LeadingAge New York CONCERN

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ADULT DAY HEALTH CARE | PACE/MLTC | NURSING HOMES

MEMORANDUM

A.3131-A (Kim)/S.1080-A (Gounardes)

AN ACT to amend the public health law in relation to establishing requirements for residential health care facilities during a state disaster emergency involving a disease outbreak

LeadingAge New York would like to raise concerns in relation to this bill which would create new requirements for the Department of Health (DOH) and nursing homes in the context of a disaster emergency that involves a disease outbreak. The bill was drafted in the context of the COVID-19 and understandably is shaped by the particular characteristics of COVID-19 infection. However, the bill's terms are general and will survive the COVID pandemic. It should be amended to accommodate different types of infectious disease so that the state's hands are not tied in responding to unknown, future infections that may be transmitted through vectors other than air or droplets and that would raise unforeseen issues. In addition, its provisions governing supplies and support to be provided by DOH should be strengthened and the temporary operator provisions should be modified.

Specifically, the bill requires that DOH issue guidance to nursing homes that includes "restrictions on visitation." While restrictions on visitation have been necessary during the COVID pandemic due to its airborne/droplet mode of transmission, restrictions on visitation may be irrelevant if the mode of transmission were, for example, foodborne or bloodborne. Likewise, screening of staff at the beginning of each shift would likely be inappropriate if the disease were sexually transmitted. And, if the mode of transmission is foodborne, daily reporting of personal protective equipment inventory may not be important, but reporting of menus or refrigeration capacity might be critical. These are just a few examples for illustrative purposes. There are certainly other types of infections and transmission vectors that were not contemplated in the drafting of the bill that would require the implementation of different infection prevention measures. Instead of importing COVID-19 infection prevention measures into all future disease outbreak guidance, the bill should be amended to include a broad statement requiring clear education and guidance on the mode(s) of transmission of the infection and the steps that must be taken to mitigate the risk of transmission.

In addition, the bill provides that if a facility's fatality rate reaches or exceeds 5 percent, DOH must provide all necessary supplies and support, and if the rate does not improve, the facility may be placed under a temporary operator or receiver. However, DOH should support and provide necessary supplies and personnel to facilities in need regardless of the facility's fatality rate. The goal should be to prevent high fatality rates in all facilities.

Further, the bill requires DOH to appoint a temporary operator if the fatality rate does not improve "due to negligent and willful actions of the established operator, which may include, but not be limited to, a willful failure to comply with procedure or utilization of supplies and equipment provided." As has been demonstrated by COVID-19, when dealing with a novel virus, it is often difficult to determine the source of an outbreak and

the vectors for its transmission. Moreover, the specific procedures that are required to control spread are often unclear or vary by public health authority or official. Thus, the appointment of a temporary operator should be a discretionary, not mandatory, action, especially in the context of a pandemic.

After the appointment of a temporary operator, the bill requires the transfer of residents from the facility, either to a new facility or to the community. In some cases, neither option may not be the best solution for the residents. It may make more sense to transfer the operation of the facility to a new operator and allow the residents who wish to do so to remain in a familiar facility that has become their home.

As a technical matter, the temporary operator provision referenced in the bill, section 2806-a of the Public Health Law, applies only to adult care facilities, hospitals, and diagnostic and treatment centers. It does not apply to nursing homes. The analogous provisions for nursing homes are the caretaker provision set forth in section 2806-b(c) and the receivership provision set forth in section 2810 of the Public Health Law.

For the reasons set forth above, LeadingAge New York has concerns with this bill and recommends that it be amended before advancing in the legislative process.

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