must have been submitted to the Department and an application number issued.” This condition could be interpreted to mean that DOH will only process those ALP-related LHCSA applications already in the queue as of the enactment of the budget provision. We see no statutory justification for this limitation. The statutory language governing exceptions for ALP-related LHCSAs describes the submission of the ALP application in the present tense -- not the past tense. It does not require the ALP-related LHCSA application to *have been* submitted (e.g., prior to the effective date of the budget provision). Rather, it requires that the LHCSA application “*is submitted*” with an ALP application (Part B, section 9-e).

The inclusion in the budget of authority to establish additional ALP beds either in existing or new ALPs (Part B, section 2), and to award health care transformation capital grants to both new and existing ALPs (Part Q), further indicates the Legislature’s intent to permit new ALP-related LHCSAs to be established pursuant to applications submitted after the enactment of the budget. The Legislature would not have authorized the creation of new ALP programs in the budget legislation, if it did not also contemplate the creation of new LHCSA’s in conjunction with those new programs.

In addition, we question the Department’s decision to permit ALP-related LHCSAs established under the exception to the moratorium to serve only the residents of the ALP. There is no basis in the statute for this limitation. Many ALP-related LHCSAs serve residents of the surrounding community. If the

Legislature had intended to prohibit this common practice among newly-established ALP-related LHCSAs, it would have drafted the exception more narrowly.

Accordingly, we recommend revising the “ALP-Related Exceptions” paragraph of the Guidance as follows:

- The ALP application must ~~have been~~ **be** submitted to the Department **concurrent with, or prior to, the submission of the LHCSA application;** ~~and an application number issued.~~
- Ownership of the LHCSA must be identical to the ownership of the ALP.
- ~~Approval will be limited to serving the residents of the associated ALP. Therefore, the application may request only the county in which the ALP resides as the county to be served.~~
- ~~The application must include an attestation acknowledging that the approval will be limited to serving the residents of the associated ALP.~~

## II. Changes of Ownership

The Guidance’s ban on changes in ownership of LHCSAs exceeds the statutory mandate and is not necessary to achieve the goal of reducing the number of LHCSAs. The statute places “a moratorium on the processing and approval of applications seeking licensure of a licensed home care services agency that have not received establishment approval or contingent establishment approval by the public health and health planning council.” It provides an exception for applications “seeking approval to transfer ownership for an existing licensed home care services agency that has been licensed and operating for a minimum of five years for the purpose of consolidating ownership of two or more licensed home care services agencies.” The statute does not address the establishment of a new controlling entity of a LHCSA or the replacement of an operator; yet the Guidance prohibits these actions during the moratorium. As long as the LHCSA seeking an ownership change is currently licensed and operational, and no new LHCSA is being established, the moratorium should not come into play.

Not only are these prohibitions unsupported by the statute, they are also contrary to the Department’s programmatic priorities and inconsistent other provisions of the Guidance. Specifically, the prohibition on a new controlling entity being established at a level above the current operator would prevent the creation or expansion of integrated LTPAC systems that span the continuum under an active parent. This would defeat the Department’s policy goal of creating fully-integrated systems that are financially-sustainable and capable of delivering more efficient person-centered care. Moreover, these prohibitions are inconsistent with the exemption granted in the Guidance for a new, non-established corporation to purchase two or more LHCSAs. We do not understand the rationale for prohibiting the establishment of a new controlling entity (particularly one that is already an established operator of other services or facilities), while permitting the establishment of an entirely new corporation to operate two or more LHCSAs.

Accordingly, we recommend revising the “Change of Ownership” exceptions as follows:

- Only changes in ownership that consolidate two or more LHCSAs, **replace an existing operator, or establish a new controlling entity above the current operator** may be

accepted during the moratorium. Consolidate means reducing the number of LHCSA license numbers, not a reduction in the number of sites operated under a license number. A LHCSA license number, for this purpose, is the first four digits, before the "L". The application must include all sites of the to-be-acquired agency.

- LHCSAs to be acquired must be currently operational and have been in operation at least five years.
- The application must include an attestation and statistical report data verifying the seller(s) is/are operational and has/have been for a minimum of five years.

Examples of ~~Non-Qualifying~~ Changes in Ownership Applications

- ~~A new proposed operator replaces the current operator of a LHCSA~~
- ~~A new controlling entity is established at a level above the current operator\*1\*~~
- ~~A partial change in ownership requiring Public Health and Health Planning Council approval\*2\*~~

Thank you very much for considering these comments and recommendations. We would happy to discuss our concerns with you at your convenience.

Sincerely,



Karen Lipson  
EVP for Innovation Strategies

CC: Mark Kissinger  
Tracy Raleigh  
Sean Doolan  
Diane Darbyshire  
Margaret Everett

