



May 17th, 2023

VIA EMAIL

The Honorable James McDonald, MD
Commissioner
New York State Department of Health
Corning Tower
Empire State Plaza
Albany, NY 12237

RE: Conclusion of Federal Public Health Emergency and State Requirements

Dear Dr. McDonald,

With the conclusion of the federal public health emergency, there remain many questions in the long-term and post-acute care community regarding how these changes will impact providers and patients/residents, given state-specific requirements. We urge the state to take this opportunity to revisit the following issues in light of the significant progress made with the COVID-19 pandemic.

HERDS reporting: We are encouraged by indications that the state is “working on” modifications to the HERDS reporting requirements; however, the provider community is frustrated that they have yet to be implemented. At a time when staffing resources are scarce, it is troubling that nursing home and adult care facility (ACF) providers are being asked questions that no longer make sense and do not reflect the current landscape. Just one of many such examples is the series of questions that reference the first and second dose of the primary vaccination series. After over three years of reporting, it is time to end this burdensome HERDS survey requirement. As we have outlined in numerous communications with the state, there are other mechanisms to capture necessary data points when they occur. For your reference, we have attached a letter sent to Dr. Bassett on November 1st, 2022, providing specific recommendations and outlining the HERDS questions that are no longer relevant.

Masking: With the CDC’s termination of Community and Community Transmission Levels metrics on May 11th, providers are assuming that the state is embracing CDC’s new recommendations for source control for nursing home, ACF/AL, adult day health care, home care and hospice providers. However, given that the Department’s February 10th DAL specifically referenced CDC’s Community Transmission Levels, providers are concerned that compliance with current CDC recommendations may not align with the Department’s expectations. Further, CDC’s updated guidance directs providers to explore state or local data on COVID-19 or other respiratory viruses to inform their decisions regarding implementation of source control on a broad or universal basis. We are interested in learning what data the Department might be collecting and making public for this purpose.

On a related matter, we are frequently asked if influenza is still prevalent as it relates to the 10 NYCRR § 2.59, the “flu mask regulation”. The Department of Health [webpage](#) provides a declaration from the Commissioner of Health dated Dec. 2019, indicating that influenza is prevalent. There are no subsequent updates. While we understand that people have been masking due to COVID; we want to ensure that the Department will

review the influenza data and notify providers when influenza is no longer prevalent, given the changing masking guidance as it relates to COVID.

Adult Care Facilities (ACFs) Provider Guidance: We also urge you to provide long-awaited updates and clarifications for ACFs regarding COVID. In January, LeadingAge NY was told that the Department of Health was planning a webinar to address COVID questions and concerns regarding ACF guidance, and we provided several issues to be addressed. To date, no webinar has taken place, and no COVID updates have been issued to ACF guidance since December, aside from the masking guidance issued for all providers in February. By contrast, nursing homes were given updated guidance in March, including the ability to shift to passive screening for staff and visitors, consistent with CDC guidance. ACFs are still operating under more stringent guidance requiring active screening.

Vaccination: With the conclusion of the federal public health emergency, CMS has announced that the federal vaccination mandate for health care workers will also end soon. This raises questions about the State's plans for the vaccination mandate for nursing homes, home care, hospice, and ACFs. LeadingAge New York and our members have promoted the safety and effectiveness of the COVID-19 vaccines and are grateful for their role in reducing severity and transmission of COVID-19 among the people we serve and our personnel. As we shift to a less lethal and possibly endemic phase of COVID-19, and in light of widespread health care staffing shortages, the state may be considering alternative approaches to health care personnel vaccination. Perhaps, a more flexible approach, for example one similar to the aforementioned "flu mask regulation," would be appropriate and could bring needed personnel back into the field while continuing to mitigate the spread of infection. Meanwhile, efforts to promote vaccination in long-term/post-acute settings would also continue, further mitigating risk.

Executive Order 4 – Healthcare Workforce Emergency: LeadingAge NY is concerned that the Governor may allow Executive Order 4 expire in the near future, even though the healthcare care workforce shortage remains a crisis, particularly in long-term/post-acute care settings. The expiration of the Executive Order will create challenges if the workforce flexibilities afforded by the Executive Order are eliminated. For some providers, losing these abilities may result in serious disruption to services. Unlike larger institutions such as hospitals, the loss of just one nurse in a nursing home setting could jeopardize the delivery of services for their residents. Unfortunately, the State's processing of nurse licensure applications have not kept pace with workforce needs. Other flexibilities have been critical in the prevention and identification of COVID, which will continue to be a need particularly in long-term care settings. Key provisions for long-term and post-acute providers include:

- the ability to using nurses licensed out of state;
- allowing New York State-licensed providers without current registrations to practice without penalty for lack of registration;
- allowing graduates of SED-registered programs (including nurse practitioners, registered nurses and licensed practical nurses) to practice in a hospital or nursing home for 180 days following graduation;
- the ability to use non-licensed staff to collect specimens for COVID tests; and,
- allowing non-nursing staff to administer COVID-19 and flu vaccinations.

We urge the state to renew the executive order to allow flexibilities to continue to prevent further strain on the workforce and subsequent disruption of services, and extend every tool available in the prevention of COVID.

Telehealth: The State issued a February 2023 Medicaid Update clarifying its coverage, payment, and billing procedures for the continued delivery of Medicaid telehealth services beyond the federal PHE. While we appreciate this guidance, we are concerned that it is not explicit enough with respect to telehealth services provided by various home and community-based services (HCBS) providers, such as home care agencies, adult day health care (ADHC), and social day programs. For example, although home care agencies, ADHC programs, and social day programs are clearly included in the definition of telehealth provider, the guidance does not include these provider types in the fee-for-service billing instructions. In addition, the guidance references “additional programmatic guidance that may be published by DOH that specifically allows or prohibits the use of telehealth by type of service.” These provisions raise concerns regarding the ongoing authority of certain providers to continue delivering services via telehealth without specific guidance.

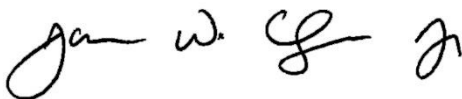
Many HCBS providers are currently delivering Medicaid telehealth on both a fee-for-service and managed care basis and are concerned about the possible expiration of authority to continue to do so. We ask the Department to clarify the impact of the May 11th expiration of the PHE on the delivery of these HCBS services through telehealth modalities. Further, we urge the Department to continue to cover the delivery of telehealth through HCBS providers on par with primary care and behavioral health providers, including sufficient reimbursement rates for telehealth care. Access to telehealth will support better access to care and coordination of services for older adults and help significantly as individuals struggle with a shortage of home care providers in their communities.

Conclusion

LeadingAge New York appreciates the complexities involved in winding down the federal public health emergency and pandemic-related activities—all while ensuring the safety and wellbeing of the public. Throughout the pandemic, long-term and post-acute care providers have been asked to adhere to the most stringent requirements and have strived to do so, despite shortages of staff and resources. The state has, at times, not kept pace with changes in the federal recommendations, as the virus, vaccines, and therapeutics have evolved. Today, when resources are scarce and severe workforce shortages continue, it is imperative that any requirements imposed on providers in the name of COVID contribute to the quality of care and quality of life experienced by residents and patients. It is also critical that flexibilities adopted during the pandemic to alleviate workforce shortages and improve access be continued without disruption.

LeadingAge NY looks forward to working with the Department as we move forward from the pandemic.

Sincerely,



James W. Clyne, Jr.
President and CEO

Attachment: **Nov. 1st letter to Dr. Bassett regarding HERDS reporting**

cc:

Angela Profeta
Megan Baldwin
Kristin Proud
Adam Herbst
Valerie Deetz
Heidi Hayes
Carol Rodat