



February 4, 2020

Heidi Hayes, Acting Director
Division of Adult Care Facility & Assisted Living Surveillance
New York State Department of Health
875 Central Avenue
Albany, New York 12206

Re: Comments on Assisted Living Program Need Methodology

Dear Heidi,

LeadingAge New York appreciates the opportunity to have participated in the Department's Assisted Living Program (ALP) Need Methodology Workgroup. This is a critical, yet complicated discussion. As the workgroup concludes, we have concerns that the workgroup has not yet come to a true conclusion about how to proceed. We believe the endeavor would benefit from continued work and additional input from the provider community, as well as an opportunity to have a copy of the spreadsheet with any formula, to more accurately provide feedback on its usefulness to this process. Below are some suggestions that we offer in hopes to assist you in the future development of your approach. Many of these suggestions have been addressed previously in our response to the Request for Information as well as our contributions to the workgroup.

Hybrid Approach

We appreciate the Department's efforts to attempt to create an objective, data-driven mechanism to identify where need exists for ALP services. Certainly, we should make full use of any data available, and make such decisions as rational and transparent as possible. Unfortunately, we continually are confounded by the limitations of the data available, extenuating factors, and unique regional issues. Given these factors, we suggest a hybrid approach, outlined on the attached flowchart developed by Rick Mills, Executive Director of Housing, Loretto. This document provides a narrative to components of the chart.

Choice of Services

While it is unclear if the ALP population and/or benefit will eventually transition into managed care/managed long term care (MLTC), we continue to maintain that consumers should have choice of services whenever possible. In the managed care context, this has been defined as having two or more providers in any given county. Thus, we believe an application for new ALP beds should be considered for any county in which there are less than two ALPs operational or in development in a county, as long as the applicant has done an analysis and can demonstrate demand for the service. If, for some reason, the applicant is unable to demonstrate need, the Department can examine the unique factors and determine if the applicant should be able to move forward.

Occupancy

Another fundamental need criterion should be existing ALP occupancy in a county. We recommend the Department utilize 80 percent rather than 85 percent as a threshold number given the many factors that influence occupancy. Based on input from providers, ALP occupancy is variable given the increasing complexity of residents and the amount of time it takes to bring a new admission in. Additionally, a poor performing provider in the county might bring down the overall county occupancy.

When the Department examines occupancy in any county, we want to ensure that it is established based on occupied ALP-specific beds, as opposed to total capacity of an ACF with a mix of ALP and non-ALP beds. The non-ALP beds should not be included in an ALP occupancy calculation. The county occupancy should be calculated based on an average over time, such as the past year, rather than a Dec. 31st snapshot.

We appreciated the Department's inclusion of ALP beds in development, when trying to project how many more ALP beds would be needed to bring the overall occupancy up to a certain threshold, and would advise you continue to consider ALP beds in development to avoid over-bedding.

As outlined on the flowchart, if the county ALP occupancy is 80% or greater in a county, the application for a new ALP beds should be considered. If the occupancy does not meet that threshold, then we look to the Department's formula or calculation of need for more direction. Below are our comments on the formula that the Department presented to the workgroup in January, as well as recommendations for additional data that could better analyze current and future need.

Comments on DOH Formula Presented to Workgroup

Unfortunately, it was extremely difficult at the last meeting to view the formula that the Department had developed, and to understand how the different variables interacted. Our comments on the formula are based on our best understanding of the presentation, but we would likely have more useful recommendations with the ability to view and interact with an electronic copy of the spreadsheet—even if fields were redacted or test data used.

We are concerned that the Department began the formula using ALP Medicaid claims data to determine how many people used the ALP from 2016 to 2018. While the claims data is important, it is limited in that it only reflects ALP billable days. When an ALP resident goes to the hospital or has a rehabilitative stay, the ALP typically holds the bed for the resident if it is expected they will return and is not billing Medicaid. In addition, many ALPs have some number of private pay residents, which are filling ALP beds but not reflected in claims data. Both factors will lead to the erroneous conclusion that the ALP has lower utilization than it does. Potentially further confounding this are potential delays in HRA processing of NYC ALP residents Medicaid applications, recertifications and changes in classification.

The Department also looked at conversions of MLTC enrollees to Medicaid ALP residents, seeing it as a key driver to ALP enrollment. While many New York City (NYC) ALPs may experience this phenomenon, this is not true statewide. Furthermore, many ALP residents come to the ALP new to Medicaid. So again, there are limitations to what this data tells us.

DOH then forecasted the growth rate for the ALP population based on the average growth of the past three years. We are concerned that this fails to account for a variety of other factors that will impact the need for ALP services and MLTC enrollment. Several initiatives underway currently and others that may result at the end of the state budget process can affect these projections as well.

Thus, while each of the data sets are useful, they are insufficient to determine need for current and future ALP services in a county. We recommend some additional data to be incorporated to create a more robust estimation of need.

Additional Data to Incorporate

Below are additional data sets that we thought would be useful to build into any sort of ALP need analysis:

- Current Medicaid enrollment in county (not just MLTC). DOH has this data.
- Future Medicaid enrollment can be projected by looking at income levels and identifying people just above Medicaid eligibility. This data is useful because many people entering the ALP are new to Medicaid. This data can be retrieved from the [American Community Survey](#).
- Various demographic information must be considered when projecting need, including age and elderly people living alone, given that increasing age and limited natural supports will indicate a potential increased need for ALP beds. This can be obtained from the [Cornell Program on Applied Demographics](#).
- Taking the demographic information, it can be useful to look at the number of elderly as it relates to the number of existing ALP beds and those under development in a county. If you look at population aged 65 and greater, you can project to the future.
- The aged dependency ratio can help to highlight a heightened need for formal care in those locations where the number of working age people is far lower than that of the elderly population. This can be obtained from Cornell Program on Applied Demographics.
- High nursing home bed occupancy in a county could suggest greater demand for ALP. DOH has this data.
- Nursing home closures will also increase need for the ALP; DOH has this data.
- Low RUG-scoring residents of existing nursing homes could have the *potential* to reside in an ALP if it were available, DOH has access to MDS data that could inform such a calculation.

The usefulness of any formula-based process, however, will be the ability to ensure that it is accurate and up to date. It cannot be a fixed calculation conducted every few years, but rather a

formula that is updated as new data is available and shared with the public. The nursing home need methodology formula has been problematic because it no longer reflects the current need.

Presuming that the Department can build these additional data sets into a formula and ensure it consistently is updated, we return our flowchart. If an applicant for ALP beds in a county that does not currently have 80% or greater occupancy currently passes the DOH need formula, then the application should be considered. If the applicant does not pass the formula, then we turn to extenuating factors.

Extenuating Factors

Throughout our work, we have repeatedly voiced the need for consideration to “extenuating factors” that may impact need but are not otherwise captured in any calculation of need or need methodology process. This is necessary because of the limitations of such calculations, the limitations of data available, and unique regional characteristics. The nursing home need methodology has incorporated such a criterion [10 NYCRR § 709.3(h)] allowing for demonstration of additional need based on significant local factors pertaining to an applicant's service/planning area.

For example, when considering a planning area, using counties is logical for many reasons—though we continue to advocate for NYC to be addressed as a single planning area or at least consolidate some of the boroughs. Whatever designation is used, we must acknowledge that such boundaries may be meaningless to the consumer. People will seek services that accommodate their needs and that of their loved ones, and thus location within a county, proximity to other counties, transportation access and travel routes must all be considered. Given the unique, local nature of such factors, it is difficult to determine how to build that into a formula.

As we have discussed, workforce is a critical consideration and yet another factor that cannot easily be built into a formula. Overall, applicants should be prompted to consider workforce availability for the region they serve to ensure the project is viable. Considerations might include proximity to public transportation, or a site that is otherwise located in a place that can help ensure access to a potential workforce.

Similarly, the availability of other services, such as home and community-based services, will impact the need for ALP services—but the existence of such services alone will not tell the whole story. The availability and accessibility of such services should likely be considered on a per applicant basis. For example-some regions may find that the availability of home care is insufficient such that congregate care, which can make more efficient use of staff, may make more sense.

If the applicant seeks to serve a unique, underserved population, the applicant should demonstrate the need exists in that community and develop a specialized plan regarding how the applicant commits to meeting those unique needs (as opposed to the greater public) in the long term. In such cases, if such a specialized service is warranted, this may merit consideration as an extenuating circumstance.

Lastly, consistent with New York state public health law section 2801-e, special consideration should be given to nursing homes that are planning to decertify nursing home beds and develop ALP beds. In that case, it is presumed that some number of nursing home residents could be served in the ALP. The nursing home provider has a demonstrated experience in successfully serving elderly and special needs populations. Furthermore, the state has been wanting to see the reduction of nursing home beds, and this provides further incentive to do so.

Character and Competence

As we work through the flowchart process, and the different decision points in which an application could move forward, character and competence is an overarching factor that will, of course, affect the success of any application.

The Department's character and competence review will serve to preclude any applicants with serious concerns from being successful in the application process. We recommend that any character and competence review that is done should incorporate any nursing homes also operated by any of the principals, in addition to any other ACFs.

An already established ACF would have gone through character and competence review when it was originally established. In this case, if an existing ACF applies for ALP beds, the Department reviews whether the ACF has a good compliance history before issuing additional beds or types of licensure. Again, this provides some quality screening which could preclude an applicant which otherwise meets need criteria from being able to move forward.

Competitive Reviews

The process outlined above does raise the possibility of the Department receiving multiple applications for more beds than any county can support. In that case, a variety of factors are likely to have to be considered, including the timing of submission of a complete application, the quality of the application and the project's ability to meet the particular needs of that community.

ALPs Being Able to Adjust Licensed Beds

Also discussed within the workgroup process has been the question of whether ALPs should be able to expand their programs or otherwise have flexibility with their ALP capacity. We support the continuation of the recent opportunity extended to currently operational ALPs to expand their ALP capacity by nine or fewer beds, given they did not require major renovation or construction and were in good standing. This process is consistent with expansion opportunities that exist for non-ALP beds. Statutory language enables this process to occur again later in 2020, and we recommend it be an ongoing option on a periodic basis such as every two years. This periodic opportunity allows ALPs to adjust based on the changing needs in their community and demand for their services, likely without a drastic impact on other providers in the market. If the facility wants to expand in a way that requires significant renovation or construction, then they should be subject to the need methodology outlined above.

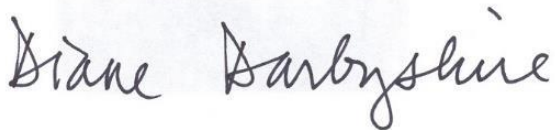
Alternatively, if after significant time of operational experience, an ALP provider consistently fails to meet their ALP occupancy or Medicaid commitments, then they should be asked to decertify some ALP beds. Additionally, if an entity with ALP beds awarded does not appear to be working to make

the program operational, the Department should explore with the entity whether they intend to utilize the beds or if they should be 'returned' to the pool of beds available for others to apply for.

Conclusion

Once again, LeadingAge NY appreciates the opportunity to be a part of this critical conversation. Our hope is that together, we can find a way to establish a rational way to increase ALP capacity to sufficiently meet the current and growing need for low-income seniors in New York. We are happy to discuss any of our suggestions further, and otherwise assist in this project as you move forward.

Sincerely,

A handwritten signature in cursive script that reads "Diane Darbyshire". The signature is written in black ink on a white background.

Diane Darbyshire, LCSW