

February 14, 2022

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

RE: HLT-50-21-00004-EP: Personal Caregiving and Compassionate Caregiving Visitors in Nursing Homes and Adult Care Facilities

Dear Ms. Ceroalo:

I am writing on behalf of the membership of LeadingAge New York to provide input on the proposed regulations intended to implement section 2801-h of the Public Health Law (PHL) and section 461-u of the Social Services Law (SSL), as enacted by Chapter 108 of the Laws of 2021. These statutory amendments provide parameters for the utilization of personal caregiving visitors in all licensed nursing homes and adult care facilities during a public health emergency. These regulations arise out of legislation aimed at expanding nursing home and adult care facility visitation in the face of draconian limitations on visitation that were imposed in the first 6 months of the pandemic to reduce the risk of COVID transmission in these facilities. LeadingAge New York repeatedly expressed concerns about the negative effects of the visitation restrictions on residents and families and advocated for a more balanced and targeted approach. While we agree with the intent behind the personal/compassionate caregiving legislation and regulations, the law has been difficult, if not impossible, to implement due to inconsistencies with federal guidance and insufficient direction from the state. Moreover, we question their necessity given the lifting of most restrictions on nursing home visitation by CMS and the relaxation of state restrictions on adult care facility visitation earlier this year.

Carrying out the law and regulations is challenging, if not infeasible, for the following reasons:

State and Federal Guidance for Nursing Homes Conflict

The Centers for Medicare and Medicaid Services (CMS) has implemented visitation requirements for nursing homes that have been both more stringent and less stringent than the state's requirements at different points in the pandemic. Specifically:

- The CMS visitation guidance issued in early November significantly relaxed visitation restrictions at nursing homes. New York's personal/compassionate caregiving regulations now conflict with CMS guidance by *imposing more stringent requirements than the CMS guidance allows*. For example, the new CMS guidance provides that "facilities can no longer limit the frequency and length of visits for residents, the number of visitors, or require advance scheduling of visits." By contrast, New York's

personal/compassionate caregiving regulations require facilities to “establish policies and procedures regarding the frequency and duration of personal caregiving visits and limitations on the total number of personal caregiving visitors allowed to visit the resident and the facility at any one time.”

- Prior to the issuance of the aforementioned guidance in November, CMS guidance on visitation *explicitly refused* to recognize state laws that established expanded visitation for “essential caregivers.” Thus, notwithstanding New York’s desire to ensure enhanced visitation for personal caregiving visitors, nursing homes in New York were never permitted to do so under binding federal guidance. (The federal guidance *does* recognize compassionate caregivers, and our members have made extensive use of that category of visitor).

Nursing homes must follow **both** federal CMS and state DOH guidance and have repeatedly been in the untenable position throughout the pandemic of having to try to reconcile inconsistent guidance and, failing that, to determine which requirements to follow. Nursing homes should not be placed in such a difficult compliance position, nor should they have to waste time and resources during an emergency to parse inconsistent requirements and find a path that poses the lowest regulatory risk.

The State Should Notify Providers When Personal and Compassionate Caregiving Visitation Requirements are Triggered

According to the regulations, visitation by personal caregivers and compassionate caregivers is triggered by the declaration of a public health emergency under section twenty-four or section twenty-eight of the Executive Law. Currently, the state has not expressly indicated whether it is currently operating under a public health emergency that would trigger the requirement to provide personal caregiving visitors with “immediate access” to residents, notwithstanding general visitation restrictions.

The proposed regulation should be amended to require the Department to notify the affected provider community when a public health emergency triggers the activation of the personal caregiving and compassionate caregiving requirements. It is inappropriate, particularly during a public health emergency, to require providers to guess at the applicability of regulatory requirements. Such a public notification mechanism exists for the implementation of the “flu mask regulation” (10 NYCRR § 2.59), which is initiated by a Commissioner’s declaration that influenza is prevalent, and concludes when the Commissioner declares influenza is no longer prevalent; a similar process should be adopted for this regulation.

Workforce Shortages and Use of Resources

Lastly, these regulations divert precious staff resources away from resident care to the collection and quarterly renewal (semiannual in adult care facilities) of personal caregiver and compassionate caregiver designations which are no longer necessary. Given the relaxation of visitation restrictions and ongoing and severe staffing shortages in facilities, we question if they serve a useful purpose at this time.

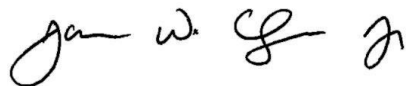
Conclusion

To summarize, LeadingAge NY appreciates the spirit of the legislation that spurred these regulations. However, the conditions that prompted the Legislature to enact this law are no longer in effect. Given the

conflicts the regulations pose in rectifying federal and state requirements, and the added strain it places on a workforce in crisis, we recommend that the Governor waive compliance with the statute by executive order.

Thank you in advance for carefully considering our comments and recommendations.

Sincerely yours,

A handwritten signature in black ink, appearing to read "James W. Clyne, Jr." with a stylized flourish at the end.

James W. Clyne, Jr.
President and CEO

cc: Adam Herbst
Val Deetz
Sheila McGarvey
Heidi Hayes