

MEMORANDUM

A.6966 (Bronson)/S.6203(May)

An act to amend the public health law and the social services law, in relation to personal caregiving visitors for residents of nursing homes; and to amend a chapter of the laws of 2021 amending the public health law and the social services law relating to personal and compassionate caregiving visitors for residents of nursing homes

This bill amends provisions of law enacted through Chapter 89 of 2021. LeadingAge New York's members share the concerns the underlying legislation seeks to address. Residents of adult care facilities (ACFs) and nursing homes have struggled mightily over the past year with restrictions on visitation and the loneliness and isolation that COVID has caused. We have consistently urged the Department of Health (DOH) to strike an appropriate balance between infection control and quality of life in its COVID-related directives. We are hopeful that with widespread vaccination of nursing home and ACF residents, restrictions imposed by DOH on visitation and social activities in nursing homes and ACFs will loosen.

We are concerned, however, with the bill's provision for the adoption of regulations on an emergency basis without the opportunity for public input and comment. During the public health emergency, the Department of Health has not consulted with stakeholders in developing emergency regulations. As a result, when emergency regulations are promulgated, there is no opportunity for the Department of Health to identify regulatory provisions that might be unclear and misinterpreted, nor to learn about the operational implications of its regulations, and no opportunity for the field to learn more about the Department's thinking behind the regulatory provisions through its response to public comments. Further, during the COVID-19 public health emergency, when state requirements have been unclear or inconsistent with federal directives, the state has been unable to provide direction to providers regarding how to comply with both sets of guidance. While this and so many matters related to this public health emergency are pressing, there needs to be a mechanism for ACFs, nursing homes, and other stakeholders to bring operational questions and concerns to the table and have them addressed.

Additionally, as we noted in connection with the original legislation, neither these chapter amendments nor the original legislation fully recognize the significant role of the federal government in regulating nursing homes, and both create a very real likelihood that nursing homes will be required to comply with inconsistent requirements. Moreover, the use of the emergency rulemaking power to adopt regulations under this legislation heightens the likelihood that inconsistent and unclear regulations will be adopted.

During the COVID-19 public health emergency, nursing homes have repeatedly been placed in the untenable position of reconciling often inconsistent directives emanating from federal, state and local health authorities. Specifically, the most recent visitation guidance issued by the federal Centers for Medicare and Medicaid Services

(CMS) does *not* provide a broad exemption of personal caregiving visitors from COVID-19 visitation restrictions. It states:

We understand that some states or facilities have designated categories of visitors, such as “essential caregivers,” based on their visit history or resident designation. CMS does not distinguish between these types of visitors and other visitors. Using a person-centered approach when applying this guidance should cover all types of visitors, including those who have been categorized as “essential caregivers.”

[CMS, QSO 20-29-NH, Mar. 10, 2021](#). Thus, while the federal guidance recognizes compassionate care visitors and allows them to visit loved ones during times of crisis, it does not recognize personal caregiving visitors outside of the compassionate care context. The federal guidance further requires the suspension of all indoor visitation, except compassionate care visitation, under certain circumstances, including when there is an outbreak of COVID-19 in the facility. This federal guidance is not codified in regulation. Like much of the COVID-19 guidance, it is issued via memorandum.

The bill, however, provides that “personal caregiving visitors may visit residents of nursing homes, in compliance with federal law and regulations” and that “[n]ursing homes *shall* admit any personal caregiving visitor who is in compliance with applicable requirements under this section” (emphasis added). Under these provisions, a nursing home may be prohibited by federal guidance from allowing visitation by the personal caregiving visitor who is not providing compassionate care. At the same time, it would be required by state law to admit that personal caregiving visitor. Moreover, since the federal guidance is not codified in “law or regulation,” it appears that the bill would not require the state to follow the federal guidance. As a result, the nursing home could be subject to an enforcement no matter what action it takes – i.e., by the federal government for violating its directive to bar the personal caregiving visitor or by the state for violating its directive to admit the visitor. Steep fines, reductions in 5-Star quality ratings, and associated financial impacts would follow.

For these reasons, LeadingAge New York requests that this bill be amended to clarify these issues, to clearly require state regulations to align with federal guidance, law and regulations and to require the promulgation of regulations through standard adoption procedures under the State Administrative Procedure Act with notice and public comment.

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