LeadingAge New York

December 21, 2020

Howard A. Zucker, M.D., J.D.
Commissioner of Health
NYS Department of Health
Corning Tower
Empire State Plaza
Albany, NY 12237

Re: COVID-19 HERDS and PPE Deficiency Citations

Dear Commissioner Zucker:

I am writing on behalf of LeadingAge New York's non-profit and public nursing home and adult care facility (ACF) members to request that the Department reconsider its approach to enforcing the HERDS survey timeliness requirements and PPE stockpile requirements applicable to nursing homes. I was surprised to learn recently that facilities are being cited for submitting a single survey 1 minute late after 8 months of consistent compliance. In addition, nursing homes are receiving unreasonable citations for non-compliance with personal protected equipment (PPE) stockpile requirements based on projections and data that do not account for real-world experience and the actual types of PPE in use. The Department's draconian approach to these deficiencies, which in many cases are minor or based on unclear or illogical standards, not only diverts facility leaders from very real patient care needs, but also serves to demoralize valuable staff who are already struggling with heavy demands and high levels of stress.

As you may be aware, many nursing homes and ACFs across the state are coping with COVID-19 outbreaks of varying levels of severity. They are cohorting residents, testing staff and residents, scouring the market for PPE, and struggling with staffing challenges as staff are excluded from work due to positive test results or community or facility exposures. Facility staff and leadership are working day and night to protect the health and safety of residents, while managing extraordinary oversight-related demands from government agencies. These include, among other responsibilities:

- For both ACFs and nursing homes, daily reporting to DOH on COVID cases and weekly reporting to DOH on staff testing and PPE;
- For nursing homes, weekly reporting to CDC's NHSN on cases, testing, and PPE in slightly different terms;
- For both ACFs and nursing homes that conduct point of care tests, daily reporting to DOH ECLRS (and in the case of nursing homes to CDC's NHSN as well) on COVID test results.
- In nursing homes with outbreaks (defined as just one COVID case among residents or staff), conducting repeated outbreak testing of all residents and staff, responding to daily phone calls from DOH to verify the information submitted in the daily and weekly surveys, and frequent on-site surveys. They are being surveyed not just by DOH, but also by OSHA, local health departments, and the attorney general's office. Many facilities report being surveyed three times in a single month.
- Managing inconsistent, unclear, and often conflicting directions from health authorities, including CMS, DOH survey staff, DOH epidemiology staff, and local health departments.


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Facilities are also working round the clock to manage the administration of the impending COVID vaccine clinics, collecting consent documents, and determining how to prioritize and stagger staff vaccinations. At the same time, they strive every day to maintain the highest possible quality of life for residents in the context of social distancing requirements, to conduct safe visitation when permitted, to facilitate remote visits and physically distant activities, and to manage physically distant dining.

In the midst of these many daunting challenges, it is extraordinarily frustrating and distressing for a dedicated nursing home administrator or director of nursing to receive a deficiency notice for submitting a survey minutes late on one occasion after roughly 240 days of on-time submissions. It is unjustifiable and excessive to threaten action against the professional license of the administrator based on a projected inadequate supply of a single type of PPE without taking into account actual use rates or the availability of alternative PPE.

In addition to pointing out the disproportionate and counter-productive nature of the Department's response to the HERDS and PPE stockpile issues, I would like to explain some of the substantive problems with the Department's enforcement of the 60-day PPE stockpile requirements:

- Neither DOH guidance nor the deficiency notices describe how reusable PPE must be factored into calculating burn rates and required inventory. The provider associations have asked Department staff how this should be accounted for, but have not received a response. We suspect that reusable supplies were counted the same way as single-use supplies in the Department's analysis, leading to under-counting of inventories.
- HERDS reports do not include goggles among the items reported, even though indirectly-vented goggles are preferable to face shields as eye protection under many circumstances.[1] Facilities that are now using goggles in addition to face shields are being cited for insufficient face shields, when they have an ample supply if goggles are also counted.
- The reported April burn rates are an unrealistic measure of current or anticipated PPE need for many facilities, and the use of this benchmark is forcing those facilities to purchase supplies at exorbitant prices that they may never use prior to their expiration. Notably, the DOH guidance requires compliance with CDC PPE guidance which recommends using the *current or expected* utilization rate to determine whether supply can meet need. Nevertheless, DOH is enforcing compliance based on reported April rates that may have little relation to current or expected rates. Some facilities that had few if any COVID cases in April reported estimated burn rates based on projections that have proven to be excessive. Facilities in the New York City metro area had both higher COVID rates and higher censuses of residents in April than they do now, resulting in much higher April burn rates than the current rates. Accordingly, facilities' April burn rates often reflect much greater PPE needs than their current or reasonably expected needs.
- Facilities were cited even though DOH surveyors have reviewed their stockpiles and associated records and have told the facilities that the supplies are adequate.
- Facilities that had ample supply of all PPE types except one were nevertheless cited.

The Department's response to these considerations may be that facilities with legitimate reasons for non-compliance may pursue an administrative hearing. However, facilities should not have to expend precious

[1] Centers for Disease Control, National Institute for Occupational Safety and Health, Eye Safety Infection Control, available at https://www.cdc.gov/niosh/topics/eye/eye-infectious.html.

time and resources in the midst of a pandemic to fight for clear and rational policies and the appropriate exercise of enforcement discretion.

Our members are keenly aware of the importance of collecting accurate and timely data on the incidence of COVID-19 in ACFs and nursing homes and of the importance of maintaining an appropriate level of PPE to prepare for spikes in COVID cases. It is, however, counterproductive and inconsistent with our mutual goal of promoting the highest quality resident care to impose, or even threaten to impose, fines and professional discipline for minuscule delays, reasonable interpretations of unclear regulations, or minor shortfalls in difficult to source supplies. We request that you refrain from citing and imposing fines on providers that have been consistently compliant with DOH directives, in response to a single instance of minimal or technical non-compliance with HERDS reporting or PPE stockpile requirements.

Thank you very much for your consideration of these issues.

Sincerely yours,

James W. Clyne, Jr.
President and CEO

Cc: Beth Garvey
Michael Bass
Mark Fleischer