February 21, 2023

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

Re: Proposed Regulation Changes for Adult Care Facilities: I.D. No. HLT-51-22-00006-P

Dear Ms. Ceroalo:

I am writing on behalf of the members of LeadingAge New York's not-for-profit adult care facility (ACF) and assisted living providers to offer comments on the above-referenced proposed regulation, which seeks to incorporate aspects of the federal home and community based settings (HCBS) rule into state regulation.

Our members embrace the spirit of the federal regulation, to ensure choice and provide services in a person-centered way. Their fundamental concern is how the Department of Health (DOH) will shift their approach the survey process. We feel that there should be a common understanding among all parties regarding the changes. This should include DOH guidance and training that allows for a dialogue with providers, and the opportunity for questions and answers. As written, the effective date of these changes is immediate upon promulgation. **We urge the state to allow more time to ensure a common understanding of how the regulations can be implemented and will be surveyed.** An effective date of 6 months from promulgation would allow this DOH education and training to occur.

We also note that Medicaid assisted living program (ALP) is the only ACF setting in which the provider is reimbursed by Medicaid for HCBS services. While the Department has decided to apply these standards to all ACF/AL settings, the federal rule does not apply to all ACF/AL settings.

Further, the ALP is a Medicaid *state plan* service, not a waiver service. It is not included in the State's 1115 waiver, nor in any of its 1915c waivers, and individuals enrolled in these waivers are not permitted to access the ALP benefit. The text of the proposed regulation changes references 42 CFR §441.301(c), which addresses the federal HCBS final rule for HCBS Medicaid *waivers*. We question whether this federal regulation applies to a state plan service. Nor is the ALP a service under the 1915(i) HCBS State Plan Option, or the 1915(k) Community First Choice – the other two federal regulatory sources for HCBS standards.

13 British American Blvd. | Suite 2 | Latham, NY 12110
P 518.867.8383 | F 518.867.8384 | LeadingAgeNewYork.org

Specific Comments on the Proposed Regulation Changes:

With regard to the below proposed change in Section 487.5(2)(a), with similar language proposed in 488.5(a):

A copy of the statement of rights issued by the department shall be posted in a conspicuous location in a public area of the facility, provided to each resident at the time of admission, and reviewed with the resident periodically thereafter.

Comment: While we believe this language is consistent with the federal rule, the standard of "periodically" is subjective. Given that this information statement of rights is given at time of admission and posted in the building, we believe *annually* would be a reasonable standard.

The below comments relate to several proposed changes in Section 487.5 (a)(3), with similar language in 488.5(a)(3):

- *At a minimum, the operator shall afford each resident the following rights and protections: * * * (vi) A resident shall have the right to manage [his or her] their own financial and personal affairs, including but not limited to the right to determine from whom medical services are received, provided such services are within the provider's scope of practice. (vii) A resident shall have the right to privacy in [his/her] their own room or sleeping unit, and in caring for personal needs, with only the resident and appropriate staff having access.*

Comment: While this language is consistent with the federal rule, we want the ensure all parties recognize that there will be different ways in which the privacy of a sleeping unit may be accomplished. There has not been a standard trend factor increase in the Medicaid ALP rates, nor a cost of living adjustment in the State Supplement Program (SSP) Congregate Care Level 3 rate in 15 years. Given that some resident rooms are shared, and there is no funding to implement significant structural modifications, there must be flexibility.

- *(viii) [A resident shall have the right to confidential treatment of personal, social, financial and health records.] A resident shall be provided the ability to select a private room if one is available and affordable to the resident. Residents in shared rooms shall be afforded a choice of roommates and operators shall take all reasonable steps to accommodate a resident's expressed choice.*

Comment: Again, this provision below also in this section will require education to ensure common understanding. We appreciation the inclusion of the concept of affordability in the language. In settings with shared rooms, choice will be limited as a practical matter. Providers always strive to accommodate resident preferences and requests, but some preferences may not be possible, available or affordable.

Additionally, we presume this right would also extend to residents of different gender wanting to live together.

- *(ix) [A resident shall have the right to receive courteous, fair and respectful care and treatment at all times, and shall not be physically, mentally or emotionally abused, or subject to any occurrence which would constitute a reportable incident.]* *A resident shall have the right to decorate their room to taste in compliance with all applicable local and state fire and safety codes.*

Comment: This amendment should allow providers to impose reasonable limits on decorative changes and preferences that impact health and safety more generally – not just those that implicate fire and safety codes. For example, a change in flooring or rugs may create a falls risk. Likewise, hoarding or excessive furniture may create safety hazards that are not contemplated by fire and safety codes.

- *(xiv) [A resident shall not be permitted, or obliged, to provide any operator or agent of the operator any gratuity in any form for services provided or arranged for in accord with law or regulation.]* *A resident shall be permitted to engage in community life, including life outside of the facility, to the degree that the resident prefers and in full recognition of the resident's safety.*

Comment: We appreciate the inclusion of the concept of resident safety, though we also know that concept in and of itself is sometimes subjective. Again, DOH education and guidance regarding the balance of resident choice and safety is warranted.

- We also note that the enriched housing regulation seems to differ in its proposed regulation change regarding access to the community:

  488.5(a)(3) (xiv) [to object if the operator terminates the resident's admission agreement against his/her will.] *to the extent the resident prefers, be permitted to engage in activities outside the facility;*

  Comment: We would recommend that the enriched housing program language mirror that of the adult home regulation proposed change, again recognizing the need to balance resident

safety. If the Department believes the language should not be consistent, this should be explained.

- *A resident shall be afforded the right to control their own schedule and activities and have access to foods of preference at any time.*

Comment: This provision should include language recognizing that these rights may be informed by health and safety considerations. There must be guidance for the provider about how to manage resident choice if a resident is on a special diet and wants foods that are outside of that special diet or pose a safety risk.

Additionally, we note that this proposed modification includes the addition of the wording "of preference", beyond what is included in the language in the federal rule. We believe that incorporating the resident's preferences is in inherent in the person-centered planning process. The possibility of providing foods of preference is limited by the financial feasibility of providing foods of preference. For example, filet mignon and lobster tails, while preferred, is generally not possible on a regular basis. Additionally, while an ACF can provide a snack in the middle of the night, it is not reasonable to expect a fully cooked meal.

Thus, while we support the intent, the statement "of preference" may mislead the consumer, and therefore should be removed. Again, these are all issues where a common understanding of the intent of the language and the practical limitations are critical.

With regard to the below changes to Section 487.7(d) and similar wording in Section 488.7(b):

These modifications require operators to file a report with the Justice Center for the Protection of People with Special Needs in the event of a resident's death or attempted suicide, or when a felony crime may have been committed by or against a resident, *if the resident had at any time received services from a mental hygiene services provider.*

Comment: While we do not object to the modifications, we believe the regulatory language would benefit from some additional parameters regarding the standard: "if the resident had at any time received services from a mental hygiene services provider." This is a remarkably broad standard. Residents may not recall if they received services earlier in their life, and the provider may not have documentation of services that were provided. Providers that are not under the general jurisdiction but file a report with the Justice Center because a resident at one time received mental hygiene services are often met with confusion about why the report is being filed. We believe that the standard is written more broadly than the intent. Refinement of the term "mental hygiene services" and "at any time received" would be beneficial, while still preserving the intent of the requirement.

With regard to the below changes to Section 487.7(g) and similar wording in Section 488.7(e)

Each resident shall be provided such case management services as are necessary to support the resident in maintaining independence of function and personal choice[.], <u>including, but not limited to, decisions regarding which daily activities to participate in, individuals with whom to interact, and the physical environment in which the resident resides.</u>

Comment: The Department must ensure that this concept is reflected in their oversight and practices. For example, should this result in a change in the food service regulations which only allow in room tray service under limited circumstances? If a resident prefers *not* to eat communally, can this be accommodated without having to submit an equivalency? The Department's Equivalency Document references the following regulations that must be addressed to enable Personal Care/ In –Room Tray Service / Food Service: 487.7(e)(6) 487.8 (e)(11) 488.7 (c), 490. 8 (b).

Another consideration is if the ACF is experiencing an infectious disease outbreak, and infection prevention guidance requires quarantine, does this provision require communal activities and dining?

With regard to the below changes to Section 487.7(g) and similar wording in Section 488.7(e) regarding case management services:

Case management services must include:
…..<u>documenting each resident's understanding of their rights and responsibilities afforded under this Part</u>

Comment: The case manager's responsibility is to review the rights and responsibilities and address questions, with the objective of ensuring understanding, and this is what the case manager should document. The case manager cannot attest to the resident's understanding of the information. We recommend the wording be revised to reflect that nuance.

With regard to the below proposed change: Section 487.11 (l) and similar wording in Section 488.11(h):

All bedrooms shall be: (a) above grade level; (b) adequately lighted; [and] (c) adequately ventilated[.]; <u>and (d) lockable by the resident via an appropriate locking mechanism, with only the resident and appropriate staff having access.</u>

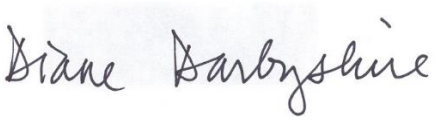
Comment: We understand this language is consistent with the federal rule. In settings where residents share a unit, with a locked door, but have individual bedrooms-must the bedrooms themselves have a lock? Additionally, if a private unit has a locked door but the bedroom door itself does not, must the bedroom have a lock installed?

Conclusion

Again, we appreciate the opportunity to comment on these regulation changes. While we understand that the changes in regulation outlined above mirror federal regulation, we believe there is important work to be done in the implementation phase to ensure a common understanding of the standards. To that end, more time for education and training is warranted.

Thank you very much for your consideration of these issues.

Sincerely,



Diane Darbyshire
Vice President for Advocacy and Public Policy

Cc: Valerie Deetz
Heidi Hayes
KellyAnn Anderson
Karen Meier
Madeline Kennedy