

MEMORANDUM

A.10427 Rules (Kim) / S.8497 (Biaggi)

An act to repeal article 30-d of the public health law relating to the emergency or disaster treatment protection act

LeadingAge New York strongly opposes A.10427/S.8497, which would repeal the Emergency or Disaster Treatment Protection Act [Public Health Law Article 30-D, the “Act”]. This critically important legislation provides health care providers and professionals with reasonable immunity from liability during the COVID-19 pandemic emergency. The Act promotes public health, safety and welfare by removing the fear of reprisal for health care facilities, agencies and individual caregivers who are treating high-risk individuals while trying to contain the spread of a deadly virus.

The Act provides coverage to a range of health care facilities including hospitals, nursing homes, clinics, mental health facilities and volunteer organizations, as well as various health care professionals and workers including physicians, extenders, nurses, nurse aides, home health aides, emergency responders and facility administrators and managers. However, the legislative bill memo refers only to nursing homes and claims, without providing any evidence, that, “...it is now apparent that negligence by administrators and executives of nursing homes has occurred at an extraordinary degree.”

The legislative bill memo goes on to state that, “Repealing this article is a much-needed step to holding health care administrators accountable and doing everything possible to stop even more preventable deaths from happening.” However, this legislation would repeal the Act entirely, meaning that all health care facilities and caregivers would be subject to civil and criminal liability for the care they have provided during the pandemic, even if they acted in good faith in spite of circumstances beyond their control such as systemic shortages of personal protective equipment (PPE) and employee/patient testing, staffing disruptions due to quarantining COVID-positive or suspected workers, and constantly changing and often conflicting directives from the state and federal governments. Without this important liability protection, there could have been more preventable deaths from the pandemic due to fear of reprisal for all the decisions and activities associated with treating COVID patients.

The Act does not provide an open-ended license to furnish substandard care. Rather, it covers acts, omissions and decisions related to pandemic response, and only if the health care facility or health care professional is arranging for or providing services in good faith. The immunity provided by the Act does not cover harm resulting from willful or intentional criminal misconduct, gross negligence, reckless misconduct, or intentional harm by the health care facility or health care professional.

Nursing homes and other senior care facilities serve individuals who are particularly susceptible to serious cases of COVID-19. Nearly 9 in 10 residents are over age 65, which the Centers for Disease Control and Prevention (CDC) has identified as a significant risk factor. Many nursing home residents in New York have underlying health conditions that the CDC has identified as making the COVID-19 virus especially dangerous including pulmonary disease (24%); diabetes (35%); heart failure (20%) and hypertension (77%). Outbreaks have occurred even in facilities with excellent infection control procedures and aggressive screening processes, due to the reality of asymptomatic transmission. LeadingAge NY's mission-driven not-for-profit and public providers have not shied away from the hardest cases – indeed, they proudly deliver care to the most vulnerable, much as they have done for generations – they view it as their responsibility to care for individuals living with COVID and to provide them critical support in their time of need. To deny protection for these organizations and their heroic front-line workers during such an unprecedented and extraordinary time would be incredibly unfair and shortsighted.

Nursing homes are already being subjected to considerable government oversight during the pandemic. The Centers for Medicare and Medicaid Services and Department of Health (DOH) are conducting infection control focused surveys throughout the state. These facilities are required to report as often as daily on resident and staff positive cases and deaths, availability of PPE and testing supplies; to test all workers for COVID-19 twice a week; to comply with a litany of changing federal and state requirements on visitation, cohorting residents and infection control procedures; and to certify their compliance with various Executive Orders and DOH directives.

At the same time, our not-for-profit and public member nursing homes and other senior care providers such as adult care facilities must battle daily with shortages of PPE, staffing challenges and expensive and difficult to arrange testing. And yet they have received no state financial support for the major, unbudgeted expenses or revenue declines that have occurred as a result of the pandemic and that are an existential threat to their very survival. In this context, repealing the Emergency or Disaster Treatment Protection Act would make health care facilities and caregivers legally liable for factors outside of their control even when they have acted in good faith. This would denigrate the heroic efforts of individual caregivers and facilities and hasten the financial decline of many of the state's not-for-profit and public providers of long term care services.

For these reasons, LeadingAge New York strongly opposes A.10427/S.8497 and urges that it be rejected.

LeadingAge New York represents over 400 not-for-profit and public long term care providers, including nursing homes, adult care and assisted living facilities, senior housing, adult day care programs, certified home health agencies, and managed long term care plans.

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