



Testimony of:

**NEW YORK STATE  
HEALTH FACILITIES ASSOCIATION**

and the

**NEW YORK STATE  
CENTER FOR ASSISTED LIVING**

on the

**FY 2022-23 New York State Executive Budget Proposal  
Health & Mental Hygiene  
Article VII Bill**

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## **Introduction**

My name is Stephen Hanse and I have the privilege of serving as the President and CEO of the New York State Health Facilities Association (“NYSHFA”) and the New York State Center for Assisted Living (“NYSCAL”). NYSHFA|NYSCAL members and their 90,000 employees provide essential long-term care services to over 70,000 elderly, frail, and physically challenged women, men, and children at over 450 not-for-profit, proprietary and government sponsored skilled nursing and assisted living facilities throughout New York State.

## **History of New York’s Nursing Home Disinvestment**

For the past 14 years, New York has cut nearly \$2 billion in essential funding to long-term care providers.<sup>1</sup>

Moreover, Medicaid cuts implemented because of the Medicaid Global Cap have forced long-term care providers to absorb nearly \$800 million in cuts over the past seven fiscal years.

As the COVID-19 pandemic has made clear, New York’s history of disinvestment in long-term care has been penny wise but pound foolish when it comes to ensuring a robust system of nursing home and adult care with a sufficient workforce to care for New York’s most vulnerable residents.

As a result of the prior administration’s disinvestment in long-term care, New York State now unfortunately leads the Nation with the largest shortfall between the amount Medicaid reimburses providers and the actual cost of providing resident care in the nursing home, which is approximately \$55 per day.<sup>2</sup>

Consequently, the current statewide average Medicaid reimbursement rate (to cover operating and capital costs) is \$246<sup>3</sup> resulting in a Medicaid reimbursement rate of \$10.25 per hour for 24-hour skilled nursing care.

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<sup>1</sup> The absence of a trend factor since 2007 alone accounts for approximately \$1.4 billion.

<sup>2</sup> See attached: Hanson Hunter & CO, P.C.

<sup>3</sup> [https://www.health.ny.gov/facilities/long\\_term\\_care/reimbursement/nhr/](https://www.health.ny.gov/facilities/long_term_care/reimbursement/nhr/)

This rate of reimbursement is well below the State’s minimum wage and has only served to exacerbate New York’s long-term care workforce crisis – a crisis that must be addressed given that the State’s population of 65 and older grew by 23.7% over the last decade, outpacing the national aging population average of 15%.<sup>4</sup> Over this time, New York’s senior citizen population grew eight times faster than the State’s total population while the State continues to cut Medicaid reimbursement to healthcare facilities caring for this growing population.

Despite significant increases to New York State’s FMAP from the Federal government for temporary COVID-19 relief, and unlike most all other states, New York, under the prior administration, failed to pass on any additional temporary funding to long-term care providers for any COVID-19 related expenses, including staff, PPE and testing during the pandemic.

In fact, to add insult to injury, the 2020-21 enacted State Budget implemented a 1.5% across-the-board Medicaid cut to nursing homes despite the enormous costs providers faced in staffing costs, procuring PPE and mandated COVID-19 staff testing incurred as a result of the pandemic. And if nursing home finances weren’t dire enough, inflation is currently estimated at 7%, as LTC providers enter their 15<sup>th</sup> year without a Medicaid inflationary trend factor increase.

### **Medicaid Cuts Harm Long Term Care Workforce**

New York State entered the COVID-19 pandemic with an inadequate workforce due in large part to the State’s woefully low Medicaid reimbursement rate resulting in providers being unable to offer competitive wages in the marketplace. A survey recently conducted by NYSHFA showed that out of almost 250 skilled nursing facilities, 93% are experiencing severe staff shortages and these shortages are negatively impacting the ability of a majority of those polled to admit new residents from both hospitals and the community.

New York’s failure to provide an adequate Medicaid reimbursement rate that reflects the cost of care is at the foundation of the State’s long-term care workforce crisis as it directly impedes the ability of providers to compete in the labor market to recruit and retain a necessary workforce. Consequently, a majority of the State’s nursing

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<sup>4</sup> SFY 20-21 Executive Budget Briefing Book, p.65

homes are unable to meet the 70/40 patient care and 3.5 staffing mandate that will become effective in 2022.

### **70/40 & 3.5 Staffing Mandate Laws**

Two laws enacted by the prior administration, will have profound and catastrophic consequences for nursing homes throughout New York.

The first is Public Health Law § 2895-b, which imposes a minimum staffing requirement for nursing homes.

The second, Public Health Law § 2828, commonly referred to as the 70/40 law, requires facilities to spend at least 70% of their revenue on direct care, 40% of which must be on resident facing staff.

While the 3.5 staffing mandate completely fails to acknowledge the reality of New York's long-term care workforce crisis, the FY 2022-23 Executive Budget does make technical amendments to the 70/40 law which NYSHFA supports, however, much more needs to be done in order to reverse the devastating negative impacts these laws will impose upon the State's long-term care community.

### **3.5 Staffing Mandate Law**

Specifically, Section 2895-b requires each nursing home to maintain daily staffing of 3.5 hours of care per resident, no less than 2.2 hours of which must be provided by a nurse's aide, and no less than 1.1 hour of which must be provided by a licensed nurse. Under the proposed regulations, failure to comply will result in a penalty of up to \$2,000 per day. To be sure, in a perfect world such legislation might be desirable, but in today's actual world, this is not just unrealistic, it is virtually impossible.

On September 27, 2021, Governor Hochul issued Executive Order No. 4 that declared "a statewide emergency disaster" recognizing that "severe understaffing in hospitals and other healthcare facilities is expected to affect the ability to provide critical care and to adequately serve vulnerable populations." Since that declaration, the more recent dramatic upsurge in COVID-19 cases due to the emergence of the "omicron variant" has only exacerbated the problem, particularly for nursing homes,

which were already under financial duress as a result of the Medicaid global cap and the decision by the previous administration to eliminate a “trend factor” to nursing homes’ Medicaid rates to account for inflation since 2008!

The “hands-on” staff our members have managed to keep are now overworked and burned out. As such, providers are in imminent danger of losing them to other industries with whom we can no longer compete in terms of wages and benefits. When skilled nursing providers must resort to staffing agencies as a desperate last gap measure to ensure adequate staffing, they must pay as much as \$100 per hour for licensed practical nurses, and \$70 per hour for nurses’ aides.

New York’s skilled nursing industry is at a crossroads. It faces an existential crisis. As noted earlier, a recent survey of NYSHFA members indicates that 93% of them will be unable to comply with the 3.5 hours staffing mandate. Section 2895-b only sets these facilities up for failure. This mandate does not solve the State’s healthcare workforce crisis. It will only make it worse. As such, NYSHFA welcomes the opportunity to work together with the Legislature to enact initiatives that will truly recruit and retain a vibrant long-term care workforce.

### **70/40 Law**

The other law of concern, Public Health Law § 2828, requires facilities, regardless of the quality of the care they provide, to spend at least 70% of their total revenue on direct care, 40% of which must be on resident-facing staff. There are serious problems with this legislation. First and foremost, it penalizes facilities that must resort to paying agencies to adequately staff their facilities. Perversely, the law mandates that any such expense must be discounted by 15% in calculating the amounts necessary to expend to meet the 70/40% mandate. This makes no sense whatsoever. It is obviously counterproductive, as it has the effect of financially penalizing facilities that are struggling mightily to get staff in the first place.

This shortsighted law that was enacted without any input from long-term care providers only compounds the financial stress that New York’s nursing homes are already under. The most recent industry-wide cost reporting data made available by the Department of Health indicates that if the statute were to have taken effect in

2019, it would cost \$511 million as a result of the spending mandate alone. The implementation of § 2828 of the Public Health Law will only serve to magnify the huge shortfall between what it costs nursing home providers to treat Medicaid patients and what DOH reimburses them for the care they provide.

These two laws, Public Health Law §§ 2895-b and 2828, will not contribute to finding a solution to the State's current health care staffing shortage. They will, in fact, only exacerbate it.

### **FY 2022-23 Executive Budget**

In the FY 2022-23 Executive Budget, Governor Hochul has presented a spending plan that seeks to address the prior administration's disinvestment in skilled nursing and assisted living and begins to rebuild New York's long-term care sector by (1) reversing last year's across the board Medicaid cuts; (2) increasing the Medicaid rate for the first time in 14 years; (3) addressing New York's long-term care workforce crisis – a crisis that predates COVID-19 and has only been exacerbated by the pandemic; (4) making technical amendments to Section 2828 of the Public Health Law; and (5) investing in long-term care infrastructure and technologies.

Specifically, NYSHFA|NYSCAL **supports** the following initiatives set forth in the Governor's FY 2022-23 Executive Budget:

**1.5% Medicaid Cut Restoration:** Restores the prior administration's 1.5% cut to fee for service Medicaid revenue in order to provide necessary funding and recognize growth in provider service costs.

**1% ATB Medicaid Rate Increase:** Provides for a Medicaid increase of 1% across all DOH Medicaid fee-for-service rates.

**NYSHFA|NYSCAL requests the Legislature support an additional increase be added by the Legislature to both nursing homes and assisted living providers to further assist providers recruit and retain necessary frontline caregivers.**

**Healthcare Workforce Retention Bonuses:** Provides frontline healthcare workers with a one-time bonus up to \$3,000.

**NYSHFA|NYSCAL requests the Legislature support the inclusion of assisted living and adult care frontline workers as eligible workers for this retention bonus.**

**70/40 Law Amendments:** Makes technical amendments to the definition of “revenue” in the 70/40 law to exclude the cash receipts assessment for all providers. Also amends the definition of “revenue” to exclude the capital per diem portion of the Medicaid rate for nursing homes that have a 4-Star or 5-Star CMS rating. Also allows for the Commissioner of Health, on a case-by-case basis, to exclude from the definition of “revenue” the capital per diem portion of the Medicaid rate for nursing homes that have a 3-Star CMS rating.

**Certified Medication Aides:** Authorizes Certified Nurse Aides to administer routine and prefilled medications in nursing homes (insulin, low weight molecular heparin, naloxone, and epinephrine) once trained and able to demonstrate competency. 47 other States currently authorize Certified Medication Aides in nursing homes and New York presently authorizes them in assisted living settings.

**Financially Distressed Facilities:** Includes residential healthcare facilities and adult care facilities among the providers that are eligible for Vital Access Provider Assurance Program (“VAPAP”) funds.

**Medicaid Global Cap:** Modifies the metric for year-to-year growth allowed for Medicaid spending by adopting the five-year rolling average of Medicaid spending projections, based on the CMS Office of Actuarial Services (replaces the 10-year rolling average of the medical component of the CPI index). The Executive Budget also provides for a 4.7% increase in the Global Cap for FY 2022-23.

**Statewide Facility Transformation Program IV:** Allocates \$1.6B for the purpose of transforming, redesigning and strengthening health care needs, including the following:

- Authorizes use of \$450M to finance existing Program III eligible capital projects. This includes funds for residential health care facilities.
- Invests an additional \$50M to support implementation of a Green House Nursing Home Initiative.
- Invests an additional \$150M for IT infrastructure and telehealth capabilities for providers.
- Allocates \$61M additional funding for minimum staffing requirements.

**Nurses Across New York:** Establishes the Nurses Across New York (“NANY”) loan repayment program. Specifically, the FY 2022-23 Executive Budget establishes the NANY program which would reimburse nurses working in underserved communities for loan repayment over three years. A workgroup would be appointed from associations representing nurses, hospitals, and other healthcare providers to streamline the application process.

**Interstate Medical Licensure Compact:** Authorizes New York to join the Interstate Medical and Nurse Licensure Compact to allow doctors and nurses to easily relocate and practice in their profession using their existing license to practice in New York. Joining the Compact recognizes the expanded mobility of nurses and the need for coordination and cooperation among states to ensure the health and safety of residents and the benefits to public health through the effective use of advanced communication technologies.

### **Assisted Living & Adult Care**

While the FY 2022-23 Executive Budget includes several measures to assist skilled nursing providers and the residents they serve, we respectfully request the Legislature’s support for Adult Care and Assisted Living facilities within the FY 2022-23 Executive Budget.

**Specifically, NYSHFA|NYSCAL requests the following items be included by the Legislature within the final FY 2022-23 State Budget:**



**Assisted Living Front Line Worker Bonuses:** Allowing frontline workers in Adult Care and Assisted Living Facilities who care for the aging to be eligible for the \$3,000 worker bonuses will help curtail the existing staffing shortages in these facilities and prevent vital staff from exiting these facilities to seek employment where they will be able to receive the worker bonuses.

**Cost of Living Adjustment:** Part DD, Section 1, subsection 2 of the Executive Budget authorizes a 5.4% Cost of Living Adjustment (“COLA”) for licensed entities under the Offices of Mental Health, Persons with Developmental Disabilities, Alcohol and Substance Abuse Services, Temporary and Disability Assistance and Children and Family Services. We urge you to extend this COLA to New York’s Adult Care and Assisted Living Facilities within the FY 2022-23 Executive Budget.

Adult Care and Assisted Living Facilities play a crucial, often overlooked role for the aging population in New York. Providers are struggling financially given the current reimbursement rate of less than \$45.00 per SSI resident per day to cover the cost of room and board, food, utilities, case management, increased costs associated with personnel, insurances such as liability and workers compensation and taxes. An increase in the COLA is essential to enable the Adult Care Facilities and Assisted Living to continue operations and to care for the SSI residents.

**Temporary COVID Relief Funding:** Additional funding relief for Adult Care and Assisted Living Facilities is necessary to offset the significant costs these facilities are facing for testing supplies, PPE, and other costs that are related to the pandemic. Adult Care and Assisted Living facilities have received minimal federal financial assistance to cover the financial burdens created by the pandemic and additional financial support is needed to assist providers to continue to provide care.

**Update the ALP Payment Methodology:** New York’s original Assisted Living Program (“ALP”) payment methodology was based on 50% of the skilled nursing facility (“SNF”) per diem rate. However, due to rebasing as well as annual case mix and capital adjustments for SNF’s, the ALP rate now approximates only 35% of the current average SNF Medicaid rate. We ask that the payment methodology be revised to meet the 50% threshold, as was originally enacted.

**Financial Distress Relief:** Section 4 of Part M of the Executive Budget provides for a temporary adjustment to the non-capital components of rates and allows for temporary Medicaid payments for eligible facilities in severe financial distress to enable such facilities to maintain operations and vital services. NYSHFA|NYSCAL asks that Adult Care and Assisted Living facilities experiencing financial distress be included in this section to afford them the ability to continue to care for the elderly population of New York.

### **Conclusion**

In conclusion, it is vitally important that the New York State Legislature protect and enhance access to the crucial services provided by skilled nursing and assisted living facilities for our rapidly aging population. As we continue to battle against the COVID-19 virus and its potential multitude of variants, New York must both invest in its skilled nursing and assisted living programs and implement measures to recruit and retain the State's long-term workforce to continue to serve the State's growing aging population.

As always, NYSHFA|NYSCAL will continue to work together with the Governor, the Legislature and all affected constituencies to ensure the continued delivery of high quality, cost effective long-term care services throughout New York State.

Thank you.