



Testimony of:

**NEW YORK STATE  
HEALTH FACILITIES ASSOCIATION**

and the

**NEW YORK STATE  
CENTER FOR ASSISTED LIVING**

on the

**FY 2023-24 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.

New York State has failed its skilled nursing and assisted living providers for too long. For over 15 years, New York has cut Medicaid funding to nursing homes and failed to adequately fund assisted living program providers. In fact, in the middle of the COVID-19 pandemic, while almost every other state was allocating additional funds to long term care providers, New York was the only state in the Nation to turn its back on our most vulnerable residents and cut Medicaid to nursing homes.

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

Over the last 15 years, New York has cut nearly \$2 billion in essential funding to long-term care providers.<sup>1</sup>

Moreover, New York’s 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 eight 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 unfortunately leads the Nation with the largest shortfall between the amount

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

Medicaid reimburses providers and the actual cost of providing resident care in the nursing home. This shortfall is approximately \$55 per day.<sup>2</sup>

The current statewide average Medicaid reimbursement rate (to cover operating and capital costs) is \$255<sup>3</sup> resulting in a Medicaid reimbursement rate of \$10.63 per hour for 24-hour skilled nursing care.

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. Currently, New York has the fourth largest population of older adults in the United States. For more than a decade, New York's senior citizen population has grown 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.

As noted above, 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.

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

Coupled with the State's failure to adequately fund Medicaid for skilled nursing care, two laws enacted by the prior administration have profound 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.

### **3.5 Staffing Mandate Law**

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<sup>2</sup> 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/)

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. 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.

In fact, at the present time, 75% of New York's nursing homes do not meet these requirements and the Department of Health estimated the requirement to cost nursing homes between \$1.9 to \$2.3 billion per year.<sup>4</sup>

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." This Executive Order is still in effect to this day. Since the issuance of this Executive Order in 2021, the situation has only gotten worse, particularly for nursing homes, which were already under financial duress because of the Medicaid global cap and the decision by the previous administration in 2008 to eliminate a "trend factor" for inflation for nursing homes' Medicaid rates.

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. 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 majority of providers are unable to comply with the 3.5-hour staffing mandate. Section 2895-b sets these facilities up for failure. This mandate does not alleviate the crisis identified by the Governor's Executive Order; it only makes it worse.

## **70/40 Law**

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<sup>4</sup> New York State Department of Health. (2020, August). *Study of Nurse Caregiver Minimum Staffing Levels and Other Staffing Enhancement Strategies and Patient Quality Improvement Initiatives.*

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 concerns with this law. Among other things, 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 is obviously counterproductive, as it has the effect of financially penalizing facilities that are struggling mightily to get staff in the first place.

This law was enacted without any input from long-term care providers and compounds the financial stress that New York's nursing homes are already under as a result of the State's underfunding of Medicaid.

### **FY 2023-24 Executive Budget**

**Given the foregoing, NYSHFA|NYSCAL respectfully requests the Legislature support a 20% Medicaid increase for nursing homes to carry out the State's commitment to high quality care.**

In the FY 2023-24 Executive Budget, Governor Hochul has presented a spending plan that seeks to address some of the prior administration's disinvestment in skilled nursing and assisted living by increasing the Medicaid rate by 5% for skilled nursing and assisted living providers.

While NYSHFA|NYSCAL is grateful for this proposed increase, it is insufficient to adequately address the Medicaid reimbursement crisis skilled nursing providers are facing as a consequence of the State's history of Medicaid disinvestment.

In order to make up for the true cost of the State's disinvestment in nursing homes over the past 15 years, it would require a Medicaid increase of over 40 percent. NYSHFA|NYSCAL recognizes the Legislature is unlikely to provide such an increase in one fiscal year. As such, **it is time to carry out the State's commitment to high quality nursing home care by providing a 20 percent nursing home Medicaid increase in the FY 2023-24 State Budget.**

Additionally, although some funding was appropriated in the FY 2021-22 and FY 2022-23 state budgets to assist with the 3.5 staffing and 70/40 spending mandates, these funds have yet to be distributed to assist nursing homes with the costs of these mandates. If and when these funds are ultimately distributed, they must be allocated by the State to skilled nursing providers for past expenses related to these mandates and not used to offset any Medicaid increase in the FY 2023-24 State Budget.

## **Other FY 2023-24 Executive Budget Proposals Impacting Nursing Homes**

### Certified Medication Aides

NYSHFA|NYSCAL supports the Governor's proposal to establish a temporary pilot program to authorize certified nurse aides to administer routine and prefilled medications in nursing homes once trained and able to demonstrate competency. Forty-seven other states currently authorize Certified Medication Aides in nursing homes and New York presently authorizes them in assisted living settings.

### Interstate Medical Licensure Compact

NYSHFA|NYSCAL supports the Governor's proposal to join the Interstate Medical and Nurse Licensure Compact to allow nurses to 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.

### Statewide Health Care Facility Capital Funding

NYSHFA|NYSCAL supports the Governor's proposal to provide \$1 billion in capital funding for the creation of a new Statewide Health Care Facility Transformation Program ("Statewide V") for nursing homes and adult care facilities for capital projects that, among other things, increase access to care, improve quality of care, ensure financial stability of health care providers or invest in technological or telehealth projects.

### Assisted Living Reporting Requirements

The FY 2023-24 Executive Budget includes a proposal to require ALRs, SNALRs and EALRs to self-report on quality measures annually based on quality indicators developed by the Department of Health. This proposal would also require providers to post service rates, staffing, residency agreements and summaries of fees on their websites.

While it is important to provide consumers with information to make informed choices, this proposal takes a one size fits all approach that fails to consider the unique diversity of these facilities that provide a variety of different services that affect rates and fees and could lead to more confusion for consumers, rather than provide clarity. As such, NYSHFA|NYSCAL requests a time period of two years for the implementation of any reporting requirement proposal in order to afford all stakeholders the opportunity to work collaboratively with DOH to develop meaningful quality measures and reporting parameters.

### **Conclusion**

It is vitally important that the New York State Legislature protect and enhance access to the crucial long-term care services provided by skilled nursing and assisted living facilities for our State's rapidly aging population.

As we continue to battle against the COVID-19 virus and its variants, New York must invest in its skilled nursing and assisted living providers to fulfill its commitment to serve the State's most vulnerable populations.

**The time is now for New York State to carry out its commitment to high quality nursing home care by providing a 20 percent nursing home Medicaid rate increase in the FY 2023-24 State Budget.**

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.