



July 27, 2018

Katherine Ceroalo  
New York State Department of Health  
Bureau of Program Counsel, Regulatory Affairs Unit  
Corning Tower Building, Room 2438  
Empire State Plaza  
Albany, NY 12237  
[REGSQNA@health.ny.gov](mailto:REGSQNA@health.ny.gov)

Re: Criminal History Record Checks and Advanced Home Health Aides  
I.D. No. HLT-22-18-00010-P

Dear Ms. Ceroalo:

On behalf of LeadingAge New York, we appreciate the opportunity to provide comments on the proposed regulations amending Parts 402, 403, 700, 763, 765, 766, 793, 794 and 1001 of Title 10 NYCRR, regarding the establishment of the role of advanced home health aide and criminal history record checks. LeadingAge NY represents approximately 400 not-for-profit and public providers of long-term and post-acute care (LTPAC) and senior services throughout the State, and we offer comments from the perspective of our members that provide home care, hospice and assisted living services.

#### **Advanced Home Health Aide Provisions**

- In the proposed rule, the patient rights and resident protection sections relating to Certified Home Health Agencies (CHHAs) 763.2(12), Licensed Home Care Services Agencies (LHCSAs) 766.1(12), Hospice 793.1(20), and Assisted Living Residences (ALRs) 1001.9(2)(b)(xviii), the Department proposes language to provide for refusal of consent to advanced tasks performed by an advanced home health aide. The proposed regulation states that if the consumer refuses the services of an advanced home health aide, then the tasks would be performed by a registered professional nurse (RN). However, the tasks that would otherwise be performed by an advanced home health aide are within the scope of practice of a Licensed Practical Nurse (LPN); thus, the proposed regulation should be amended to clarify that the task be performed by *either* an RN or LPN.
- In the proposed rule, 766.5 (c) is amended as follows:
  - (c) home health aides or personal care aides are supervised, as appropriate by a registered professional nurse [or licensed practical nurse], or a therapist if the aide carries out simple procedures as an extension of physical therapy, occupational therapy or speech/language pathology.

LeadingAge New York believes that the proposed elimination of the “licensed practical nurse” is in error. LPNs should continue to be able to supervise home health aides or personal care aides; this change is not relevant to the role of advanced home health aides. We acknowledge that a supervisory relationship between an LPN and an *advanced* home health aide would not be appropriate as their scopes of practice are quite similar. However, RN supervision of advanced home health aides, home health aides and personal care aides, and LPN supervision of home health aides and personal care aides could be parsed out separately in regulation to distinguish the differences. Thus, the words “or licensed practical nurse” should not be deleted from this section.

- In the proposed rule, the sections relating to CHHAs 763.4(h)(10), LHCSAs 766.5 (g), Hospice 793.7(o)(12), and ALRs 1001.11(r)(5) regarding the direct supervision of an advanced home health aide conducted by an RN, each contain the following language: “...any failure by a supervising registered professional nurse to comply with the requirements of paragraph eight of this subdivision shall be reported to the department”

LeadingAge New York sees this provision as overly broad and subjective. We recommend that this provision be more specific to indicate what constitutes a failure to comply.

### **Home Care Registry and the EALR Setting**

The regulatory summary of the proposal indicates that 10 NYCRR Part 403 would be amended to add home health aides and advanced home health aides employed by Enhanced Assisted Living Residences (EALRs) to the Registry, however the actual proposed changes would have a broader impact. Pursuant to Section 403.2, regarding the responsibilities of home care services entities, the registry also includes people who have successfully completed a state approved education or training program for *personal care aides*. While it is not required that someone complete a state approved education or training program, as defined in this section of regulation, to provide personal care in an ALR, EALR, or Special Needs Assisted Living Residence (SNALR), it is possible that aides working in those settings have completed the state approved training program for personal care aides. Under the proposed changes to Part 403, will certified personal care aides who have completed the state approved training programs and work in the EALR now be subject to the registry? Would EALRs that do not employ home health aides or advanced home health aides have still be subject to the registry?

Additionally, the regulations specify that *only* the EALR must comply with the home care registry regulations. Many facilities only certify a portion of their ALR beds as EALR beds. Thus, certified personal care aides may work in the ALR, EALR, or SNALR—all in the same facility. Will those certified personal care aides employed in a facility certified as an EALR and providing personal care services exclusively in the facility’s ALR and/or SNALR be subject to the registry?

### **Advanced Home Health Aide and the Assisted Living Program**

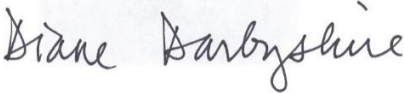
Pursuant to the law, an Assisted Living Program (ALP) must be comprised of an adult care facility licensed under Article 7 of the Social Services Law and a home care agency licensed under Article 36 of the Public Health Law, such as a LHCSA. Many ALPs operate a LHCSA to satisfy the required home care component of the ALP. While the statute and proposed regulation are clear that LHCSAs can provide

advanced home health aide services, there has been debate about whether the ALP's LHCSA can offer advanced home health aide services to residents in the ALP. LHCSAs associated with ALPs are subject to the same regulations as other LHCSAs in the state. For this reason, it follows that under the proposed regulations, an ALP's LHSCA would be able to use advanced home health aides in the ALP. We support this approach because it will allow ALPs to provide more services to their residents, in a more efficient way. In some parts of the state, there is a nursing shortage and the services of an advanced home health aide can help ensure that ALP residents needed services in a timely manner. If it is not the Department's interpretation of its regulations that an ALP LHCSA can offer advanced home health aide services, please provide the basis for the prohibition.

### **Conclusion**

Thank you for the opportunity to provide input on the proposed rule. If you have any questions on our comments, please contact Meg Everett at [meverett@leadingagency.org](mailto:meverett@leadingagency.org) or Diane Darbyshire at [ddarbyshire@leadingagency.org](mailto:ddarbyshire@leadingagency.org). We can both be reached at (518) 867-8383.

Sincerely,

A handwritten signature in cursive script that reads "Diane Darbyshire". The signature is written in black ink on a light-colored background.

Diane Darbyshire, LCSW  
Senior Policy Analyst