

MEMORANDUM

A.6034-A (Paulin)

AN ACT to amend the public health law, in relation to expanding the scope of the temporary operator program

LeadingAge New York opposes this legislation, which would allow the Commissioner of Health to appoint a temporary operator if a nursing facility experiences serious financial instability or conditions that seriously endanger the life, health or safety of residents or patients. The legislation would duplicate and likely conflict with existing authorities for temporary operation of nursing facilities and could create a significant disincentive for facilities to seek access to state financial assistance programs to address the effects of inadequate Medicaid rates and rapidly rising costs.

The existing Public Health Law § 2806-a was enacted in 2013 to allow the Commissioner to establish an operator of an adult care facility, a general hospital or diagnostic and treatment center on a temporary basis in the event of severe management failures that endanger the life, health or safety of residents or patients. At the time, other provider types were considered for inclusion in the proposal, but not nursing facilities. It is reasonable to conclude that the existence of other federal and state authorities for temporary operation of nursing facilities made their inclusion in § 2806-a unnecessary.

The Public Health Law already provides for authorities **that are unique to nursing facilities** to address quality of care issues. Section 2806-b allows the Commissioner to revoke a facility's operating certificate, and to seek authority to appoint a caretaker. Section 2810 authorizes the Commissioner to petition the Supreme Court to appoint a receiver to operate a facility until a new operator can be established.

Furthermore, federal regulations at 42 CFR § 488.415 allow the Centers for Medicare & Medicaid Services (CMS) or the state to appoint a temporary manager to address quality issues. According to CMS guidance, temporary management may be used instead of termination of the provider in cases where nursing facilities place residents at risk of death or serious injury--referred to as immediate jeopardy--or place residents at widespread risk of actual harm. The temporary facility manager is authorized to hire, terminate or reassign staff, obligate facility funds, alter facility procedures, and manage the facility to correct deficiencies identified in the facility's operation.

The federal authority for appointing temporary management not only preceded the original enactment of Public Health Law § 2806-a; it also relies on different standards for appointing a temporary manager than this legislation would establish, creating the potential for conflicting requirements.

The added standards for invoking the proposed authority in this legislation include: (1) broadly defined criteria for defining financial instability. It is unclear who would make this determination, and how it would be made objectively; and (2) improper delegation of management authority. This determination would be based on "professional expertise" which is to say it would be a subjective judgement, and the remedy of temporary management may be disproportionate to the alleged action.

Furthermore, linking temporary management to obtaining “extraordinary financial assistance” could have a significant chilling effect on nursing facilities seeking financial assistance under formalized programs that were established after the original enactment of § 2806-a, such as temporary rate adjustments authorized under Public Health Law § 2826. Protecting or enhancing quality of care is among the benchmarks and goals that a recipient of these adjustments would commit to as a condition of receiving such funding.

For these reasons, LeadingAge NY opposes A.6034-A (Paulin) and urges that it be rejected.

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

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