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Oral Testimony of
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Before the Joint Legislative Committees on Aging, Health, and Investigations and Government
Operations

August 10, 2020

Thank you for the opportunity to testify today. I am a Supervising Attorney at The Center for Elder Law & Justice, located in Western New York, where we provide free civil legal and advocacy services to older adults and people with disabilities. We are partnered with the local regional Long Term Care Ombudsman Program, and as that program's legal liaison, we advocate for the rights of people living in nursing homes and adult care facilities.

The growing crisis of substandard care in nursing homes and other residential settings is nothing new. The pandemic has exacerbated these issues and brought long overdue public scrutiny. For too long New York State (NYS), including the Department of Health (DOH), has been complacent with the poor care and services offered in our long-term care facilities. Our written testimony provides recommendations on many issues including: the need for transparency and accountability in decision making, policy and actions that harmfully impact resident rights and care (such as insufficient staffing, visitation, admission/discharge issues, and infection control), the insufficient funding of NYS Long Term Care Ombudsman Program, and the need to overhaul long-term care in NYS.

Included in our written testimony is a detailed timeline of the numerous orders and guidance issued by the Centers for Medicare & Medicaid Services (CMS), the Centers for Disease Control and Prevention (CDC), Governor Andrew M. Cuomo, and DOH. **While DOH is not without fault for its handling of its oversight responsibilities before and during the pandemic, nursing homes have always had the legal responsibility to only admit residents they can provide care and services for, that meet that resident's individual needs.** However we know they do not, and this is not a problem limited to COVID-19. For example, a WNY nursing home was cited by DOH on February 24, 2020 when a resident could not fit through the shower room doorway and the



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resident sustained a leg laceration and received 18 sutures at the hospital.¹ Imagine the mental anguish this person experienced, in addition to the physical pain. The nursing home admitted a person without ensuring the basic hygiene practice of a shower could safely occur.

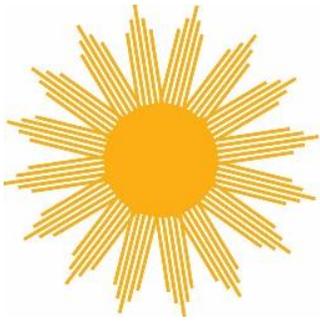
I use this example to focus on this point: yes the March 25, 2020 advisory issued to nursing homes did state that no resident shall be denied re-admission or admission to a nursing home solely based on a confirmed or suspected diagnosis of COVID-19.² However, the advisory did not negate the requirement that nursing homes only admit residents they can provide care and services for, that meet that person's needs. DOH and CMS issued multiple guidance to nursing homes prior to March 25, 2020, that in part, required staff with respiratory symptoms not work, asymptomatic staff who had potential exposure to COVID-19 be furloughed for 14 days, residents suspected of COVID-19 infection should be given a mask and isolated, cohorting of residents should occur and facilities should use staff dedicated to COVID-19 patients and not float staff between units.³

If a nursing home was short on staff or other resources needed to meet the needs of current residents during this (or any) time, regardless of the March 25, 2020 advisory, that nursing home should not have accepted patients from the hospital as new residents. A denial of admission to a hospital patient due to not having sufficient resources is not the same as denying a patient admission based on a confirmed or suspected diagnosis of COVID-19. While the March 25, 2020 advisory could have been written differently to be more clear, the basic legal responsibility and premise remains the same. If a nursing home could not isolate or cohort a resident, or ensure

¹ Ellicott Center for Rehabilitation and Nursing, survey completed February 24, 2020, accessible at https://profiles.health.ny.gov/nursing_home/view/150364#inspections.

² NYS DOH. *Advisory: Hospital Discharges and Admissions to Nursing Homes. March 25, 2020.* May 11, 2020. https://skillednursingnews.com/wp-content/uploads/sites/4/2020/03/DOH_COVID19_NHAdmissionsReadmissions_032520_1585166684475_0.pdf.

³ See CMS, *Guidance for Infection Control and Prevention of Coronavirus Disease 2019 (COVID-19) in nursing homes*, March 4, 2020, <https://www.cms.gov/medicareprovider-enrollment-and-certificationsurveycertificationgeninfopolicy-and/qso-20-14-nh.pdf>; NYS DOH, *DAL NH-20-04 COVID-19 Guidance for Nursing Homes*, March 11, 2020, https://www.health.ny.gov/professionals/nursing_home_administrator/dal/docs/dal_nh_20-04.pdf; CMS, *Guidance for Infection Control and Prevention of Coronavirus Disease 2019 (COVID-19) in Nursing Homes*, March 13, 2020, <https://www.cms.gov/files/document/qso-20-14-nh-revised.pdf>; NYS DOH, *Health Advisory: COVID-19 Cases in Nursing Homes and Adult Care Facilities*, March 12, 2020, <https://coronavirus.health.ny.gov/system/files/documents/2020/03/acfguidance.pdf>; NYS DOH, *Health Advisory: Respiratory Illness in Nursing Homes and Adult Care Facilities in Areas of Sustained Community Transmission of COVID-19*, March 21, 2020, https://coronavirus.health.ny.gov/system/files/documents/2020/03/22-doh_covid19_nh_alf_ilitest_032120.pdf.



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there were enough staffing and resources to meet that individual's needs, that patient should have been denied admission to the nursing home.

On April 29, 2020, DOH reminded nursing homes of their obligation to ensure residents receive the care they need, and on May 10, 2020, DOH informed nursing homes that a Nursing Home Assistance and Coordination Center was created to respond to urgent requests from nursing homes statewide.⁴ While this occurred a month after the March 25, 2020 advisory, DOH was meeting with nursing home trade associations throughout the pandemic, and had issued guidance that provided contact numbers and emails for nursing homes to use if they had questions or needed assistance.

We do not know the number of nursing homes who reached out for help during the pandemic. However, if a nursing home reached out for help and properly stopped admitting new residents during that time, and NYS and/or DOH did not take action to ensure the nursing home had what it needed to provide for the safety and care needs of the residents, that is a problem. If a nursing home was short on resources, such as staff, continued to admit new residents, and did not reach out for help, that nursing home must be prosecuted to the full extent of the law and enforcement actions must be taken.

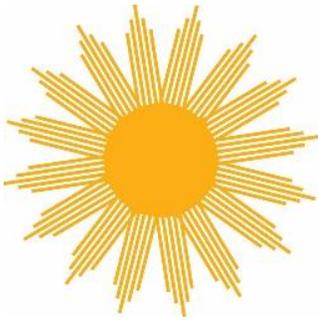
DOH also played a part in the thousands of nursing home resident deaths by failing to timely and fully enforce necessary nursing home regulations. Infection control practices in nursing homes has been a longstanding issue that has plagued nursing homes across the CMS star ratings from 1 star up to 5 star facilities.⁵ This includes in February, during the time COVID-19 was silently spreading in our nursing homes. For example:

- A 5 star CMS rated facility was cited on February 19, 2020 when staff were observed without PPE in the rooms of residents on transmission-based precautions.⁶

⁴ DOH Commissioner Dr. Howard A. Zucker, *Letter to Nursing Home Administrator*, April 29, 2020, <https://coronavirus.health.ny.gov/system/files/documents/2020/05/nhletterregarding-residents-4.29.20.pdf>; and DOH, *DAL NH-20-06 Nursing Home Assistance and Coordination Center*, May 10, 2020, [https://www.manatt.com/Manatt/media/Media/PDF/Nursing-Home-Assistance-and-Coordination-Center-\(NHACC\)-DAL-5-10-20.PDF](https://www.manatt.com/Manatt/media/Media/PDF/Nursing-Home-Assistance-and-Coordination-Center-(NHACC)-DAL-5-10-20.PDF).

⁵ Pasciak, Mary, Michel, Lou. "Even before COVID-19, infection control was an issue at area nursing homes." *The Buffalo News*, May 24, 2020, https://buffalonews.com/news/local/even-before-covid-19-infection-control-was-an-issue-at-area-nursing-homes/article_90ec5d4c-43ff-5a5d-ab1b-f440492a7001.html.

⁶ Eger Health Care and Rehabilitation Center, survey completed February 19, 2020, accessible at https://profiles.health.ny.gov/nursing_home/view/150773#inspections



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- A 3 star CMS rated facility was cited on February 27, 2020 for staff failing to wear appropriate PPE when entering a resident room where droplet precautions were in place.⁷ This same facility that made the NY Daily News on May 5, 2020, when quote “20 bodies wrapped in black bags [were] carted out” of the facility.⁸ The facility was again cited on May 11, 2020 for, amongst other things, staff were observed not doffing PPE appropriately when as they left resident rooms. In total, this facility has been cited for infection control deficiencies on three consecutive surveys: September 25, 2018, February 27, 2020, and May 11, 2020.⁹

On March 20, 2020, CMS halted all state inspections except for the Focused Infection Control Survey and complaints triaged at the Immediate Jeopardy (IJ) level. On June 1, 2020, CMS began allowing states to expand beyond those restrictions at the state’s discretion including full certification surveys. To our knowledge, DOH has not resumed full certification surveys and seems to only be investigating complaints that are likely triaged at the IJ level. So serious, quality of life issues continue every day unchecked in these facilities. For example:

- A WNY nursing home, CMS 1-star rated, was cited for failure to maintain resident call bell systems in working order. This affected all of the resident units. Staff stated the system has not worked for months and residents were on 15 minute checks and given a tap bell to ring.
- Residents interviewed by DOH stated they were not given a tap bell to ring, did not know how to call for help, and have had to scream for help or use their cell phone to call a family member.
- One resident stated “they have been living here for about six months and the call bell at their bedside had ‘on and off problems’ for the first three months and was completely broken for the last three months.

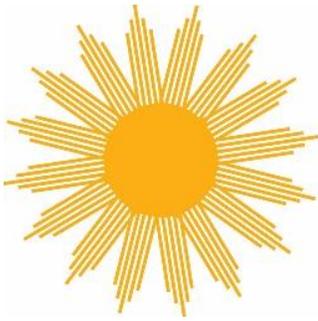
DOH determined this deficiency was a pattern that constituted no actual harm with the potential for more than minimal harm that is not IJ whereby corrections are required (E).¹⁰ This issue was happening for months, and residents were left to scream for help. I highly doubt “no harm”

⁷ Harlem Center for Nursing and Rehabilitation, survey completed February 27, 2020, accessible at https://profiles.health.ny.gov/nursing_home/view/150726#inspections

⁸ Brown, Stephen Rex, Burke, Kerry. “At least 20 bodies removed from Harlem nursing home during coronavirus pandemic, though state data only shows five COVID-19 deaths.” *NY Daily News*, May 5, 2020, <https://www.nydailynews.com/new-york/ny-harlem-nursing-home-coronavirus-20200506-egvjgmwcihfrogedllzfk5u-story.html>.

⁹ See https://profiles.health.ny.gov/nursing_home/view/150726#inspections

¹⁰ Comprehensive Rehabilitation and Nursing Center at Williamsville, survey completed June 26, 2020, not yet accessible online, but available from facility. Event ID: KSMQ11, Facility ID 0274.



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occurred. Imagine, you are sick, in pain, or are waiting for assistance to the bathroom, and you do not get it. You have to cry out for help and you do not know whether help will come. No harm? Were records examined to verify no physical harm resulted from the call bell system repeatedly not working?

This particular home has had 117 citations compared to the statewide average of 27 over the past 3 years. Including being cited for infection control deficiencies May 20, 2020, Nov. 4, 2019, and October 16, 2019.¹¹ How long is this facility going to be allowed to continue to operate before effective action is taken?

DOH must resume its full certification surveys and properly tackle its backlog of over 5,000 complaints.¹² This includes investigators contacting each complainant, if they left contact information. If DOH was conducting full certification and complaint inspection, how many more deficiencies would be cited? How many times is DOH going to issue repeat deficiencies before meaningful actions are taken against nursing homes that have double, triple, quadruple or more deficiencies than the state averages? Is DOH and the State going to continue to allow for residents to suffer and die, like in the case of the now closed Emerald South Nursing & Rehabilitation?

It is time that NYS, DOH, and society stop being complicit in substandard care that occurs in our nursing homes. Business as usual is not working. We are willing and able to work with the Legislature, DOH, and others, to improve the quality of care in long-term care settings and in the community.

Thank you for the opportunity to testify today,

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¹¹ See Comprehensive Rehabilitation and Nursing Center at Williamsville,
https://profiles.health.ny.gov/nursing_home/view/150369#inspections

¹² Michel, Lou. "5,000 nursing home investigations delayed, thanks to COVID-19." *The Buffalo News*, July 17, 2020,
https://buffalonews.com/news/state-and-regional/5-000-nursing-home-investigations-delayed-thanks-to-covid-19/article_abaa7896-c205-11ea-8c7b-4f2c25860c00.html