



February 17, 2008

Ms. Katherine E. Ceralo  
New York State Department of Health  
Office of Regulatory Affairs  
Corning Tower, Room 2438  
Empire State Plaza  
Albany, New York 12237-0097

Re: Licensed Home Care Services Agency Regulations, ID No. HLT-01-08-00022-P

Dear Ms. Ceralo:

On behalf of the diverse home care agencies that comprise the membership of the Home Care Association of New York State (HCA), I write to submit comments with respect to the notice of proposed rulemaking, amending sections 763.12, 766.10 and 766.12 of Title 10 NYCRR, published by the New York State Department of Health (DOH) in the *State Register* on January 2, 2008. These rules would require Certified Home Health Agencies (CHHAs) and Licensed Home Care Services Agencies (LHCSAs) to compile and submit annual reports on the type, frequency and reimbursement of services provided, and would impose upon LHCSAs the annual administrative and general (A&G) cost limitations applied to CHHAs.

HCA's more than 260 provider agency members are deeply committed to providing high quality, appropriate home care services, and aspire to the highest standards of efficiency, accountability and transparency with respect to the expenditure of funds for these services. While we strongly support these goals, HCA has serious concerns regarding the scope, impact and unforeseen consequences of the Department's proposed rule. We urge your consideration of our comments and the adoption of our recommendations and amendments based on these concerns. These consequences were undoubtedly not intended by the Legislature in its enactment of the underlying legislation and many were prudently identified and acknowledged as impacts by DOH in its promulgation of the regulations.

HCA's comments and recommendations are organized according to the proposed rule's provisions for Reporting Requirements and for the Imposition of an A&G cap on licensed agencies.

### **Proposed Reporting Requirements**

- According to the Department's own Regulatory Impact Statement, the proposed reporting requirements will create a new administrative burden on home care agencies that in some cases will be incapable of being implemented without new computer systems and will otherwise add to agency burden and costs. We ask that this be addressed through a streamlining of any proposed new reporting requirements and procedures, a phase-in period and/or a suspension of the implementation of these regulations until the proper capacity for compliance is duly assessed and in place within the agencies.

### Analysis

- The regulation states that “The commissioner shall require certified home health agencies to provide all information necessary to all licensed home care services agencies contracting with such CHHA to allow such LHCSA to file its annual report.” We are extremely concerned with the potential breadth of this directive for creating excessive information disclosure requirements on CHHAs and new agency administrative and cost burdens. Indeed, the Department’s own Regulatory Impact Statement explicitly acknowledges that the regulation may have cost implications for “CHHAs who do not currently maintain and provide such data.”
- The Regulatory Impact Statement also confirms that “the proposed regulations may create some additional paperwork requirements for the regulated CHHAs,” thereby adding to their already heavy administrative burden. The Statement further identifies a disproportionate administrative burden on smaller CHHAs, stating that “rural CHHAs may need to obtain additional computer services if their current systems are not sufficient to produce the required data to their contracting LHCSAs for compliance with reporting requirements.”
- The regulation imposes new data collection and reporting requirements on LHCSAs that would add to LHCSAs’ administrative burden and expenses, the reimbursement for which would ironically be capped under these same regulations. Again, the Regulatory Impact analysis states the very concern that these new reporting requirements will impose additional paperwork requirements and financial burden on LHCSAs, and further indicates that “as a result of the application of a cap on their administrative and general costs and their limitations in defraying such fixed costs, it is likely that rural LHCSAs will now be more limited in their ability to provide the required data.”

### Recommendations

- Delay the implementation of these regulations until the capacity for compliance can be duly assessed and verified.
- Narrow the proposed rule to streamline and limit the compilation of information and reports required to be submitted by CHHAs and LHCSAs in order to minimize the consequential administrative and cost burden of the proposed rule.
- Amend the rule to utilize existing reports prepared and submitted to DOH by LHCSAs as the tool to collect the additional information required, and institute a transition period that allows ample time for LHCSAs to implement internal procedures to begin the new reporting requirements.
- Exempt rural and small community LHCSAs from the reporting requirements, or at least limit the requirements on these agencies to comport with their compliance capability.

- Information disclosed by CHHAs and LHCSAs should be protected from disclosure that is unrelated to the governance intended under the new rule. HCA believes that the proposed rule fails to ensure due protection of potentially sensitive and proprietary information disclosed in connection with the new reporting requirements, which could potentially impact the contracting parties and arrangements. Proprietary information should either be excluded from the reported information or be otherwise explicitly protected from unwarranted disclosure.

### Analysis

- The proposed rule requires the disclosure of information by home care providers and their contractors that is not otherwise required of other sectors and that may enter the realm of information ordinarily respected as proprietary. Each provider and contractor arrives at their contractual payment and service terms through private negotiation, and the specifics of their arrangements should be respected and treated as proprietary information between the parties.
- HCA believes that the proposed rule improperly lacks provisions to ensure due protection of such potentially sensitive and respected information in connection with the proposed new reporting requirements imposed upon CHHAs and LHCSAs. Access to the reported information by CHHAs and LHCSAs should thus be limited to the governmental purposes associated with the proposed rule. Precedents exist elsewhere in the Public Health Law against unwarranted disclosure of or access to proprietary information.

### Recommendation

- Amend the proposal rule to ensure that information disclosed in compliance with the rule is either nonproprietary or is made accessible solely for the intended governance of CHHAs and LHCSAs under the rule, and specify that unrelated disclosure shall be a violation subject to sanction under Departmental rules and regulations.

## **Imposition and Execution of an Administrative and General Cap on LHCSAs**

- Imposition of a CHHA A&G Cap on LHCSAs is methodologically unsound, would be arbitrarily applied and would unjustifiably reduce or limit reimbursement to LHCSAs and/or CHHAs. The methodology should either be revised or its implementation suspended until these issues are resolved.

### Analysis

- HCA has long held a strong advocacy position in opposition to an A&G cap on CHHAs and LTHHCPs. The cap on A&G cost allocations as formulated and imposed on CHHAs and LTHHCPs has far-reaching implications on agencies' operations and patient care capabilities.
- While characterized as "administrative," significant portions of agency expenses reimbursed as A&G are actually directly associated with the delivery of patient care. These costs include case management, patient outreach, initial assessments for eligibility and care, working with families and informal supports, patient recordkeeping and other similar activities that support the care

of the patient. A&G also includes costs for vital agency infrastructure investments such as information technology, electronic medical records, point of care technology tools, as well as expenses related to enhanced quality assurance programs, corporate compliance and enhanced accountability measures. These are purposes which are not only essential to provider operation, but are being actively encouraged by the Department as State health policy priorities.

- The capping of LHCSAs' A&G expenses in the manner proposed by the rule is based on the existing A&G cap applied to CHHAs and Long Term Home Health Care Programs (LTHHCPs). It is already well established that the A&G cap on CHHAs/LTHHCPs impairs the ability of these agencies to meet the essential operating costs described above. This cap further diminishes the ability, and otherwise acts as a strong disincentive, for these agencies to invest in their own infrastructure because these costs and investments increase their proportion of A&G. As a result, these agencies have a greater likelihood to reach the A&G cap and to have their rates reduced by it. The proposal would extend these same problems and impediments to LHCSAs, and ultimately on the patients and communities they serve, with yet additional ripple effects on their contracting CHHAs and LTHHCPs.
- Not only does the proposed rule impose an A&G cap on LHCSAs, but it imposes a CHHA-based rather than a LHCSA-based A&G. The administrative costs of the CHHA may bear no resemblance to the A&G needs and expenses of the LHCSA. Furthermore, the existing cost accounting by LHCSAs is different than that of the CHHAs, making the proposed rule even more incompatible.
- The proposed rule imposes new administrative costs to CHHAs and LHCSAs at the very same time as it seeks to cap these same types of costs.

### **Recommendation**

- Calculate the A&G in a manner that exempts patient care related costs, costs for strategic investment and, minimally, costs related to compliance with the proposed rule, including costs for information technology and data collection,
- Calculate the LHCSA A&G cap based on appropriate data supplied by LHCSAs, rather than by agencies with noncomparable A&G costs or methods of cost allocation.
- If the above recommendations are not possible, then HCA asks that the rule imposing the A&G cap on LHCSAs be suspended until its effects on LHCSAs are properly assessed and a suitable methodology is established.
- **There has been no description of the method by which the rule will execute the A&G Cap on LHCSAs. The fundamental differences in how CHHAs and LHCSAs are reimbursed raise extreme concerns over how this could be accomplished. Clarification of this process, and if necessary a suspension of the implementation date, is required in order for there to be adequate opportunity for public comment on this core feature of the proposed rule.**

### **Analysis**

- Unlike DOH's authority with respect to CHHAs, DOH does not set the rates paid to LHCSAs or pay these agencies directly for their services. These rates and payment arrangements are instead formulated between the CHHAs and LHCSAs. It is thus unclear as to how the imposition of the CHHA A&G cap on LHCSAs would be executed under this rule.
- If the execution of a cap were to be based on a disallowance of costs over cap, as DOH imposes upon CHHAs under the CHHA A&G cap, the rule would offer no benefit to LHCSA personnel, to the operation of the agency or to the patients its serves.

### Recommendation

- This process must be clarified or the implementation of the rule suspended until there is opportunity for assessment as to how the proposed A&G cap will be executed and enforced. In the absence of such, public comment on this core component of the proposed rule is not possible.

HCA appreciates this opportunity to comment and would be pleased to answer further any questions or discuss this rule in greater detail with the Department at any time. We respectfully ask the Department's consideration of the concerns and amendments submitted herewith.

Thank you.

Sincerely,



Joanne Cunningham  
President