

Elder Justice Committee of Metro Justice

MaryDel Wypych, Chairperson

TESTIMONY

**Joint Fiscal Committees
Budget Meeting on Health
February 8, 2022**

**State Budget Items Impacting
Nursing Home Residents
State Fiscal Year (SFY) 2022-2023**

**Executive Budget Proposed by Governor Kathy Hochul
January 18, 2022**

Thank you for the opportunity to testify. My name is MaryDel Wypych, chairperson of Elder Justice Committee of Metro Justice, a volunteer advocacy organization which began in Rochester, New York. For many years our members have advocated for seniors, particularly those residing in nursing homes and related facilities. The positions of Elder Justice Committee are informed by stakeholders including residents and family members, experts and other advocates in the areas of health, safety and care of nursing home residents.

1. IMPLEMENTING NEW AND AMENDED NURSING HOME REFORM LAWS

COVID-19 not only caused the deaths of over 15,000 NYS residents of nursing homes, but also shed a light on the long-time neglect and inaction by both the NYS and Federal Governments to nursing homes, which contributed to the fatalities.

We are grateful and compliment the legislature for implementing at least thirteen new bills which were passed into law in 2021 addressing:

- Minimum direct care staffing levels in nursing Homes
- NYSDOH oversight and regulation of nursing homes
- Curbing the for-profit entities putting profit above resident health, safety and quality of care through requiring a minimum of 70% of revenue be used for care of residents
- Transparency and accountability of nursing home owners and operators
- Infection control and clinical care in nursing homes
- Application of new and expanded health care facilities including nursing homes

The new and amended laws charge the NYS Department of Health (NYSDOH) to:

- Collect and analyze reports from nursing homes regarding minimum direct care staffing levels such as payroll-based journal
- Audit facility reports for compliance using 70% of revenue on direct care, maintenance and improvements to physical plants and resident facing staffing
- Establish penalties and collect payments from nursing homes found not in compliance with PH Laws, 2805-T, 2895-b, 2805-e
- Review changes in contractual agreements regarding sale or financing of nursing homes;
- Assess applications of new or planned expansions of health care facilities
- Assure nursing homes provide residents and families with the CMS Star ratings of the nursing home and a list of violations, complaints, enforcement actions, and penalties against the nursing home, including where the information may be accessed
- Provide nursing home information collected as per the laws accessible to the public on the DOH website

Elder Justice Committee of Metro Justice asks the NYS Legislature to take action to implement the new and amended laws necessary for adequate health, safety and care of nursing home residents. The implementation and enforcement of the laws requires adequate levels and training of NYSDOH staff and proper infrastructure to achieve these ends.

2. NYSDOH OVERSIGHT AND REGULATION of NURSING HOMES

The health and safety of residents is the responsibility of the NYSDOH. The NYSDOH is charged with assuring that nursing homes adhere to federal and state regulations through review and in-person assessments of nursing homes policies and practices. Its survey teams conduct in-person inspections roughly once a year and the inspections are summarized into CMS Star Ratings. Infractions of federal and state regulations are reported and deficiencies are rated.

By law, every nursing home receiving Medicare or Medicaid payment must undergo a standard survey during which teams of state surveyors conduct a comprehensive on-site evaluation of compliance with federal quality standards. These surveys must occur at least once every 15 months, with a statewide average interval for surveys not to exceed 12 months. CMS categorizes deficiencies into one of three scope categories based on whether the incident was: (1) an isolated occurrence; (2) a part of a pattern of behavior; or (3) a widespread behavior. CMS categorizes deficiencies into one of four severity categories based on whether the deficiency constitutes: (1) no actual harm with a potential for minimal harm; (2) no actual harm with a potential for more than minimal harm, but not immediate jeopardy; (3) actual harm that is not immediate jeopardy; or (4) immediate jeopardy to resident health or safety. CMS guidance does not require enforcement actions be imposed for all deficiencies. Enforcement actions include, but are not limited to, directed in-service training, fines known as civil money penalties, denial of payment, and termination from the Medicare and Medicaid programs. (Government Accounting Office, May 20, 2021)

NYSDOH inspectors have been found to be reluctant to report infractions as “Harm to Resident,” even when the observation by the inspectors shows egregious actions or descriptions of health, safety and environmental problems. (Nursing homes are rarely fined for violations and even when fines are levied, they are small and meaningless to operator).

This history of deficiencies with no accountability caused NYS nursing homes to not be ready the COVID-19 pandemic. Even with government guidance and financial assistance, many nursing homes continued to have inadequate infection control policies and procedures contributing to the deaths of 15,000 residents. The Attorney General’s report of January 28, 2021 found that many facilities were not prepared to handle the COVID-19 pandemic as they did not have adequate infection control protocols and procedures. The report recommended that operators of facilities are held accountable for infection control protocols, training and compliance and that the NYSDOH needs to improve oversight through surveys, inspections and complaint assessment.

To improve oversight and regulation of nursing homes, the NYSDOH should:

- Perform frequent and unannounced nursing home inspections as they are currently required by CMS to do with several “Special Focus Facilities.”
[fyi: <https://www.cms.gov/Medicare/Provider-Enrollment-and-Certification/CertificationandCompliance/Downloads/SFFList.pdf>]
- Respond to complaints regarding nursing homes in a timely and effectual manner
- Enforce regulations strictly by utilizing meaningful fines for serious infractions, both during and after the pandemic
- Put into receivership or have licenses to operate revoked nursing homes that continually fail to deliver sufficient resident safety and quality of life.
- Make available on the NYSDOH website nursing home inspections, including violations and fines incurred.

Elder Justice Committee of Metro Justice asks the NYS Legislature to take action to closely monitor and greatly strengthen the NYSDOH's oversight and regulation of nursing homes by allocating sufficient funds to the NYSDOH to quickly hire the required additional staff and systems necessary to meet these ends.

3. ELDER NEGLECT, ABUSE AND EXPLOITATION OF NURSING HOME RESIDENTS

Neglect, abuse, theft and exploitation of residents of facilities is a serious issue. NYS Public Health Law Section 2803-d states that all facility employees and contractors are mandated to report to the NYSDOH suspected instances of physical abuse, mistreatment, neglect or the misappropriation of property of residents of the facility to the NYSDOH immediately by telephone and in writing (within 48 hours) to the department's website. The NYSDOH is charged with investigating the allegation, making a written determination based on the findings, and notifying the appropriate law enforcement agency if the allegation may constitute a crime. The NYSDOH is to report incidents to the Legislature.

Elder Justice Committee of Metro Justice asks the NYS Legislature to monitor the implementation of this fairly new law (signed 12-16-2019) and to assure that the NYSDOH is afforded sufficient funds for staff and systems to take reports, promptly investigate, make reports on incidents to the legislature annually and perform appropriate oversight of facilities' compliance.

Thank you for the opportunity to submit testimony.

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