

July 28, 2021

Jeffrey A. Kraut  
Chair, Public Health and Health Planning Council  
Angel Gutierrez, M.D.  
Chair, Committee on Codes, Regulations, and Legislation  
c/o Executive Secretary, Public Health and Health Planning Council  
Empire State Plaza, Corning Tower, Room 1805  
Albany, New York 12237

Re: Emergency Regulations

- 21-06 Addition of Subpart 66-4 to Title 10 NYCRR (COVID-19 Vaccinations of Nursing Home and Adult Care Facility Residents and Personnel)
- 20-23 Amendment of Section 415.19 of Title 10 NYCRR (Nursing Home Personal Protective Equipment Requirements)

Via E-Mail

Dear Mr. Kraut, Dr. Gutierrez, and members of the Public Health and Health Planning Council,

I am writing on behalf of LeadingAge New York's non-profit and public nursing home and adult care facility- (ACF) members to offer comments on two emergency regulations on your agendas for discussion on July 29<sup>th</sup>. LeadingAge NY urges you to take the following into consideration in your discussion of the below emergency regulations and as you consider further actions in response to the COVID-19 pandemic:

- **21-06 Addition of Subpart 66-4 to Title 10 NYCRR (COVID-19 Vaccinations of Nursing Home and Adult Care Facility Residents and Personnel)**

LeadingAge NY has consistently supported and facilitated efforts to get residents and staff of nursing homes and ACFs vaccinated, and we understand the objective of these regulations. These regulations pose some challenges, however, which we believe are easily resolved.

Our reading of regulations suggests that nursing homes and ACFs to go back to all staff and residents declining the vaccine and have them sign a statement, every time this regulation is republished with a new effective date. Upon republication, declination statements would have to be obtained for a *third time*. These providers have already offered all existing residents and staff the ability to get vaccinated multiple times and have a process in place to do so with new residents and staff. The regulations require that anyone who declines the vaccine sign a statement indicating that the signatory is aware that, if they later decide to be vaccinated for COVID-19, it is their responsibility to request the facility arrange for their vaccination. To require these providers who are operating under tremendous financial strain and experiencing serious workforce shortages to repeatedly get this statement signed diverts focus from resident quality of life and care. Thus, we urge the Department of Health to amend the regulations or otherwise clarify that this is not the intent of the language.

LeadingAge NY also notes that the regulation is similar to, but inconsistent with, recently implemented federal regulations applicable to nursing homes which require ongoing education, offer of vaccines, documentation of efforts, and reporting of vaccine status of residents and staff. These providers are continually contending with multiple sometimes conflicting requirements that again pull scarce resources away from their most important responsibility of caring for their residents. DOH should rely on the federal vaccination regulation with respect to nursing homes and abandon or modify the comparable state regulation.

LeadingAge NY has other concerns, which we have previously commented to the council. The regulation implies that nursing homes must supply vaccine on-site, when it is often faster for staff to get vaccine off-site. Logistically, facilities still need to aggregate 5-10 people to receive the vaccine due to the number of doses in each vial, and this sometimes cannot happen within the short timeframe provided. In addition, the regulation requires nursing homes to “offer all consenting, unvaccinated existing personnel and residents” the opportunity to be vaccinated, without regard for eligibility. It does not contain any explicit exemptions for pediatric residents under age 12 and those who are medically ineligible. There should be an explicit exemption from offering the vaccine to these individuals.

- **20-23 Amendment of Section 415.19 of Title 10 NYCRR (Nursing Home Personal Protective Equipment (PPE) Requirements)**

As we commented previously, LeadingAge NY understands the importance of maintaining an adequate supply of PPE in preparation for the current and future public health emergencies. The proposed regulation includes an entirely new methodology for determining the size of the required stockpile. While we are pleased to see that it updates the obsolete April 2020 amounts, it is difficult to confer with nursing homes and adequately analyze the proposed PPE stockpile reg and its real-world impact with only one day to review the proposed regs. The new methodology may require some facilities to make substantial additions to their stockpile (for example, those upstate homes that did not have sizeable use rates in April 2020), and we don't know whether it will require a significant expenditure of funds. Given the financial and cash flow challenges that many facilities are facing, they should be given adequate time to come into compliance with the new regulation. A two-week grace period in the event of a finding of non-compliance is wholly inadequate.

Additionally, the proposed regulation still does not address how reusable items should be counted (e.g. reusable gowns). As we previously commented, the method used by the Department to calculate the required supply of reusable PPE has never been explained. We suspect that reusable supplies are counted the same way as single-use supplies in the Department's analysis, leading to under-counting of inventories and the potential imposition of fines. Additionally, HERDS reports that are used to collect data on PPE inventories do not include goggles among the items reported, even though indirectly-vented goggles are preferable to face shields as eye protection under many circumstances.<sup>1</sup> Facilities that have used goggles in

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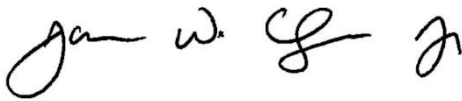
<sup>1</sup> Centers for Disease Control, National Institute for Occupational Safety and Health, Eye Safety Infection Control, available at <https://www.cdc.gov/niosh/topics/eye/eye-infectious.html>.

addition to face shields have been cited for an insufficient quantity of face shields, when they have a n ample supply if goggles are also counted.

Lastly, the proposed regulation does not include any provision that would allow nursing homes to dip into their stockpile in the event that there is another PPE shortage and they cannot purchase their regular additional supply. Providers should not face penalties for a shortfall in the stockpile in the event of supply chain shortages.

Thank you very much for your consideration of these issues.

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.

Cc: Colleen Leonard  
Lisa Thomson  
Jaclyn Sheltry