



13 British American Blvd. | Suite 2 | Latham, New York 12110 | P 518.867.8383 | F 518.867.8384 | www.leadingageny.org

MEMORANDUM

TO: RHCF Members

FROM: Dan Heim, Executive Vice President

DATE: March 1, 2012

SUBJECT: **Proposed Litigation and Rate Appeals Settlement**

ROUTE TO: Administrator, Director of Finance

ABSTRACT: Action needed on proposed global settlement of nursing home appeals/litigation.

Introduction

LeadingAge New York and other associations met on February 23 with Department of Health (DOH) officials to obtain further clarifications on their proposal for a settlement of outstanding rate challenges that, if agreed to, could result in additional funding during and after the transition to the pricing system. **We are asking each member nursing home to respond to a brief survey (<http://www.surveymonkey.com/s/D8328LH>) by March 9 as to their interest in pursuing this settlement. Please note that this is an opportunity to indicate your interest, and your response will not legally bind your organization to participate in any settlement.**

Under DOH's proposal, in exchange for withdrawal of nearly all pending litigation and rate appeals (i.e., for rate periods prior to 1/1/12), the state would make \$100 million available in new funding to ensure that: (1) no facility incurs a loss from statewide pricing in the first two years of transition; and (2) the facilities that would benefit from pricing would have their gains accelerated in the first three years of transition. Further background on how this would work is provided in DOH's statewide pricing [PowerPoint presentation](#) (beginning on page 28).

DOH Clarifications

During our meeting last week, we went through DOH's responses to questions posed by LeadingAge NY and other associations, which are spelled out below. DOH stressed that their

responses provide general guidelines, but could be subject to change based on further discussions/negotiations with the associations and others.

1. What is the purpose of the proposal?
To collaboratively resolve outstanding appeals and litigation, using existing resources within the Medicaid global spending cap to mitigate the impact of the statewide pricing system.
2. What is the universe of appeals and litigation that would be covered under the settlement?
All nursing home (excluding specialty facilities and discrete specialty units within facilities) appeals and litigation involving rates in effect for periods prior to 1/1/12. As indicated below, certain types of appeals would not be included in the settlement.
3. How many nursing homes must participate for the settlement to take effect?
DOH would expect nearly all facilities (with the exception of specialty facilities/ units noted above) to participate in the settlement.
4. What is the estimated value of outstanding appeals and litigation?
DOH is not able to estimate the value. The \$100 million in funding that would be made available to facilities under the settlement is not based on the value of the pending appeals and litigation.
5. What is the potential impact on the Medicaid global spending cap?
The state's share of the \$100 million in funding (i.e., \$50 million) would be counted in the spending that is compared to the cap. However, the state currently carries a potential liability within the financial plan for appeals/litigation; therefore the settlement should not adversely affect spending versus the cap. In the event the cap is pierced, these funds may be considered as part of a Medicaid Savings Allocation Plan.
6. Would appeals related to rates in effect for periods prior to 1/1/12 be included in the settlement, regardless of when they were filed?
Yes.
7. Would appeals and litigation filed with respect to rates in effect for periods on or after 1/1/12 be constrained under the settlement?
No.
8. What specific types of appeals and litigation are included or excluded from the proposed settlement, and how will this affect processing of the remaining appeals?
 - ***Included in the settlement:***
 - I. *All nursing home rate appeals and litigation that involve rates in effect for periods prior to 1/1/12 and that are pending as of the effective date of the settlement (DOH to clarify whether appeals that have been processed but not paid are deemed still pending), excluding those from specialty facilities and discrete specialty units within a facility as well as the further exclusions noted below. Specifically included are:*
 - *Medicare Part B reconciliations*
 - *DOH rate setting errors*
 - *Negative rate appeals (see reference below to "dropped services" appeals)*
 - ***Excluded from the settlement:***
 - I. *Capital (First stage appeals)*
 - *Interim and Final Approved Project Costs (APCs)*
 - *Refinancings*
 - *MATPs (Medicaid Allowable Transfer Price)*
 - *Change in bed capacity*

- *Change in ownership*
- *New facilities*
- II. *Cash receipts assessment reconciliations*
- III. *Adult Day Health Care rates*
- IV. *Initial 12-month cost reports for eligible rebasings*
- V. *New facility rate appeals (awaiting a rate)*
- VI. *Dropped services (positive or negative)*
- VII. *Closed facility appeals*
- VIII. *Consolidated facilities (initial appeals)*

The current \$80 million annual cap on rate appeals processing (which is in effect through 3/31/15) would be reduced to \$30 million per year. Payments related to the processing of the appeal types excluded above would need to be accommodated within the new lower annual appeal caps through 3/31/15.

9. How would closed facility or new owner-operated facility appeals and litigation be treated under the settlement?
Closed facility appeals are excluded. Litigation filed by only closed facilities is excluded. Closed facilities that are part of group litigation may be included, but DOH is still considering this issue. Current owners would need to resolve outstanding issues with prior owners.
10. Does DOH see the need to codify the settlement agreement in statute?
No.
11. Does DOH see the need for CMS to approve the settlement through a Medicaid state plan amendment?
No.
12. What is OMIG's involvement with respect to the settlement?
DOH has not yet discussed the specifics of the proposed settlement with OMIG. If the proposal moves forward, DOH will further discuss it with OMIG.

Assessing Participation in the Universal Settlement

DOH previously provided information for facilities and associations to use in evaluating whether to agree to the proposed universal settlement. The following information, which was first made available to LeadingAge NY members in mid-January, can be accessed by [clicking here](#):

1. **A facility listing comparing the annual impacts under the finalized statewide pricing system to the corresponding annual impacts if the \$100 million settlement is implemented.**
2. **A facility listing of outstanding pre-rebasing rate appeals.** For each appeal, the list shows the appeal number, rate year and type of appeal at issue.
3. **A facility listing of outstanding rate appeals to rebased rates.** For each appeal, the list shows the appeal number, rate publication date and type of appeal at issue.
4. **Listings of lawsuits filed on nursing home reimbursement.** Please note that: (1) only one plaintiff name is listed per case; (2) some of these suits may no longer be pending; and (3) other suits may not be correctly listed in the state's database.

Action Needed

The next step in this process is to ascertain from your organization and other members by March 9 whether or not there is interest in agreeing to the DOH proposal. Ultimately, each

facility will need to estimate the value of any affected rate appeals it has outstanding, as well as any litigation it is party to, and compare those amounts to the net benefit, if any, it would receive from the settlement. Consultations with boards, CPAs, attorneys, etc. may all be prudent given an individual facility's appeals and litigation status.

After reviewing the information discussed above, please complete the [brief survey](#) developed jointly by the associations by March 9. Please submit only one response per facility, even if your facility belongs to more than one association. We will convey the survey information on your behalf to DOH and keep you posted on this matter. If you have questions in the meantime, please contact Patrick Cucinelli at pcucinelli@leadingageny.org or Dan Heim at dheim@leadingageny.org; or call us at (518) 867-8383.