

Memorandum in Opposition

ELDER LAW AND SPECIAL NEEDS SECTION COMMITTEE ON LONG TERM CARE FACILITY REFORM

ELDER #3

March 9, 2021

Comments to the 30-day Executive Budget Amendment (Part “GG”) submitted by the Governor to amend the Public Health Law and the Social Services Law in relation to improving the safety and quality of nursing homes in New York State dated 2/18/2021 (the “Budget Bill.”)

The Elder Law & Special Needs Section of the New York State Bar Association is committed to improving the quality of life for long term care facility residents of New York State. Accordingly, to the extent to which the Budget Bill Section GG proposes nursing home reform legislation, we are compelled to respond to certain proposals therein.

As attorneys who serve older adults and persons with disabilities, we remain deeply troubled by the rampant spread of Covid-19 and the accompanying high number of recent deaths that have occurred in nursing homes. This COVID-19 crisis has starkly uncovered underlying systemic problems in how we care for nursing home residents and the failure of nursing homes to provide sufficient services, resources, and protocols to address patient needs.

This tragedy demands that we address the state of resident care in nursing homes during and after this crisis, to cure systemic nursing home deficiencies. There is a dire need for improved resident care that respects the dignity of each individual resident. Deficiencies regarding staffing, infection control and protocol, the availability of personal protective equipment for residents and staff, testing, visitation by and notice to family members and governmental representatives and reporting and oversight are clear. This crisis compels us to ensure that nursing homes meet current statutory and contractual requirements and explore legislative and other changes to meet current inadequacies and future challenges. We must ensure adequate oversight and transparency and nursing home operators and owners must suffer consequences when they fail to comply with laws and regulations intended to ensure resident safety.

While we commend the Governor’s efforts to amend and propose a bill to cure nursing home deficiencies through better oversight, higher fines for infractions and compelling that a fractional share of revenue be dedicated to direct patient care, the Budget Bill falls far short of enacting changes needed to protect the most vulnerable.

Having witnessed suffering and neglect due to nursing home conditions that existed before the current pandemic, we urge the to the amendment of the Budget Bill’s shortfalls

and implement substantial changes. We need objectively verifiable oversight to improve the lives of seniors and the disabled who cannot care for themselves, and provide comments and recommendations, as follows.

1. Repeal the restriction on Medicaid home care eligibility enacted in the FY 20-21 including repeal of the 30-month lookback. Unless the lookback is repealed or designed to ensure there is no delay in access to home care, NYS will push older adults and people with disabilities into nursing homes and deprive them of the ability to live in their own homes.
2. Repeal Executive Budget cuts of 50% to worker recruitment and retention funds, which enhance recruitment of personal care service workers by certified home health care agencies and long-term home health care programs to allow people to live at home in the least restrictive settings.
3. Include the “Fair Pay for Home Care Act” in the budget. This will ensure that nursing home and home care workers are paid a wage that will lift them out of poverty and increase the pool of persons that are willing to perform this essential work.
4. Enact policies that mandate oversight of the business dealings and operations of nursing homes. Absent accountability and transparency about how Medicaid and Medicaid dollars are spent, the claims of nursing home operators that more government funds are needed to improve patient care cannot be substantiated. Nursing home operation and ownership has become an “industry” that is increasingly more sophisticated at hiding profits by diverting funds to “related parties” who serve these facilities. Related party transactions enable home operators to claim that they are losing money and cannot devote funds to direct resident care, such as by increasing staffing levels and providing staff training. Real accountability and oversight is needed to reveal how operators spend our precious public funds and private dollars.
5. We applaud a Budget Bill provision that proposes a Medical Loss Ratio (MLR) by ensuring that at least 70% of a nursing home’s aggregate revenue be spent on direct care of residents, and further measures that provide that, of that amount, at least 40% be spent on staff wages for “resident facing staff” rather than management contracts and related party transactions. We suggest, however, that 70% is too low and the starting threshold should be higher, noting that New Jersey passed a law in 2020 that requires at least 90% of revenues received be expended on direct resident care.
6. The Budget Bill seeks to impose limits on revenues for non-patient care executive and management positions. We support the intent of this proposal but note that the salary limitation is tied to bed count. This bed count threshold is objectionable because it may encourage the development and operation of larger facilities rather than smaller, more humane, and homelike settings.

7. Medicaid funding and increases to funding should be contingent on nursing homes meeting certain patient care standards. The Budget Bill states that it “advances a series of actions that advance the goal of ensuring nursing homes spend an appropriate level of their resources on resident care.” But these suggested “actions” are indefinite and vague regarding what levels are “appropriate” and how oversight or violation of such vague standards will be implemented/issued. Objective measurable standards are needed.
8. Mandate Minimum Staffing Standards. Insufficient staffing has long been a cause of resident neglect and the failure of nursing homes to deliver adequate care, ensure infection control and prevent the abuses, such as the overuse of psychotropic medications. This problem, while not new, became starkly evident during the COVID-19 pandemic. For this reason, we oppose any proposal that allows nursing home operators to unilaterally determine the number of nurses and other health professional that are sufficient to provide the level of patient care mandated by NYS and federal law. Minimum staffing ratios that provide a certain required number of nurse hours and certified nursing aide hours per resident per day as set forth in The Safe Staffing for Quality Care Act [A108A(Gunther)/S11680(Rivera)] as well as increases in staff wages are needed to establish a baseline for the delivery of resident care that promotes health and dignity. New York State is lagging some 37 other states that have enacted mandatory minimum staff/resident ratios. Similar staffing mandates have been introduced and failed to pass the NYS legislature for many years. Now is the time to make sure we save lives that will otherwise be lost to neglect and maximize resident and patient outcomes. Multiple studies have shown that that passing the Safe Staffing for Quality Care Act extends and saves lives.
9. We support the proposals to increase violations of NYS Health Law from \$2,000 to \$10,000 per violation and from \$10,000 to \$25,000 if the violation directly results in serious physical harm to residents. The Budget Bill increases violations for repeat violations from \$5,000 to \$15,000. These increases, a modest start, will help avoid operators viewing fines as the mere cost of doing business. However, the efficacy of these greater fines is dependent on the proper and regular identification of resident harm and the violation of countless rights, regulations, and protections many of which go unreported. Without substantial increases in funding for more frequent and vigorous oversight, training of surveyors and notice to residents and their representatives about resident rights and how to report infractions and dangerous conditions, violations will not be issued, and fines remain meaningless. Currently, NYS DOH often fails to uncover basic violations of rights and hazardous conditions. This must change if we are serious about improving resident care and safety.
10. The NYS Long Term Care Ombudsman Program (LTCOP), which exists to identify, investigate, and resolve complaints made by residents of long-term care facilities, is underfunded. Nursing homes that have ombudsmen present for

deficiency evaluations tend to have more deficiencies cited. The Budget Bill merely maintains current levels of funding for LTCOP. Substantially more funding is needed to train and employ more staff ombudsman to strengthen, expand and promote the program in every county of New York State. With its strong volunteer component, expansion of LTCOP is one of the most cost-effective ways to protect residents from abuse and neglect.

11. We support the Governor's proposal to increase civil penalties for violations at Adult Care Facilities (ACFs). At the same time, we advocate for even higher fines in certain situations, such as when facilities egregiously operate without a license or violations result in a resident's physical injury. We recommend stronger measures like those proposed in Bill A198 (Gottfried)/S1576(Rivera), including consumer protections to require DOH's "do not refer" list to be sent to hospitals and nursing homes and require facilities to make DOH investigation reports and admissions agreements accessible to the public prior to admission, via website.

For the foregoing reasons, the New York State Bar Association Elder Law and Special Needs Section **OPPOSES** Part GG of the Health and Mental Hygiene Article VII bill of the Governors' Executive Budget.