



January 9, 2012

Mr. Jason A. Helgerson
Deputy Commissioner
Office of Health Insurance Programs
NYS Department of Health
Corning Tower, Empire State Plaza
Albany, NY 12237

RE: Possible Universal Litigation and Appeals Settlement

Dear Mr. Helgerson:

I am writing on behalf of LeadingAge New York to provide our initial comments on the Department of Health's (DOH's) proposal for a universal settlement of outstanding rate appeals and litigation relating to nursing home reimbursement.

Founded in 1961 and formerly known as the New York Association of Homes and Services for the Aging, LeadingAge NY is the only statewide organization representing the entire continuum of not-for-profit and publicly-sponsored continuing care providers including nursing homes, adult day health care programs, home care agencies, managed long term care plans, senior housing, continuing care retirement communities, adult care facilities and assisted living.

As you are aware, a number of factors have contributed to the large number of pending nursing home rate appeals and lawsuits. As noted in our previous conversations on this proposal, constructively addressing these backlogs poses a formidable challenge for both the state and providers. At the same time, there is a compelling need to develop and implement a plan to address these administrative and legal challenges that takes into account the realities facing providers and the state in this regard. We also applaud any effort on the Department's part to free up funding to assist in the transition to, and full implementation of, statewide pricing. LeadingAge NY sees merit in both goals.

From the providers' perspective, the proposal would result in a much-needed investment of resources in the prospective Medicaid reimbursement system; from DOH's perspective, the proposal would provide a mechanism to dispose of the backlog of pending rate appeals and lawsuits. However, there are several unanswered questions as to how the proposal would be implemented, how it would affect providers and whether there is an opportunity for modifications. These questions and concerns would have a bearing on the ability of LeadingAge NY and our members to fully evaluate the proposal released on December 14, 2011:

- 1. How does the \$100 million compare with the estimated total value of the appeals inventory and pending legal actions?** For providers and associations to understand the overall scope of

any agreed upon settlement and assess its merits, it would be most helpful to know how the settlement figure was arrived at and what relationship it has to the actual estimated liability and calculated reserves included in the state's financial plan. In particular, does the estimated liability include only the state share of the estimated value of the pending appeals and lawsuits, or both state and federal shares?

2. **What proportion of the pending appeals and/or litigation must be settled for the proposal to move forward?** It is highly unlikely that every nursing home and every group of facilities (whether association-based or not) in the state will agree to drop its pending appeals and/or lawsuits. That said, what is the minimum proportion of appeals and lawsuits that would need to be abandoned in order for the full \$100 million settlement to be effectuated?
3. **Can the settlement offer amount be proportionally adjusted to reflect a less than 100 percent agreement to settle all pending lawsuits and rate appeals?** If, as suggested above, there is less than full agreement to settle outstanding appeals and litigation, perhaps the state would consider modifying the \$100 million amount to reflect the level of agreement that can be reached.
4. **Are the rate appeals and litigation settlements separable?** It was suggested that the estimated liability carried by the state is roughly \$50 million for appeals and \$50 million for litigation. Would the state consider a settlement focusing on either appeals or litigation if that approach was more viable than a settlement encompassing both? Would it be possible to secure partial relief if the associations were to withdraw their lawsuits?
5. **Are appeals and litigation filed subsequent to 1/1/12 affected by the settlement?** The new methodology and how it is administered may give rise to associated rate appeals and litigation. Would the proposed universal settlement agreement seek to place any restrictions on providers' ability to challenge such rates administratively and/or legally?
6. **Would certain types of rate issues be excluded from the proposed settlement?** Please confirm our understanding that all capital component rate appeals are excluded from the settlement, unless they seek to challenge the capital methodology itself. Would the state seek to include or exclude the following types of rate issues from the settlement process: (1) new base year/cost-based rates; (2) DOH rate setting errors; (3) cash receipts assessment reconciliations; (4) adult day health care rates; and (5) discrete rates for specialty facilities/units? An argument could be made that these issues should be addressed outside of the settlement due to their unique nature as well as how the associated financial relief would be conferred under the proposal (i.e., there would be no additional funding for ADHC programs or specialty providers).
7. **If participating providers receive revised rates or otherwise learn of new or different errors in their rates for periods covered by the proposal, for the first time, after entering into the settlement agreement, would the providers have a right to challenge those particular rate errors administratively or legally?**

- 8. Would there still be an annual amount allocated for outstanding appeals and future appeals?** Invariably, the new pricing system will still generate appeals to both the capital and operating components of rates. Any past appeals that are excluded from the settlement will also need to be processed. For these reasons, we would expect that there will be amounts budgeted for rate appeals activity on an ongoing basis.
- 9. How does this offer intersect with the negotiated rate appeals settlement program currently authorized in law?** Would this settlement program remain in law and be used to address appeals that are excluded from any universal settlement?
- 10. Would negative rate appeals be included in the settlement, or addressed outside of it?** If the answer is affirmative, will the Offices of the Medicaid Inspector General (OMIG) and the Attorney General (OAG) be parties to the settlement agreement? Would OMIG and OAG acknowledge and agree that a participating provider would have no duty to self-disclose and refund, and no false claims act or other liability, with respect to any actual or potential negative rate appeals to be withdrawn or waived under the proposal? Would the federal OIG and other authorities similarly so acknowledge? In particular, would the proposal also finally resolve negative rate appeals and associated liabilities based on “dropped services”?
- 11. More broadly, will OMIG and OAG waive their rights to audit, recoup, or sue to recover any additional payments (and any associated relief) made during and after transition that are attributable to a settlement of appeals and/or litigation?** Is there also a need to obtain a similar acknowledgement by the federal authorities?
- 12. In the Department’s view, will any of the provisions of the universal settlement need to be codified in statute?** For example, would the law capping total nursing home reimbursements at the 2008 spending base plus \$210 million need to be revised to exempt these payments? Or would the additional payments be treated as “settlement” payments of the prior appeals and lawsuits and outside of the statutory reimbursement strictures? Obviously, any statutory changes that are needed would affect the timing of this settlement.
- 13. Similarly, does DOH anticipate that the provisions of the universal settlement will need to be submitted and approved by CMS as a part of a state plan amendment?**
- 14. Within what timeframe does the state anticipate that the settlement would take effect?** How might this affect any rate appeals or lawsuits that are otherwise in the process of being resolved?
- 15. Is DOH open to considering alternatives to the proposed financial relief that would be provided to facilities under the settlement transition?**

Thank you for the opportunity to provide input on the proposal. LeadingAge NY remains interested in working with the Department and other stakeholders on the issues of rate appeals, litigation and providing additional financial relief in connection with statewide pricing implementation. If you have any questions on our comments, please contact me at (518) 867-8383 or dheim@leadingageny.org.

Sincerely,

A handwritten signature in black ink, appearing to read "Daniel J. Heim", followed by a horizontal line extending to the right.

Daniel J. Heim
Executive Vice President

cc: John Ulberg
Lana Earle