

MEMORANDUM

A.1052B (Bronson)/S.614B (May)

AN ACT to amend the public health law and social services law, in relation to personal and compassionate caregiving visitors for residents of nursing homes

This bill directs the Commissioners of Health and the Office of Temporary and Disability Assistance to promulgate regulations to require nursing homes and adult care facilities (ACFs) to allow residents to receive “personal caregiving” and “compassionate caregiving” visitors. LeadingAge New York’s members share the concerns this bill 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 to strike an appropriate balance between infection control and quality of life in its COVID-related directives. We are hopeful that, as nursing homes and ACFs complete the first cycle of vaccinations of their residents through the federal vaccination program, the balance will begin to shift toward the quality of life of residents. At the time of this writing, nursing homes are completing their second round of vaccinations, and ACFs their first.

Although we support the goals of this bill, there are several technical and substantive flaws in the bill that should be addressed before it is enacted. First, the bill overlooks the significant role of the federal government in regulating nursing homes. During the COVID-19 public health emergency, the Centers for Medicare and Medicaid Services (CMS) has issued several guidance documents governing nursing home visitation. The most recent is available [here](#). In addition to the CMS guidance, nursing homes have had to adhere to guidance issued by the State Department of Health governing visitation and, in some cases, local health department directives. Each of these governmental entities strikes a different balance between the competing demands of infection prevention and the need for visitation. As a result, nursing homes have been placed in the impossible position of trying to comply with inconsistent requirements. This bill would exacerbate the problem by embedding State visitation requirements in statute and eliminating any flexibility for the State Department of Health to modify its standards to align with federal regulations or guidance.

Second, personal caregiving visitors should be subject to the same requirements as volunteers in facilities. They should be subject to the same orientation, training, background check, and health status assessment as volunteers. To the extent that these visitors are assisting residents with eating, ambulating, hygiene, or grooming they will require training. In addition, if a personal caregiving visitor refuses to adhere to facility policies and protocols, the facility should have the authority to exclude the visitor.

Third, facilities should not be subject to any survey citations or liability based on the refusal or failure of a visitor who has been properly trained to follow facility protocols and policies. To the extent that personal

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caregiving visitors are assuming responsibilities such as assistance with eating, grooming, ambulating, etc., the facility should also be immune from liability to the resident caused by any negligence or failure on the part of the visitor to follow proper policies or protocols. Likewise, facilities should not be held liable for any intentional misconduct or abuse perpetrated by a properly screened visitor. Similarly, if the caregiving visitor suffers an injury while assisting the resident through no fault of the facility, the facility should be immune from liability as well.

Fourth, although the bill creates two distinct categories of visitors who would be exempt from visitation restrictions – “personal caregiving” and “compassionate caregiving” -- it conflates the two categories by including “compassionate caregiving visitor” in the definition of “personal caregiving visitor.” Compassionate care, although broader in scope than end-of-life care, is generally time-sensitive and targeted at addressing a psychosocial or health crisis. By contrast, the “personal caregiving” category appears to offer an ongoing opportunity to visit regularly with a resident to serve as an informal caregiver. Given these differences, the two types of visitors should be subject to different requirements. Compassionate care visitors, unlike personal caregiving visitors, should not be delayed in their visitation by prolonged training, background check, or health status assessment requirements. Moreover, the CMS guidance includes valuable standards for compassionate care, and New York should align with the federal guidance.

Further, although this legislation was motivated by the COVID-19 pandemic, it will survive this pandemic. The standards for personal caregiving and compassionate caregiving visitation that are reasonable in the context of COVID-19 may not be reasonable in a different context. We recommend including language that would ensure flexibility to respond to changing circumstances.

Finally, this bill directs the Office of Temporary and Disability Assistance (OTDA) to develop regulations to implement this legislation. However, the Department of Health (DOH) oversees adult care facilities and is the appropriate regulating body.

For these reasons, A.1052B (Bronson)/S.614B (May) should be amended to permit alignment with federal regulations and guidance; to require proper screening and training of visitors and exclusion where appropriate; to exempt facilities from liability for the activities of visitors who are negligent, abusive or fail to follow facility policies; to include distinct requirements for personal caregiving and compassionate caregiving visitors; and to assign regulatory authority for ACFs to the Department of Health.