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**Testimony to the New York State Legislature
Joint Hearings of the Senate Finance and Assembly
Ways and Means Committees**

2022-2023 Executive Budget

Topic: Health

February 8, 2022

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Thank you for the opportunity to provide testimony on the Fiscal Year 2023 Executive Budget (“Executive Budget”). The Center for Elder Law & Justice (“CELJ”) has been serving the Western New York region for over 40 years, providing free civil legal services to older adults, persons with disabilities, and low-income families. CELJ’s primary goal is to use the legal system to assure that individuals may live independently and with dignity. CELJ also advocates for policy and systems change, particularly in the areas of elder abuse prevention, nursing home reform, consumer protection, and housing reform. Currently, CELJ provides full legal representation in ten counties of Western New York. CELJ’s Free Senior Legal Advice Helpline is open to all of New York State. CELJ operates a main office in downtown Buffalo, with two additional offices in Niagara and Chautauqua counties.

I. Improve Nursing Home Resident Care and Life by Retaining and Strengthening the Reforms implemented during the 2021 Legislative Session.

A. Reject the Executive Budget Proposed Changes to Public Health Law § 2828

The failures of the nursing home industry that gained widespread attention and outrage during the pandemic are not new. The same failures that lead to the Federal Nursing Home Reform Law of 1987: insufficient staffing, subpar quality care, abuse, neglect, and institutionalization, exist today. As part of the FY 2021-2022 budget, Public Health Law (PHL) § 2828 was enacted, and the Legislature took additional various actions to address the failures of the nursing home industry.¹ However portions of the Executive Budget directly undermine the progress made in the FY 2021-2022 budget and 2021 legislative session.

The Executive Budget, HMM Part M, proposes to exclude the capital per diem portion of reimbursement rates for nursing homes with a Centers for Medicare and Medicaid Services (CMS) 4 or 5 star rating; and would provide the Commissioner of the Department of Health (DOH) the authority to modify the definition of revenue to exclude the capital per diem portion of reimbursement rates for nursing homes that have a 3 star CMS rating, on a case-by-case basis.

Allowing for a free pass from complying with the entire PHL § 2828 based on a star rating that is easily gamed is not the course forward for improving care, life and safety. We urge the Legislature to reject those portions of HMM Part M as it will allow for nursing home operators to maintain the status quo, with no improvement to resident care and quality of life.

¹ Including the Safe Staffing (A7119(Gunther)/S6436(Rivera)-Chapter 156 of the Laws of 2021);Certificate of Need and Related Party Contracts (A5684A(Gottfried)/S54893A(Rivera)-Chapter 102 of the Laws of 2021, amended by A7517(Gottfried)/S6767(Rivera)-Chapter 141 of the laws of 2021.



As we have previously testified, and most recently in comment to the DOH,² minimum direct resident care spending requirements are a way to ensure there is accountability on how nursing homes spend taxpayer (Medicaid) funds by ensuring a large percentage of the funds received are spent on actual resident care and services; not administrative expenses, management contracts, nor excessive related party transactions. PHL § 2828 was implemented to do this. PHL § 2828 was implemented as one piece of comprehensive measures to ensure that every resident's care and quality life needs are met in accordance with State and Federal laws. In addition, PHL § 2828 already allows for nursing homes to seek waivers of compliance from the Commissioner of the DOH. The Legislature must reject the Executive Budget proposal to undermine the PHL § 2828.

In addition, it is important to understand that while the CMS Care Compare star rating ("CMS star rating") system can be beneficial for identifying the 'worst of the worst' nursing homes and comparing nursing homes, there are weaknesses to this system, and should not form the sole basis, nor a shortcut, in determining whether a nursing home must comply with PHL § 2828 (or other laws). For example, nursing homes manipulate the CMS star rating system in ways that have masked deep problems.³

Furthermore, as we have stated in prior testimony and comment, the rating system is flawed because the DOH fails in its role as the oversight entity not only in identifying violations, but also fails at uniformly identifying violations across the state.⁴ This failure skews the CMS star rating for health inspections and therefore the overall CMS star rating. Facilities can further game the CMS star rating system through the facility submitted information for the quality measure domain.⁵ Just because a nursing home has a 4 or 5 star overall rating, does not mean it is providing quality of care and life services to the residents.

² HLT-46-21-00005-P: Nursing Home Minimum Direct Resident Care Spending; <https://elderjusticenyc.org/wp-content/uploads/2022/02/CEJ-HLT-46-21-00005-P-Nursing-Home-Minimum-Direct-Resident-Care-Spending.pdf>

³The flaws in the CMS star rating system are not new, see <https://oversight.house.gov/news/press-releases/cummings-requests-briefing-on-nursing-homes-gaming-cms-rating-system> ; <https://medicareadvocacy.org/dont-be-fooled-by-the-federal-nursing-home-five-star-quality-rating-system/> ; and most recently <https://www.nytimes.com/2021/03/13/business/nursing-homes-ratings-medicare-covid.html>

⁴ For example, the weighted 3-year average for nursing homes surveyed by the Metro Area Region (New York City, Long Island, and lower Hudson Valley) is 20.3 points; but nursing homes in the rest of the state is 39.44. See also CELJ's comment on DOH proposed regulation HLT-46-21-00006-P <https://elderjusticenyc.org/wp-content/uploads/2022/02/CEJ-HLT-46-21-00006-P-Art-28-Nursing-Homes-Establishment-Notice-and-Character-and-Competence.pdf>

⁵ See *Edelman, T.*, "Nursing Home Quality Measures do not reflect Quality of Nursing Home Care", (Jul. 2, 2019), <https://medicareadvocacy.org/nursing-home-quality-measures-do-not-reflect-quality-of-nursing-home-care/> . See also *Sanghavi, P., Pan, S., Caudrey, D.*, "Assessment of Nursing Home Reporting of Major Injury Falls for Quality Measurement on Nursing Home Compare," (Dec. 29, 2019) that found of the 150,828 major injury falls in claims that occurred during nursing home residency, the MDS items used by nursing home compare only identified 57.5%. Accessed: <https://onlinelibrary.wiley.com/doi/full/10.1111/1475-6773.13247> .



For example, a 5 star rated nursing home in Niagara County was recently cited for failure to thoroughly investigate neglect and the inappropriate use of antipsychotics.⁶ The report details that a resident was upset that they are not helped out of bed, their assigned aide grabbed their arm to turn them in bed and was rough, was told by aides he wouldn't get up because they were short staffed, and the resident was afraid to report the issues because the aides would be upset..

The State must focus on is improving the quality of care and life services across every nursing home. The industry lawsuit that details over \$500 million per year diverted from resident care, and the amount of monies nursing home have received from the federal provider relief funds, should be a wake-up call for the State.⁷ We urge the legislature to reject the Executive's proposal.

B. Reject the Executive Budget Proposal to Establish Memory Care Certification.

The Governor, in the 2022 State of the State book, further proposes to improve the quality of care in nursing homes by establishing certification criteria for "memory care." CELJ opposes this proposal and urges the Legislature to do the same. Nursing homes are already mandated by federal law to meet the care needs of residents in need of "memory care."

Federal law requires nursing homes provide services to attain or maintain the highest practicable physical, mental, and psychosocial well-being of each resident in accordance with a written plan of care that is based on a comprehensive and accurate assessment. In addition, 42 CFR § 483.40(b)(3) requires that a resident "who displays or is diagnosed with dementia, receives the appropriate treatment and services to attain or maintain [their] highest practicable physical, mental, and psychosocial well-being." It is the nursing homes responsibility ensure all staff are trained for dementia management and abuse prevention (42 CFR § 483.95).

It has been the job of nursing home operators to provide memory care services to meet resident needs for decades. Nursing home residents living with dementia are already subjected to subpar quality care due to insufficient staffing and poorly trained staffing for years.⁸ Furthermore, the DOH allows for nursing homes to shirk its duties by shipping those with dementia to across the state, to other states, or to be subjected to a locked unit, when the nursing home is not properly staffed, for "behaviors".

⁶ https://profiles.health.ny.gov/nursing_home/view/150470#inspections ; Survey date 11/23/2021.

⁷ See LTCCC Alert: NY Nursing Homes Admit Excess Process and spreadsheet detailing the information, <https://nursinghome411.org/nys-provider-lawsuit/> ; See also Edelman, T., "New York Nursing Homes Suing the State Received Federal Provider Relief Funds.", (Jan. 3, 2022), accessed <https://medicareadvocacy.org/new-york-nursing-homes-suing-the-state-received-federal-provider-relief-funds/?emci=4f608dd5-2685-ec11-94f6-281878b85110&emdi=6295ff99-3d85-ec11-94f6-281878b85110&ceid=4163813>

⁸ See prior CELJ testimony and most recently comment submitted to DOH on proposed rule HLT-46-21-00007-P <https://elderjusticenyc.org/wp-content/uploads/2022/02/CELJ-HLT-46-21-00007-P-Minimum-Staffing-Requirements-for-Nursing-Homes.pdf>



Creating additional certification for “memory care” undermines current law and basic fundamentals of resident rights, and will further create a ‘tiered’ system that already exists.⁹ We urge the Legislature to reject this proposal. Instead of addressing quality of care issues through additional ‘certifications’, the State must enforce the current laws and regulations, including pursuing recovery of Medicaid funds spent on substandard care.

C. Statewide Healthcare Facility Transformation Program: Caution

The Executive Budget includes \$50M to support innovative alternatives to the current, traditional and institutional nursing home model. While we support the intent behind this funding, as many nursing homes are inherently structured as institutions and are in dire need of redesign, we are concerned that, under the Executive’s proposal, these grants will be awarded without request for proposal or competitive bid. The State must ensure any grants that are awarded do not go to operators who have a history of providing substandard, neglectful care. Operators should not be rewarded for failures.

D. Increase Personal Needs Allowance for Nursing Home Residents

We urge the Legislature to include an increase to the Personal Needs Allowance (PNA) for nursing home residents. The PNA is the monthly sum of money nursing home residents who receive institutional Medicaid may retain from their income. The PNA, currently \$50, was set back in 1981, and has never been increased or adjusted for increased in cost of living. This leaves older adults who reside in nursing homes with little funds to purchase personal items that improve their quality of life: beauty/barber services, clothing, internet, books, hobby materials and more.

Herman Friske, who lived in a nursing home in Clinton, NY, devoted years to advocating for an increase to the PNA, died in disappointment.¹⁰ The Legislature has passed many bills that address the quality of nursing home care and services at the operator and consumer information level. **Increasing the PNA to at least \$100, with annual increases for cost of living, in the budget is a straightforward way the State can directly improve the quality of life for older adults who reside in nursing homes.**

E. Invest in the NYS Long Term Care Ombudsman Program (LTCOP).

As the chief advocate for long-term care residents in both nursing homes and adult care facilities, LTCOP can play a significant role in raising the level of care provided by these facilities and ensure

⁹ Michel, L., McAndrew, M., “New York’s Top Nursing Homes Less Likely to Admit Poor”, Jul. 14, 2019 Buffalo News. https://buffalonews.com/news/local/new-yorks-top-nursing-homes-less-likely-to-admit-poor/article_114cf25e-47f8-54e9-ac52-bf0e84d5d285.html

¹⁰ Neff Roth, A., “Life Well Lived; a Quest Unfulfilled; Local Advocate for Medicaid Allowance Increase Dies at 81”, June 29, 2018. <https://www.uticaod.com/story/news/2018/06/29/life-well-lived-quest-unfulfilled/11630044007/>



each resident is treated with the dignity they deserve.¹¹ However LTCOP's severe underfunding by the State is preventing LTCOP from succeeding in its role. The Legislature recognized the importance of LTCOP to resident care and safety during the 2021 legislative session by passing legislation, all of which were signed into law, that directly involved LTCOP.¹² The intent of the legislation was to ensure all residents have access to the full array of advocacy services that help address the quality of care and quality of life issues they face daily. The Executive Budget however fails to increase state investment into the program, instead only recommending a study of the needs of LTCOP.

According to the New York State Office for the Aging (NYSOFA), there are about 1,500 facilities in the state, housing more than 160,000 residents who have a need for – and a right to – LTCOP services. The LTCOP is allocated \$1.190 million in state resources to cover these facilities. That is far less than most states; for example, New York's state spending of \$7 per resident is less than a third California's \$22.

The result of this underfunding is LTCOP is reliant on volunteer ombudsmen to try to carry out its mission. This is not feasible for a variety of reasons. Another study is not needed. **What is needed is a \$20 million investment into LTCOP for the program to hire paid staff ombudsmen.** It is time the program moves away from a volunteer-based model to one that is professionally staffed and supplemented by volunteers.

II. Address Quality Conditions in Adult Care Facilities.

A. Support: Enhancing the Quality of Adult Living (EQUAL) Program.

We support the inclusion of the EQUAL program in the FY 2023 Budget. The EQUAL program is a way to improve the quality of life for Adult Care Facility (ACF) residents who are in the greatest need as directed by those residents. Specifically, the EQUAL program is a grant that is available to ACFs who provide housing and services to residents receiving Supplemental Security Income (SSI). Residents in these ACFs, do not have access to the same quality services, food, activities,

¹¹ For example, see: The Impact of Long-Term Care Ombudsman Presence on Nursing Home Survey Deficiencies Berish, Diane E. et al. Journal of the American Medical Directors Association, Volume 20, Issue 10, 1325 - 1330

¹² S.4893 Rivera/ A. 5684 Gottfried (Chapter Law 102 of the Laws of 2021); S.3058 Rivera/ A.3919 Hevesi (Chapter 80 of the Laws of 2021); S.4377 May/ A. 622 Wallace (Chapter 705 of the Laws of 2021) amended by S. 7886/ A. 8839; S.4377 May/ A. 622 Wallace (Chapter 705 of the Laws of 2021) amended by S. 7886/ A. 8839; . 612-B May/ A. 5436-B Clark (Chapter 759 of the Laws of 2021); S.2507-C Budget Bill/A. 3007-C Budget Bill Health article VII (Chapter 57 of the Laws of 2021) Budget article VII provision requires DOH to send LTCOP a notice whenever DOH is going to exclude revenues when calculating the minimum amount spent on staffing. LTCOP is envisioned as evaluating this information and provide comment on the request.



and environment, when compared to primarily private pay ACFs. The EQUAL program helps residents live with dignity and right to quality life. Under this program, it is the residents who decide what the funding should be used for including, but not limited to: air conditioning in resident rooms, furniture, televisions, computers, transportation for resident services, and other activities/equipment the residents determine as through the resident council.

B. Support: A198A(Gottfried)/S1576A(Rivera)

We urge the Legislature to pass A198A/S1576A, relates to violations of safety conditions in adult care facilities. Approximately 50,000 older adults and persons with disabilities live in ACFs and these numbers are expected to grow. Like with nursing homes, older adults and persons with disabilities deserve to live in home-like settings and to age with independence and dignity. While many of the States 500+ ACFs respect residents' rights and foster safety, others have been allowed to consistently fall short. This bill will address those ACFs who constantly fail by:

- Mandating increased fines when: the violation results in a resident's physical injury; financial abuse (such as preventing a resident from accessing their PNA); a facility operator, administrator, or other manager purposely violates a resident's rights; and if a previously cited violation is repeated within a 12-month period.
- Affording consumer protections for residents by: requiring DOH's do not refer list be sent to hospitals and nursing homes; requires facilities make DOH complaint investigation reports more accessible; and requires ACFs to post their admissions agreement on their website.

III. Implement Policy that Eliminates Institutionalization Bias and Support Home & Community Based Services.

A. Include Fair Pay for Home Care in FY 2023 Budget

Contrary to what State Budget Director Mujica believes; the minimum wage does not "take care" of home care workforce. The bonuses set forth in the Executive Budget are nice, but they do nothing to address the workforce shortage issue. In addition, with the expansions to Medicaid are important, such expansions will not be effective for those who need long term services and supports without a workforce.

It is no secret there is a shortage of home care workers and that this is one of the main reasons older adults and persons with disabilities are institutionalized. Low wages is one of the reasons for the shortage. Including the Fair Pay for Home Care Act in the FY 2023 Budget addresses this issue by ensuring home care workers are paid 150% of the regional minimum wage.¹³ Caregiving

¹³ A6329A(Gottfried)/S5374A(May)



is strenuous work, both physically and mentally. Homecare workers deserve to be paid a living wage, and the Fair Pay for Home Care Act will accomplish this. This investment is needed for our community's older adults and persons with disabilities who are being unconstitutionally institutionalized and subjected to neglectful conditions in nursing homes. In order to effectuate comprehensive long-term care reform, the State must realign the system such that nursing homes are the last option and not the first. The first step to doing this, is ensuring there is a home care workforce.¹⁴

B. Support: Expanded Medicaid Eligibility (HMH Part N)

CELJ supports HMH Part N that expands Medicaid eligibility by increasing the income limit to 138% FPL and eliminating the resource test. This needed expansion ensures low income older adults and persons with disabilities are able to maintain Medicaid eligibility after they become eligible for Medicare and eliminates the inequity in eligibility due to age and disability. Currently a "Medicaid cliff" is created because at the cliff, the Medicaid income limit drops to 84% FPL and individuals are subject to an asset test. For individuals in the cliff who need long term services and supports to live in the community, they lose these services because Medicare does not pay for them.¹⁵

C. Increase Income Eligibility for Medicare Savings Program: Support S8228(May)

Medicare Savings Programs (MSP) provide crucial financial support for low-income older adults and persons with disabilities by helping defray the costs of Medicare premiums, coinsurance, and prescriptions. As detailed in advocates letter to the Governor, dated August 24, 2021, raising the income limits to the MSP would enable low-income individuals to use their Medicare benefits without accruing debt and advances equity.¹⁶

We support S8228(May), an act to amend the social services law, in relation to expanding eligibility for the Medicare savings program. This bill expands eligibility for all three benefits and aligns will help older adults and persons with disabilities afford needed health care.

¹⁴ See Sterling et al. "Utilization, Contributions, and Perceptions of Paid Home Care Workers among Households in New York State." Accessed <https://academic.oup.com/innovateage/advance-article/doi/10.1093/qeroni/igac001/6499014?login=false>, See also: Jacobal-Carolus, Luce, Stephane, Milkman, Ruth. "The Case for Public Investment in Higher Pay for New York State Home Care Workers-Estimated Costs and Savings-Executive Summary., Accessed <https://static1.squarespace.com/static/58fa6c032e69cfe88ec0e99f/t/6022ae8312cfd1015354dbee/1612885635936/Executive+Summary+CUNY+REPORT.pdf>

¹⁵ See <https://medicaidmattersny.org/advocates-urge-governor-to-include-eligibility-equity-in-the-executive-budget/> for additional information and examples as to why this expansion is needed.

¹⁶ <https://medicaidmattersny.org/wp-content/uploads/2021/08/non-MAGI-advocates-ltr-to-Hochul-8.24.21-final-w-attachments.pdf>



D. Repeal the Harmful Changes to the Medicaid program implemented under prior Budgets.

The FY 2020-2021 Budget (FY 20-21 Budget), amended NYS Soc. Serv. Law and set new minimum requirements for eligibility for personal care services (PCS) and consumer directed personal assistance program (CDPAP) services for eligibility to enroll in a Medicaid Managed Long Term Care (MLTC) plan. Under the FY 20-21 Budget enactments, applicants have to require assistance with physical maneuvering for 3 (“more than two”), Activities of Daily Living (“ADLs”), except for applicants with dementia or Alzheimer’s. For people with dementia or Alzheimer’s, only supervision with more than one ADL is needed.

These amendments create irrational and discriminatory distinctions between Medicaid consumers with different types of disabilities. These irrational and discriminatory distinctions are arbitrary and violate federal regulation.¹⁷ Furthermore, these amendments will force older adults and people with disabilities inappropriately into nursing homes. This outright violates the Americans with Disabilities Act and the Olmstead Integration Mandate. We support A5637(Gottfried)/S5028(Rivera) and urge the Legislature to repeal these harmful changes.

In addition, the FY 20-21 budget implemented Medicaid cuts of access to home care services through a 30-month lookback. We urge the legislature to repeal this lookback as it will make no sense, as under HMM Part N, the asset test will be eliminated.

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We again thank you for the opportunity to submit this testimony and are available to answer any questions and provide additional information.

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¹⁷ 42 C.F.R. §440.230(c): The Medicaid agency may not arbitrarily deny or reduce the amount, duration, or scope of a required service under §§440.210 and 440.220 to an otherwise eligible beneficiary solely because of the diagnosis, type of illness, or condition.