

The Vision

A Newsletter for Assisted Living Residences

March/April 2009

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Legislature Passes 2009-2010 State Budget

The New York State Legislature has passed all budget bills that comprise the state's 2009-2010 budget. Hinman Straub, ESAAL's government relations firm, has provided a health and long term care budget overview for members, which may be accessed in the "Members-only" portion of our website at www.esaal.org.

The following summarizes budget items of interest to the assisted living industry:

ALP 6,000 Bed Phase In: This issue is perhaps the most important to ESAAL and its members in terms of the future of our industry. Governor Paterson's original proposal was to add 6,000 Assisted Living Program (ALP) beds over several years, under three conditions: 1) the addition of each ALP bed would be dependent on the closing/downsizing of a nursing home bed; 2) nursing homes that want to obtain ALP beds would not have to obtain an adult care facility (adult home or enriched housing program) license; and 3) the Department of Health would not be required to issue a Request for Proposals (RFP) for new ALP capacity, meaning that the state agency could grant the beds to an entity without competitive review or comparison with other applicants. ESAAL supported the concept of new ALP capacity, but rejected the three conditions under which the increase was proposed, because of our concern that they create an "unlevel playing field;" stray from the intent of ALP being based in the social model Adult Care Facility; and don't allow for creation of ALP in areas that have not been determined to have an oversupply of nursing home beds, even if ALP capacity is needed.

During March, ESAAL members visited their legislators in Albany during our Legislative Advocacy Day, made visits to their home offices, wrote letters and made phone calls. As a result of our collective efforts, the final budget agreement has been modified to address some of our concerns. The agreement is still tied to the decertification of nursing home beds in certain geographic regions, but was modified to clarify that "any eligible applicant" (including ACFs) may apply for new ALP beds. We are pleased that the final agreement requires that any nursing home seeking ALP capacity must obtain an ACF license. Also, the Legislature agreed the new beds should be tied to an RFP process; however the language does not clearly express the Legislature's intent and ESAAL is working to have it revised so that it is clear that an RFP will accompany the distribution of the new ALP beds.

The ability of adult homes and enriched housing programs to compete for any new ALP capacity is of paramount importance to ESAAL and its members. Our Board of Directors has determined to pursue a multi-faceted strategy to achieve this, and we will ask members to



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actively participate in those efforts. Seniors should be able to age in place in their new ACF homes and should not have to relocate to a nursing home in order to access Medicaid-funded assisted living. It is our mission to ensure that they can.

AARP's position is that ALPs should be subject to Assisted Living Residence (ALR) Law and Regulation. The Assisted Living Residence (ALR) law specifically exempts ALPs from its provisions. AARP is advocating that the exemption be removed and ALPs be made subject to ALR law and regulation because they view the ALR structure as affording residents additional and/or superior protections beyond what is available to them in the ALP. While this issue is not directly related to the state's budget, AARP pursued removing the exemption because of the proposed 6,000 bed increase in ALP bed capacity. In the final days of budget negotiation, ESAAL's government relations representatives at Hinman Straub were successful in educating legislators that while the ALP may have rules and regulations that are somewhat different from the ALR, there are strong consumer protections in place and the program is not necessarily inferior, just different. As a result of our efforts, the Legislature agreed not to pursue this in the context of the budget. However, we expect lawmakers to revisit the issue during this legislative session, after the budget is passed, and therefore our continued effort and education is necessary. ESAAL has scheduled a meeting of ALP members in Albany on April 22nd in order to discuss this and other ALP-related issues. An invitation to attend has been sent to ALP members, and we will keep all members informed about decisions made at the meeting, as well as our action plan.

QUIP Funding: In this very difficult financial environment, we are pleased that the Legislature added \$2.068 million in funding to Governor Paterson's original proposal of \$2.605 million, for a total of \$4.67 million for 2009-2010. These funds will help SSI-focused ACFs to remain viable and invest resources into their buildings and programs, to the benefit of our residents. We thank members for their successful efforts to educate legislators on the importance of this funding.

Also, at ESAAL's request, the final budget restores \$2.75 million for QUIP funding for a past year (2006-2007) that has not yet been paid out and required a re-appropriation in order for the Department to make payments. For efficiency purposes, it is likely that the Department will combine the \$2.75 million with the 2009-2010 appropriation of \$4.67 million. ESAAL will inquire with the Department to ensure timely payment for both appropriations.

EnAbLE Funding: The Legislature approved funding for three EnAbLE initiatives, adding more than \$1.3 million to the Executive's proposal, thanks to ESAAL's and our members' efforts: 1) A "general" fund of \$2.5 million made available to awardees that successfully propose projects that improve resident quality of life. 2) \$1.35 million is available for air conditioning. 3) \$1.8 million is available for generators or air conditioning.

ALP Trend Factor: The final budget agreement eliminates the ALP trend factor, which is the Medicaid program's cost of living adjustment for 2008. Each year ALPs receive an increase, usually authorized in the second or third quarter but applied retroactively to the first of the year. This will not occur in 2009, so ALP rates will remain at their current levels. The elimination of the ALP trend factor is consistent with their elimination for nursing homes and home care.

Long-Term Care Assessment Centers: Governor Paterson's original proposal was to remove the responsibility for Medicaid eligibility assessment processes from local social service districts and to place that responsibility into newly created "Long Term Care Assessment Centers" that the Department would work with under contract. The final agreement modifies the Governor's proposal by establishing a three-year demonstration program to create these centers in two counties: one that must be located within the city of New York and the other established in a region of one or more contiguous counties in another part of the State. ESAAL views this initiative in part as an attempt by the Department of Health to have more oversight of processes related to assessments for Medicaid services. We will closely monitor the implementation of the demonstration program.

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Members may access the budget language re: Long Term Care Assessment Centers in the “Members-only” portion of our website at www.esaal.org.

Uniform Assessment Program: The final agreement includes a \$5 million appropriation for the Department of Health to create a uniform assessment program for the various long term care settings, including ACFs, ALPs and ALRs. The agreement does not provide any details on the initiative. ESAAL will closely monitor and provide input in order to ensure efficient assessment and paperwork processes for our members.

CHHA Subcontracting with LHCSAs: During budget negotiations the home care industry has been very concerned with the Executive’s proposal to prohibit certified home health agencies (CHHAs) from subcontracting with licensed home care service agencies (LHCSAs) for Medicaid-funded home health care services. The final budget agreement rejected the Executive’s proposal.

In conclusion, the final budget agreement poses both opportunities and challenges for ESAAL members. In light of the deep financial problems that our state encounters, we are heartened to see lawmakers’ commitment to supporting our level of care through additional ALP capacity, and increased QUIP and EnAbLE funding, especially when most long term care related programs suffered funding decreases. At the same time, we must be diligent to ensure that government’s legitimate need to pursue financial savings is accomplished in a manner that enables seniors to live and receive services in the most integrated setting possible, oftentimes the adult home or enriched housing program.

Remainder of Legislative Session Likely to be Active

With the annual budget behind them, Legislators still have almost three months to consider thousands of proposals related to almost every aspect of our society, and assisted living is no exception. ESAAL is monitoring hundreds of legislative proposals that if advanced would have some

impact on the operation of an adult care facility and/or assisted living residence. Below is a summary of two of the most consequential:

Adult Care Facility “Reform” Legislation-S3297:

Every year the Executive proposes “reform” legislation pertaining to adult homes, enriched housing programs, and now assisted living residences. In prior years, ESAAL has successfully educated legislators about the need, or lack of need, for various proposals. This year, it is once again possible that the Legislature will focus on the Executive’s legislation, which proposes:

- Rectification language as follows: “Rectification shall not preclude the assessment of a penalty if the Department establishes that a particular violation, although corrected, was a violation cited by the department at the previous facility inspection.” This provision appears to be the Department’s attempt to clarify that they may impose fines on an ACF if they issue a violation for the same thing in two concurrent surveys, even if they correct the violation after the second cite;
- With regard to the Department’s authority to revoke, suspend or limit an ACF’s operating certificate, the period of suspension or limitation may be extended beyond the currently authorized 60 days “if the department makes reasonable efforts to commence a hearing within such sixty day period and to complete such hearing within a reasonable period of time...”;
- Extend the same powers and protections that an ACF receiver has under the law to a temporary operator;
- Require the Department to inform all ACFs if it has taken any of the following actions against a particular ACF: 1) revoke, suspend or limit an ACF’s operating certificate; 2) issued an endangerment violation; 3) placed it on the “Do Not Refer List”. This provision would further prohibit all ACFs from making referrals for admission to that ACF until the issue is resolved;
- When there is a court appointed receiver in place, the law is extended to allow the receiver to take part in a written agreement with the Department and the ACF operator,

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and that the receivership shall terminate in a manner and time “agreed upon by the parties” (current law only allows for 60 day period agreement, with an 60 day extension possible);

- Adds that, like adult homes, enriched housing programs will have the statutory requirement to report resident deaths to the Department and to the Commission on Quality of Care within 24 hours of knowledge of the death;
- Adds a provision that when the Department has determined there is “imminent danger to the health, safety or welfare” of any resident in an ACF, the agency “may prohibit the operator from admitting any new resident to the facility until the department determines that there is no longer an imminent danger to the health, safety or welfare of any resident”;
- Clarifies/adds to ACF law to define “resident representative” as “a family member or other person designated by a resident...in the admissions agreement to advocate on behalf of the resident. The admissions agreement may be amended at any time to allow the resident to designate or change a resident representative”;
- Adds to ACF law to define “legal representative” as “a person duly authorized under applicable law to take certain action on behalf of a resident...Such legal representative could include, but is not necessarily limited to, legal counsel, a court-appointed guardian, an attorney-in-fact under a power of attorney, an agent under a health care proxy or a representative payee, depending upon the action to be taken.” This proposed language is consistent with the definition of a legal representative in the Assisted Living Residence (ALR) law;
- Adds three resident rights 1) “Every resident shall have the right to be fully informed by his or her physician, health or mental health provider of his or her medical condition and proposed medication, treatment and services, unless medically contraindicated, and to refuse medication after being fully informed of the consequences of such actions.” This language is

similar to, but not the same as, the ALR law/regulation. In the ALR law/regulation, ESAAL successfully accomplished language to make it clear that under these circumstances the ALR provider may not be held liable for negative outcomes. Should this legislative proposal advance, we will pursue similar protections. 2) “Every resident shall have the right to choose his or her own health care providers of services not covered by his or her admission agreement, subject to limitations that may apply as a result or a resident’s third party payer coverage. 3) “Every resident shall have the right to choose his or her own legal representative and his or her own resident representative”;

- New provision clarifies that resident representatives cannot waive resident rights;
- In addition to adult homes, the proposal clarifies that fines collected from ACFs can be targeted to a special revenue fund that is to the benefit of enriched housing programs and residences for adults;
- Clarifying language that if upon inspection an ACF is in compliance or substantial compliance, they may be re-inspected after eighteen months;
- Changes current language so that an inspection report only has to reflect areas of non-compliance, rather than having to acknowledge areas of operation that are in compliance;
- Adds that an ACF must submit a written plan of correction to each inspection report within 30 days from the date that the report was received;
- Adds that the Department must notify the ACF operator of the acceptability of their plan of correction within 30 days of the Department’s receipt of the plan;
- Removes existing language that each violation in an inspection report has to contain directions as to the manner and time in which compliance must occur;
- Adds that enriched housing programs must develop, biannually update and implement plans for quality assurance in each area of operation (requirement already exists for adult homes);

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- Adds a provision that an individual or entity that is not the duly approved operator “shall not participate in the total gross income or net revenue of such facility”;
- Adds a provision that fees for lease of real property for an ACF may not exceed the commercially reasonable fair market value “for similar properties or premises in the geographic region in which such a facility, program or residence is located”;
- Adds a provision that no ACF operator may directly or indirectly “make any charitable contribution of state monies, medical assistance payments or social security or supplemental security income or any interest or other income earned thereon, except as expressly authorized by the commissioner”;
- Clarifies the Department’s right to “pend” QUIP payments while enforcement actions for endangerment violations are pending;

This legislation also proposes changes to the Assisted Living Residence (ALR) law:

- Adds a provision to allow direct admission into an Enhanced ALR from the outer community, but further clarifies that no person may be admitted into an ALR if they are in need of 24-hour nursing or medical care, chronically bedfast or impaired to such a degree that their safety would be endangered;
- Clarifies that any ACF that serves individuals with special needs must obtain Special Needs ALR;

Immunization of Health Care Workers Legislation-

S3256: This legislation would amend existing law for ACFs and nursing homes pertaining to employee and resident immunizations for flu. Specifically:

- Makes annual flu vaccination a requirement for “personnel” unless it is medically contraindicated. Personnel is defined to include employees and “students and volunteers whose activities are such that their health impairment would pose a potential risk to patients”;

- Prohibits the operator from passing the cost of the vaccination on to the “personnel”;
- Requires documentation of the vaccination by the ACF or nursing home;
- Allows the commissioner to create an exception to the new provisions if there is a vaccine shortage.

While ESAAL strongly encourages and supports personnel’s voluntary immunization for flu and pneumonia, this proposal creates an unfunded mandate and could severely limit residents’ social interaction with volunteers and visitors from the community. ESAAL has issued a Memorandum of Opposition to this proposal, which can be viewed in the Members Only area of our website at www.esaal.org.

ESAAL will continue to advocate for members on these and the many other legislative proposals that potentially have impact on Adult Care Facility and/or Assisted Living Residence operations.



*Kelly Ryan,
Associate,
Hinman Straub P.C.*

Counsel’s Corner **New Disclosure Requirements for Employers that Conduct Background Checks**

*Submitted by Kelly Ryan, Esq.,
Hinman Straub P.C.*

A recent change to New York’s Fair Credit Reporting law places new disclosure requirements upon any employer who requests a credit or background check in the context of an offer of employment. Additionally, the new law also requires all employers to post information about applicants’ rights to such disclosure in a place accessible to their employees. Although ACFs are not required by either the Criminal History Record Check (“CCRC”) law or any other law to conduct criminal background checks on prospective employees, some operators have elected to hire private companies to conduct similar checks. Therefore, operators who are currently conducting such checks on applicants, and those that may

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be considering it, should be aware of the changes and be sure to comply. Moreover, all employers, regardless of whether they conduct background checks, must comply with the posting requirement immediately.

The new provision of the Fair Credit Reporting Act were designed to ensure that New Yorkers with criminal histories are aware of their rights by requiring disclosure of existing protections afforded by the Correction Law. Specifically, existing Correction Law Article 23-A generally prohibits employment discrimination on the basis of an applicant's criminal history, with specific exceptions. Essentially, it is unlawful for an employer to reject an application for employment solely on the basis of a previous conviction, except under two circumstances:

(1) There is a direct relationship between one or more of the previous criminal offenses and the ... employment sought or held by the individual; or

(2) The ... granting or continuation of the employment would involve an unreasonable risk to property or the safety or welfare of specific individuals of the general public. [Correction Law section 752]

Disclosure Prior to Conducting the Background Check

The substance of Article 23-A has not been changed, and thus the manner in which employers can utilize information obtained in a criminal background check remains the same. The new law (Chapter 465 of the Laws of 2008) does, however, require all employers who conduct criminal background checks to provide prospective and current employees for whom background checks were or will be completed with a copy of Correction Law Article 23-A so that they are aware of their rights with respect to any criminal history and its effect on their employment. Only those applicants for whom a background check will be performed must be provided with a copy of these provisions. The simplest way to comply with this requirement is to include a copy of the relatively short Article 23-A in any application packet and have applicants acknowledge receipt in writing when permission to conduct the check is granted.

Disclosures Upon Receipt of Criminal History

Should a background check reveal a criminal history of a prospective employee, the employer requesting the check is obligated to provide the applicant with an additional copy of Article 23-A. This copy may be either electronic or printed. Maintaining a record that this second copy of Article 23-A was delivered to the applicant is important and can be achieved by sending copies via certified mail or, if practical, electronic mail. If an applicant with a criminal history requests a statement regarding the reasons for denial of his or her employment application, a written statement must be provided within 30 days. Such statement, however, need not be provided without a request and should not be included in the mailed copy of Article 23-A.

Posting Requirement for all Employers

Finally, the new law requires all employers to conspicuously post the provisions of Article 23-A in the facility where employees have access to them. This posting does not need to be in an area accessible to residents or to the public. Ideally, this posting should be with other required postings such as minimum wage posters, typically the employee break room.

Notably, for employers currently subject to the CCRC law, these requirements are in addition to any requirements imposed by the CCRC law and regulations. These amendments became effective in February 2009 and should **(continued on pg. 8)**

New Provider Members

- Friends Adult Home, Stanfordville, NY
- Maple-Pointe, Rockville Center, NY
- Tennyson Court Senior Care Community, Williamsville, NY

New Industry Partner Members

- Church Mutual Insurance Company, Merrill, WI

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therefore be complied with immediately. A copy of Article 23-A, which is appropriate for inclusion in your application package and for posting for your employees, is available in the Members Only section of the ESAAL website.

Notes from ACF/DOH Quarterly Meeting

In late March, ESAAL Executive Director Lisa Newcomb and Member Services Associate Carla Erhartic attended the quarterly Adult Care Facility/NYS Department of Health meeting to discuss current ACF and ALR issues. (*Editor's Note: This meeting took place before the passage of the 2009-10 state budget.*) The topics discussed were as follows:

DOH Office of Long Term Care (OLTC) Reorganization:

Mark Kissinger, OLTC Deputy Commissioner discussed his office's recent reorganization into three divisions: The Division of Residential Services; The Division of Home & Community Based Services; and the Division of Long Term Care Resources. ACFs and assisted living will be overseen within the Division of Residential Services, which is also responsible for licensure and oversight of nursing homes. This division will be led by Jackie Pappalardi, Director. Home care programs will continue to be based within the Division of Home & Community Based Services. The Department is searching for a Division Director. Ms. Pappalardi was present at the meeting and introduced herself to participants. In response to ESAAL's concerns that ACFs' cohabitation with nursing homes instead of home care will lead to increasing clinical focus for assisted living, both Mark Kissinger and Mary Hart emphasized that the Department recognizes and will preserve assisted living as a socially based model. They also stressed that providers should not expect to see major changes in their interactions with the Department, either in central office or in the regional offices. In central office, Mary Hart will continue to oversee the ACF survey process, and Guy Warner will continue to oversee ACF licensure and certification.

The 2009-2010 State Budget: In the final days and hours

of budget negotiations, the Executive's proposal to link Assisted Living Program (ALP) beds to nursing home bed closings/downsizing continues to be a topic of discussion in the Legislature, and final amounts for QUIP and Enable grant appropriations is yet to be determined. With regard to the Executive's proposal to create LTC Assessment Centers to replace local social service districts' Medicaid assessment and eligibility functions, the proposal has been modified to authorize a demonstration program. The Executive's proposal also includes funding for the Department of Health to begin to develop a Uniform Assessment Tool for use by various long term care settings and services, including ACFs.

Universal Transfer Data: The Department is working internally, with input from the agency's Discharge Planning Committee, to develop a list of information and data that hospitals, nursing homes, ACF and home care providers will share with each other whenever an individual is transferred to/from any of these settings. Lisa Newcomb expressed concern that early drafts of the data list contain information that ACF providers would not typically be able to provide. It was agreed that Lisa would submit written comments to Department representatives.

ACF Respite and Day Care Programs: At ESAAL's request Department representatives provided a list of approved ACF respite and day care programs. (Note to members: Contact Lisa Newcomb at LNewcomb1@aol.com to receive a copy of the list.)

QUIP: Payments for fiscal year 2008-2009 have been mailed to eligible ACFs.

- 263 ACFs applied
- 19 are pending, most of them because they have not submitted their annual financial report and/or their QUIP expenditure report from previous years
- 3-4 were denied

The per-resident payment is \$356.40, which is almost \$100 less than the payment estimated by the Department

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as included in the QUIP application form. Lisa Newcomb expressed concern that the payment was significantly less than applicants planned for. (Note to members: Department representatives have since indicated the reasons for the substantial difference in estimated versus actual: 1) the total QUIP amount available was reduced twice when the Legislature imposed across-the-board cuts in late 2008 in an attempt to offset the state's large budget deficit; 2) two large ACFs successfully challenged denial of their QUIP from previous years and therefore those payments had to be taken from the 2008-2009 pot; 3) a moderately higher number of ACF applied and/or were determined to be eligible. Should the payment shortfall prevent any QUIP recipient from carrying out their project(s) as proposed, it was recommended that they submit the information to the Department in terms of any alternate plan.)

Air-conditioning and EnABLE Grants: Air-conditioning award letters are in the process of being sent out. EnABLE applications continue to be under review and the Department's goal is to issue award letters by April 15, 2009.

ACF Census Reports Filed on HPN: The Department is pleased that filing of ACF 2008 census reports on the Health Provider Network (HPN) went relatively smoothly. Of the 485 licensed adult homes and enriched housing programs, only 36 reports have not been completed. (Twenty-two of those have not been started, and the other 14 have been started but are pending.)

Assisted Living Program (ALP) Certifications: The Department summarized its efforts to finalize ALP projects granted to awardees under three recent Requests for Applications (RFAs): two RFAs related to Berger Commission recommendations totaling 560, and the third being the 1,584 beds that ESAAL and its members worked to secure from the Legislature in 2007. There are a total of 40 awardees from the three RFAs. The biggest challenge for some of the awardees is meeting architectural standards in their buildings. For the most part, processing of the applications is proceeding, with two or three nearing final approvals. From the 1,584 bed RFA, 34 applicants that

were not approved have filed for an appeal. ESAAL inquired if there is a right to appeal the decisions from the most recent 330-bed RFA. Department representatives responded that applicants can request a meeting if they have questions about their denial, but it is unclear whether they will have a right to appeal.

Architectural Standards for ALPs Located in Nursing Homes: Inquiry was made as to what building standards apply should a nursing home seek to license part of its building as Assisted Living Program (ALP), since nursing home building code differs from assisted living code. The building codes for the SNF differ from the ALP. Department officials indicated that for the ALP portion of a nursing home, I-1 occupancy, which is the ALP standard, must be met. In addition, the ALP unit should be separated from the nursing home unit by fire walls.

Assisted Living Residence (ALR) Certifications: Three more ALR applicants have received final approvals, bringing the total number approved to 12. One is in the Capital District Region and the other two are in the Metropolitan Region, both in the mid-Hudson area. One is licensed for ALR only, and the other two are licensed for ALR with certifications for both Enhanced and Special Needs ALR.

There remain approximately 275 active ALR applications. Like the ALP, architectural standards for the ALR have been the most problematic, and the Department's architect has only signed off on 62 applications. The Department continues to maintain that they are awaiting information from the applicants for more than two-thirds of applications for several reasons. Applicants are encouraged to inquire with their assigned program manager if they are unsure where they stand. The Department is giving applicants 60 days to respond to requested information and if not received, they may consider the application withdrawn. In addition, the Department is not acting on some nurse waiver requests because of ALR litigation.

With regard to the ALR requirement for sprinkler systems, which is NFPA 13, Department officials indicated that they have issued some "Equivalencies" to applicants that have the NFPA 13R system. Rather than having to replace their

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entire system to NFPA 13, through the equivalency they are allowed to expand the coverage of the 13R system into closets without having to change the entire piping system. Questions about architectural standard equivalencies should be directed to Sal Maccione in Central Office.

Notice of Approval for ALR and ALP Applications:

ESAAL inquired as to the Department's process for notifying ALR applicants and ALP awardees when the application process has been complete and they may begin providing services. For ALPs, there is a Part 1 and Part 2 process, similar to that used for ACF applications. Part 1 comprises of central office review of character and competence, legal, and financial feasibility. Part 2 is the regional office programmatic review, i.e. policies and procedures. ALP awardees should receive a Part 1 approval letter from central office, and ultimately Part 2 approval from regional office. To keep the application review process moving, when possible based on Department staff resources, Part 1 and Part 2 reviews will occur simultaneously.

This process is different for ALRs because the entire process is viewed as one. (Therefore one letter of approval would be issued.) However, like the ALP, central and region offices review different parts of the application, with Sections E, F, and G the responsibility of the region. Also, with regard to ALRs for facilities that do not already have an ACF license, the Department is willing to approve the ACF separately and prior to approving the ALR application in those instances where there is some delay on the ALR side that does not impact the ACF component.

Unlicensed Facilities: Department representatives stated that if an unlicensed facility is identified by them as requiring ACF or ALR license, they are imposing deadlines on the facility to submit licensure information and will move forward with the hearing process if the facility does not respond in a timely manner.

ALR Consumer Information Guide: Some modifications have been made to the guide and are in the final stages of Department approval. Once approved, the guide will be posted on the Department's website and ALRs may

distribute it to new residents. Lisa Newcomb suggested that it should be sufficient for providers to refer individuals to the website due to the cost of printing the lengthy document for each inquiry. Department officials agreed to consider this option and respond in the near future.

ALR Questions & Answers: A new set of ALR "Q&A's" has been drafted and will be issued in the near future.

ALR Aide Training: The Department is developing personal care curriculum for ALR aides and that will be made available in the near future.

Community Fees: The Department has recently issued a new Dear Administrator Letter (DAL) re: ACF and ALR's use of community fees, which revises its previous policy in terms of the provider's disclosure.

SSI Study: Department staff has completed the report and it is being reviewed by the Executive. Release of the study's findings is expected in the near future.

Regulatory Interpretation Questions Submitted by ESAAL: At the meeting Department officials responded to a number of regulatory compliance questions/issues submitted by ESAAL from member inquiries:

- **Direct Employment of Dietitians:** ESAAL inquired as to whether an ACF may directly employ a dietitian rather than engage them as a consultant. Department officials indicated that ACFs may directly employ a dietitian, as long as there is a written agreement in accordance with Department regulations 487.9 (j) and 488.9 (f).
- **Completing PRIs:** Department officials indicated that PRI trained nurses that are employed by an ACF may not complete a PRI for a resident. They justify this position because 1) the assessment process involved is a skilled nursing task and ACF nurses may not provide skilled nursing and; 2) It is a conflict of interest for the ACF to be making decisions based on a PRI that has not been completed by an independent person.

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- **PPD Testing:** ESAAL inquired if an employee has an allergy to the PPD test, how often a chest x-ray must be done in its place. Department officials responded that it is the physician's decision as to how often an x-ray should be done, and that it is the physician's decision on all matters related to contraindications. ACFs should maintain documentation from the physician reflecting those decisions.
- **Employee Rubeola and Rubella Vaccines in the ALR:** The ALR is not responsible to pay for these vaccinations. Employees may be required to receive them as a condition of employment.
- **Use of Personal Allowance Funds for Transportation and/or Escorts to Doctors:** ESAAL asked if a physician requests an escort to accompany an SSI resident to a doctor's visit, can the facility request payment from the resident from their personal allowance funds. The Department has asked their attorney to review this and will report back at the next quarterly meeting.
- **On-line First Aid Training:** ESAAL inquired if recertification every three years for first aid training could be conducted on-line. The Department responded "no" due to concerns that this option does not ensure actual demonstration by the employee.
- **Reporting Illness Outbreaks to DOH:** ESAAL has had a number of inquiries from members as to whether they need to report a variety of different illnesses to the Department, and when, i.e. after how many cases. The Department will review this with the Bureau of Epidemiology and establish a protocol for ACFs to be made available in the near future.
- **TB Testing:** Currently it is the Department's policy that ACF nurses may not read or administer TB tests because it is considered a skilled nursing function. However, they are reconsidering their position based on the fact that the nursing task is not considered to be "chronic" or "continual" nursing, so perhaps this practice would not violate ACF statute or regulation. The Department is revisiting this issue and will inform us when they have made a final decision. (Note to members: Until the Department indicates that this practice is permissible, their position as indicated in their DALs remain in effect, and ACF nurses may not perform this function beyond the scope of what is allowed in current DALs. ESAAL will encourage an expeditious decision from the Department.)
- **Emergency Pull Cords:** There are some ACFs that only have one pull cord in the bathroom which may not be reachable by both the shower and the toilet area, as required for ALRs and new ACFs. ESAAL inquired if the pull cord may be modified so that it has a second cord. Department officials responded that is an acceptable option, but that an Equivalency is required and providers should inquire with central office before attempting so that it can be assured that it is done in a manner that keeps residents safe.
- **Mental Health Evaluations:** When a resident with a mental health history is admitted to general hospital for medical reasons (not mental health), they only need a new 3122 upon return; a new mental health evaluation is not necessary. If a resident is admitted for a psychiatric reason but has no medical issues, they only need a new mental health evaluation upon return; a new 3122 is not necessary in this circumstance.
- **Eye Drops and Creams Assistance:** The Department is currently reviewing its policy as to what constitutes assistance with eye drops and creams, taking into account what is realistic in today's health care environment. They will inform providers when decisions are made.
- **Plastic Covers on Resident Mattresses:** If a resident requests a plastic cover for their bed, it is allowed if it is the "zipper kind", but not the original plastic wrapping. However, plastic covers are not to be used to contain a bed bug infestation.
- **Look-Back Period for SSI, Medicaid:** The five-year look-back period for Medicaid applies for an ACF resident even if they qualify for SSI.

- **E-Signatures and E-Prescriptions:** ACFs may accept E-signatures and E-prescriptions.
- **ACF's Obligations when Residents Self-administer Their Medications:** While it is understood that ACF providers have a responsibility for ongoing monitoring of residents that self-administer to make sure their medications are current, reordered in a timely manner, etc., there is some confusion as to the extent of the operator's responsibility. ESAAL inquired as to whether the ACF needs to have copies of each of the resident's prescriptions. Department officials responded that is not required. Rather, they need to maintain a list of the medications being taken and monitor on a regular basis.
- **Public Telephones:** The Department clarified that while regulations require that residents have access to a telephone at a ratio of one phone to 40 residents, it is not required that there be a public telephone or phone booth. Rather, there must be a phone to which they have access. They also indicated that because so many residents now have cell phones and/or phones in their rooms, they are willing to consider waiver requests on the 1:40 requirement, and waiver applicants should indicate how many residents have their own phones when making the request.

OMIG Issues Draft Regulations to Implement Statutory Requirement for Compliance Programs

by Susan V. Kayser, Esq.

On January 14, 2009, the New York Office of Medicaid Inspection General ("OMIG") issued proposed regulations to implement a statutory requirement (Social Services Law §363-d, passed in 2007) for mandatory compliance programs for certain providers that participate in the Medicaid program. Assisted Living Programs ("ALPs") with more than \$500,000 of Medicaid claims in a 12-month

period will be subject to this new requirement. This article highlights some of the key questions relating to this development.

Who is covered?

The proposed regulations cover the following Medicaid providers:

- Article 28 facilities, including hospitals, nursing homes, and diagnostic and treatment centers;
- Article 36 home care providers, including CHHAs and LHCSAs;
- Article 16 and 31 mental health providers;
- Other providers with \$500,000 or more of Medicaid claims in a consecutive 12-month period; and
- Those who submit Medicaid claims on behalf of providers in the aggregate amount of \$500,000 or more in a consecutive 12-month period.

Although ALPs are not specifically listed, any ALP with \$500,000 or more of annual Medicaid claims will be covered by the regulations.

What is required of covered providers?

All covered providers must implement an "effective" compliance program.

What is the deadline for implementation?

The compliance program requirement will be effective 90 days after final regulations are published. OMIG will publish the regulations in final form after reviewing comments from the public on the proposed regulations, which were accepted until March 1, 2009. It is unlikely there will be significant changes to the proposed provisions, and the final rules could be published as early as May 1, 2009. If this in fact were the date of publication of the final rules, providers would then be required to have compliance programs in place by August 1, 2009. With the date of final publication uncertain, it is necessary to monitor developments closely.

What must be included in a compliance program?

Most requirements under the proposed rules are similar to provisions suggested by the federal DHHS Office

The Vision

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of Inspector General in the guidelines for provider compliance programs that it published several years ago. Many providers already have a compliance program that covers much of what will be required under New York's requirements. However, New York's proposed rule includes a requirement that procedures concerning "mandatory reporting" be included in a provider's program. This factor appears to be a new element and warrants careful attention in meeting New York's requirements. Other provisions that must be included in a compliance program include:

- Standards of conduct;
- Designation of a compliance officer;
- Training and education of all employees and others associated with the provider;
- Establishment of lines of communication for reporting compliance issues;
- Disciplinary policies for failure to comply with a provider's compliance program;
- A system for routine audits of compliance risk areas;
- A system for responding to compliance issues as they are raised; and
- A policy of non-intimidation and non-retaliation for good faith participation in the compliance program.

How will the new requirements be enforced?

OMIG will have authority to determine, in its discretion, whether a provider's compliance is "effective" and "satisfactory" to meet the requirements of the regulations. In addition, providers will be required to submit to OMIG an annual certification of compliance with the regulations.

What are the penalties for non-compliance?

OMIG has given itself broad authority to impose "any sanctions permitted by federal or state laws and regulations." Accordingly, a wide range of penalties will be available to OMIG, including hefty civil monetary penalties and exclusion from participation in the Medicaid program.

Is there anything that should be done now?

Providers that do not currently have a compliance program can begin to consider what will be required of them. Because there is a strong indication of what OMIG will

demand, providers are in a position to begin to develop a compliance program. Providers that already have a program in place can begin to review it for consistency with the new requirements.

New York's Inspector General, James Sheehan, has been extremely aggressive in his Medicaid compliance auditing efforts. In 2008, OMIG collected \$551 million in Medicaid
(continued on pg. 14)

What's New at www.esaal.org

- Final State Budget Language for Regional Long-term Care Assessment Centers
- DOH's Office Long Term Care Reorganization
- Article 23-A Licensure & Employment of Persons Previously Convicted of One or More Criminal Offenses
- Member Alert 2/11/09 Application for 2008-2009 QUIP Funds Posted On HPN
- Member Alert 3/13/09 DOH Restructuring and Judi Mooney's Replacement
- DOH DAL HCBS 09-04 Pharmacy Co-Payments
- Hinman Straub's Memo on SFY 2009-10 Budget and Health Summary
- Member Alert 3/30/09 Enacted Budget Summary for ESAAL Members from Hinman Straub
- Press Advisory: ESAAL Members Will Urge Lawmakers to Reject the Governor's Proposal Forcing Seniors into Institutions
- DOH DAL Regarding ALR Completion of Medical Evaluation Information
- DOH DAL Immunization Reports Due May 1, 2009
- DOH DAL Community or Admission Fees

overpayments, more than twice its budgeted amount. It is anticipated that Mr. Sheehan will be similarly aggressive in enforcing the new compliance program requirements, particularly with regard to self-reporting provisions. A compliance program should not be merely pages in a binder that sit on the bookshelf but, rather, should be a viable system for preventing and detecting compliance issues, and for effectively correcting any compliance problems that may arise. In addition to meeting the new requirement, a strong compliance program can go a long way to provide a framework for catching compliance problems early before they become a subject for OMIG review.

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Technology Spotlight: What You Need to Know if You're Shopping for Software Tailored for Assisted Living

by Vince Saturino of Senior Insight, Inc., an ESAAL Industry Partner Member

The Job: Senior Insights sells Internet based software application to Assisted Living Communities with applications tailored to New York's rules and regulations. What are the challenges for an assisted living provider that is searching for a software solution? A couple of factors; first, local community leadership for the project and second, educating customers about what they need to know to select the right application for them. When I meet a prospective customer I have two initial goals. One is to understand what they need (a needs assessment) and if we can meet those needs. The other is to commit to simply viewing the application at their convenience (known as "the demo"). My experience has led me to understand that when you're not focused on selling at every turn the quality of the information shared is more valuable and provides for an opportunity to help. The chance to help is AL-Insight software in our case.

It is simple, I have learned that once the right people become aware that a cost effective software product exists to help solve their problems a general excitement develops. The "team" begins to collaborate on how they can do their jobs more efficiently and easily envisions having a positive impact it will have on Resident Care, Staffing and Customer Satisfaction (this happens fairly quickly).

Professional Background: My name is Vincent Saturnino and I started Senior Insight over 9 years ago with some ideas and no customers. Having started my Long Term Care career in accounting and ending up as a Nursing Home Administrator, the past 15 years has given me a unique perspective. With this perspective, I have been the central figure in managing the project development of our only web based software application, AL-Insight (as in Assisted Living "AL" – Insight). It is our primary focus and I believe this to be an important characteristic in working partnership. We develop, market and support one application and our customers see the difference.

AL-Insight Begins: My Company had a management contract to operate 109 Assisted Living Apartments, 50 Independent Units and 56 Nursing Home Beds. When we took over in 2003 one of my main challenges was to research and purchase a software application for the Assisted Living Business. At that time all Assisted Living documentation and communication was hand written - face sheets, manual census, service plans, assessment forms that were different from other assessment forms.

What did I do? First I began a simple internet search for providers of "Assisted Living Software". Five years ago you could count them on one hand. I reviewed the offerings and discovered two primary concerns. One, they didn't solve any of the problems I needed help with; and two, they were very costly to setup, install, train and then maintain. I knew there was a better way but we had to build it. We have built AL-Insight from a provider's perspective which was guided by some of the following issues:

1. Improve Safety: We solved our MAR and medication assistance problems first.

2. Simple to use: Staff found the interface intuitive and easy to use, even if they had not had previous computer experience.
3. Cost Effective: We did not have money to invest in a lot of new equipment. We worked on a couple of computers, an Internet Connection and a decent printer.
4. Practical / Functional: Stay focused on solving the problem: Over the years I have heard a lot about “eMARs”. Interestingly we have the technology platform to do this; however it is not practical, prone to error, expensive and can be handled with an approach that attacks the same problem differently. That’s what we did with AL-Insight, we provide for communication (sending and receiving faxes directly with the web based software application). You gain control over producing your own community MAR. Think about this – cut off dates are now at the end of the month. If you find that a discontinued medication printed, you remove it and print again (never to be seen again). This is one of our unique features and most widely used by our customers as the first part of the implementation plan.
5. Minimize Training Needs: Most often administrative staff use AL-Insight which means staff barely see a difference in their jobs. They are still working off a formatted MAR and signing off the way they always have. Only now they have every opportunity to make simple suggestions for changes, notes etc. and the MAR document becomes more precise and refined with all staff working towards the same goal. With improved accuracy, not having to install complicated new equipment and train all staff the big payoff is efficiency – you save lots of time and don’t have to spend money you don’t need to.
6. Critical Services: Make a difference where it counts. We looked at where systems and communication were breaking down. We approached this solely from a service standpoint. For example – having an evaluation drive the service plan which in turn populates a list of tasks a caregiver must provide for a resident. We looked at work flow and how staff gathered information, completed the task, documented the service and things fell into place.
7. Level of Care (points, time or dollars): After completing the above, it became a matter of querying the data and writing reports on which residents needed which services

and how much staff time was spent assisting. Now this is not solely intended for billing it is as equally as important in understanding your acuity

If you are are interested in learning more and plan on attending ESAAL’s upcoming trade show, stop by and see us and enter the drawing. We will have sample reports, screen shots, other printed material and a sign-up sheet for presentations. I will bring my calendar to set one hour slots for those of you wanting to see a presentation; however, we will first need to chat for 5-10 minutes for a brief needs assessment.

If you are not going to the trade show, you can visit our website and view the material at www.seniorinsight.com. Fill out the contact form or simply call us at 1-866-248-4845. We will talk about your needs and see if we can schedule a remote online presentation using common technology these days; GoToMeeting. This will allow you to view our screen and we can use our conference number for the audio portion.

Agreement for Trial: We offer free trials of up to 90 days, fully implemented and training at no cost.

Questions: Visit us at ESSAL’s trade show, contact us at www.seniorinsight.com or call us toll free at 1.866.248.4845. Testimonials will be made available.

ESAAL Seeks Board Member Candidates for Mid-Hudson Region

Board member candidates will be asked to present to the Board of Directors at its June 17 meeting. Board member applications will be due to the Association by Monday, June 1. Please contact the association office at 518-371-2573 for the job description and application. Applicants can also go to ESAAL’s website: www.esaal.org, log-in to the Members Only section and then click on Board Member Job Description and Board Member Application form.

ESAAL's 30th Annual Conference and Trade Show *Challenges • Changes • Choices*

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