

September 25, 2022

Katherine Ceroalo  
New York State Department of Health  
Bureau of Program Counsel, Regulatory Affairs Unit  
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Sent via email: [regsgna@health.ny.gov](mailto:regsgna@health.ny.gov)

Re: Minimum Staffing Requirements for Nursing Homes  
I.D. No. HLT-46-21-00007-P

Dear Ms. Ceroalo:

We the undersigned organizations, submit these comments on the second round of proposed rulemaking implementing the minimum nurse staffing standards set forth under NYS Public Health Law section 2895-b (L 2021, c.156, eff June 18, 2021).

Nursing homes have a fundamental obligation to New York residents, families, and taxpayers to maintain the staffing and supplies necessary to meet the needs of their residents in an appropriate and humane manner 24-hours per day, seven days a week. For this reason, federal Requirements of Participation for nursing homes prohibit them from accepting new residents if they are facing staffing shortages. Despite this, residents of nursing homes in New York State have long dealt with insufficient staffing resulting in inadequate care, neglect, poor infection prevention practices, and a lack of human dignity. The COVID-19 pandemic did not cause these problems; rather, it unmasked them to the public. Yet, as we saw, catastrophically, during the COVID-19 pandemic, too many facilities fail to maintain the staff necessary to meet the needs of their current residents, and have even accepted new admissions when they are unable meet the needs of their current residents. Without adequate penalties, these heartbreaking tragedies will repeat themselves unnecessarily.

As stated under the regulatory impact statement, the legislative objective of PHL section 2895-b is to ensure safe and appropriate levels of nurse staffing in nursing homes in order to improve the care for residents of nursing homes. However, as detailed below, we are deeply concerned that the Department's proposed regulation's determination of compliance and penalties will not accomplish the critical legislative objective.

**I. Compliance must be based on whether a nursing home is meeting the standards daily.**

We strongly oppose the Department's proposal to base compliance on the quarterly average of reported staffing data. This proposal flouts the plain language of the law and legislative intent to ensure resident care needs are met on a daily basis. The law explicitly states:

Compliance shall be determined quarterly by comparing the daily average of the number of hours provided per resident per day, using the federal Centers for Medicare and Medicaid Services payroll based journal and the facility's average daily census **on a daily basis**. [Emphasis added.]

However, the Department continues to maintain and propose that compliance be based on averages over the course of the quarter through three assessments:

(a) whether the total daily staffing fell below 3.5 hours of care on average over the course of the quarter; (b) whether at least 2.2 hours of care per resident per day was provided by a certified nurse aid or nurse aide on average over the course of the quarter; and (c) whether at least 1.1 hours of care per resident per day was provided by a RN or LPN on average over the course of the quarter.

413.13(f)(1)(i). The intent and language of the law is clear: the Department, on a quarterly basis, must assess whether a nursing home is complying with the minimum standards daily.<sup>1</sup> The law does not afford nor direct the Department to determine compliance based on the “average over the course of the quarter.”

Persons who reside in nursing homes, whether there for short-term rehabilitation or long-term care, have daily care needs. A facility that meets the minimum statutory standards averaged over the course of the quarter can still be in violation of the minimum statutory standards for providing sufficient staffing to meet the resident's care needs *every day*. This is the reality for far too many nursing homes in New York State. LTCCC's analysis of payroll-based journal data for Q1 2022 indicates that 59.1% (139 of 235) of New York's nursing homes that met the *quarterly* minimum staffing standards (3.50 hprd) failed to meet that same standard on weekends. (Note: Overall for the quarter, 60.8% of New York's 600 nursing homes reporting staffing data failed to meet the 3.50 hprd minimum staffing standard).

## **II. Penalties must be sufficient to compel compliance.**

We strongly oppose the Department's proposal to eliminate minimum penalties for a nursing home's noncompliance with the law. (415.13(f)(2)(i)). The previous proposed language of this section allowed for the Department to reduce penalties to an amount no lower than three hundred (300) dollars per day in a quarter that a facility is non-compliant.

**We oppose the removal of the \$300 minimum penalty.** Without this language, there is nothing stopping the Department from issuing no penalty at all to one that is substandard, for example

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<sup>1</sup> For example, New York State Senator Gustavo Rivera, bill sponsor, through pre-vote dialogue, clearly states the law's intent is for nursing homes to meet the minimum nurse staffing levels: “[w]e have a situation in which an individual...who requires care...has 3.5 hours of where actual people that are professional...actually take care of individuals. We believe that this is necessary, it's important.” Transcript of New York State Senate, 2021 Proposed A71119 Establishes Standard Nursing Home Staffing Levels, at 3116 [May 4, 2021]. Accessed at [https://legislation.nysenate.gov/static/docs/html/transcripts\\_floor.html](https://legislation.nysenate.gov/static/docs/html/transcripts_floor.html).

\$5 per day. The purpose of a penalty is to deter facilities from being noncompliant. There must be a guaranteed penalty and not one that is subject to fluctuation.

Residents should not be subject to the operator's willingness (or not) to voluntarily secure the staff needed to meet their care needs. It is the state's obligation, under both state law and federal rules, to ensure program integrity, i.e., the provision of appropriate staffing and services every day.

In this second round of rulemaking, the Department proposes to reduce mitigating efforts facilities in areas experiencing an acute labor supply shortage must make to qualify for a waiver. Specifically, these understaffed facilities would no longer be required to close units (and thereby reduce the footprint staff need to cover to care for the same number of residents). (415.13)(f)(2)(ii)(b)(3). **We oppose this change.** Facilities should be required to maximize the effectiveness of their inadequate staff before getting a free pass or transferring residents out of their home to other facilities. Transferring residents can cause transfer trauma also known as relocation stress syndrome, which can lead to a decline in physical and emotional well-being that can lead to significant health complications and even premature death. Transfer trauma can also trigger depression, psychological distress, and a withdrawal from social activities. It does not make sense to allow a nursing home to force residents out of their home, subjecting them to further harm, without first requiring the facility to take other actions such as consolidating units, which might enable residents to remain in the same facility.

Thank you for the opportunity to submit these comments. As always, we would welcome the opportunity to participate in a meeting to express and address the quality of care and life of persons who reside in nursing homes in a productive manner.



Lindsay Heckler  
Center for Elder Law and Justice



Richard Mollot  
Long Term Care Community Coalition



Tanya Kessler  
Mobilization for Justice

On behalf of:  
AARP New York  
Alliance of New York Family Councils

*(List Continues on Next Page)*

Coalition of Institutionalized Aging and Disabled  
Center for Independence of the Disabled, NY  
Empire Justice Center  
Gray Panthers NYC  
Housing Works  
The Law Firm of D.F. Truhowsky  
Massena Independent Living Center, Inc.  
National Consumer Voice for Quality Long-Term Care  
New York Lawyers for the Public Interest  
New York Legal Assistance Group  
The New York State Veterans Home at Montrose Family Council  
Riverside Family Council  
Westchester Disabled on the Move inc.