LONG TERM CARE
COMMUNITY COALITION

Advancing Quality, Dignity & Justice

TESTIMONY FOR A HEARING ON:

NURSING HOME QUALITY

NOVEMBER 20, 2017

PRESENTED BEFORE:

ASSEMBLY COMMITTEE ON HEALTH

RICHARD N. GOTTFRIED, CHAIR

AND

ASSEMBLY COMMITTEE ON AGING

DONNA A LUPARDO, CHAIR

PRESENTED BY:

RICHARD J. MOLLOT

EXECUTIVE DIRECTOR

LONG TERM CARE COMMUNITY COALITION

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Visit our website, www.nursinghome411.org, for quality, enforcement and other data on nursing homes in New York and nationwide, as well as resources for residents, families and other stakeholders.

I. Introduction

Thank you for the opportunity to testify today.

My name is Richard Mollot. I am the executive director of the Long Term Care Coalition (LTCCC). LTCCC is a non-profit organization dedicated to improving care and quality of life for residents in nursing homes and assisted living. As a coalition, we include a range of organizations and individuals representing the interests of the elderly and disabled, and their caregivers, across New York. LTCCC focuses on systemic advocacy, conducting research on LTC issues to identify the root causes of problems and develop practicable recommendations to address them.

Nursing home residents are among our most vulnerable citizens. By definition, they require 24-hour a day monitoring and care. For these reasons, there are federal and state standards to ensure that residents are protected and receive the care and services they need to attain their highest practicable medical, emotional and social well-being.

While there are efforts underway to help people access long term care services outside of nursing homes, nursing homes will always provide critical services, particularly as our citizens age and more people live longer with dementia and other chronic conditions. In fact, recent research indicates that over ½ of people who reach their late 50s will need nursing home care at some point. In addition to the substantial public need for nursing home care, there is a substantial public investment; taxpayers pay for a significant majority of nursing home care.

Thankfully, there are numerous nursing homes in NY that provide good care, treat their residents with dignity and demonstrate a commitment every day to fulfilling the promise they make to NY residents and families as well as taxpayers. Unfortunately, too many of our nursing homes fail to take essential resident protections seriously. They take our money every day, and promise to provide good care, but fail to do so.

In my testimony, I will provide a brief overview of some of the numerous, widespread problems that we and others have identified which indicate that too many of our nursing home residents are not receiving the quality of care which they deserve and for which (for the majority of residents) the public pays. In addition, I will present some of our recommendations for reducing the rates of substandard care, abuse and neglect in our nursing homes.

II. Indicators that Substandard Nursing Home Care, Abuse and Neglect are Significant Problems, Experienced by Too Many New York Residents & Families

Staffing

Decades of research have told us what any resident, family member or ombudsman can tell you personally: staffing is key to nursing home quality. Despite this, far too many nursing homes fail to have sufficient – or sufficiently trained – staff. Unfortunately, this is a particularly longstanding

problem in New York State. NY nursing home staffing is, on average, in the bottom quarter of the country. According to the latest payroll-based staffing data, 78% of NYS facilities are providing ½ hour or less of RN care time to their residents. Studies indicate that at least .55 hours are needed to meet the needs of residents.[1] In fact, of the 544 NYS facilities which have reported payroll based data, 31 reported RN staffing that was so low that their residents received the equivalent of zero hours of RN care time per day in 2017Q2.

Pressure Ulcers

According to the U.S. Centers for Disease Control & Prevention (CDC), "[p]ressure ulcers are serious medical conditions and one of the important measures of the quality of clinical care in nursing homes."[2] While some pressure ulcers are unavoidable, research and experience indicate that,"[i]n the vast majority of cases, appropriate identification and mitigation of risk factors can prevent or minimize pressure ulcer (PU) formation."[3] In fact, the need to reduce pressure ulcers in nursing homes has been one of the key areas identified for quality improvement in the last two decades by both the NYS Department of Health (DOH) and the nursing home industry.

Nevertheless, pressure sores remain a significant, often horrifying, problem for too many of our nursing home residents. New York's average pressure ulcer rate is among the highest in the country (top quintile). Over eight percent (8%) of New York nursing home residents have a pressure ulcer.[4] That comes out to well over 8,000 of our residents today.

Despite the extent to which NY residents are afflicted with pressure ulcers, DOH only cited nursing homes for inadequate pressure ulcer care 95 times in all of 2016. That is the equivalent of 1.15% of the time that one of our residents had a pressure sore. Even worse, in our opinion, DOH only identified the failure to provide appropriate pressure ulcer care as harmful to residents 10% of the time.[5] When is a pressure ulcer not harm? According to our study of state agency performance in 2015, NYDOH was the second poorest performer in the country in respect to citing pressure ulcers and the eighth worst in identifying substandard pressure ulcer care as having caused resident harm.[6]

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[1] The 2010 Affordable Care Act requires facilities to electronically submit direct care staffing information (including agency and contract staff) based on payroll and other auditable data. These data were reported publically for the first time this month, for the first two quarters of this year, on data.cms.gov. Data for 2017Q2 are published on our website, www.nursinghome411.org. Note that not all facilities are in compliance with the federal requirement. Our discussion is based on the 544 NYS facilities which complied with the reporting requirement.

[2] NCHS Data Brief, No. 14 (February 2009), which incorporates *Pressure Ulcers Among Nursing Home Residents: United States*, *2004*. Available at www.cdc.gov/nchs/data/databriefs/db14.pdf.

[3] Edsberg, L.; Langemo, D.; Baharestani, M.; Posthauer, M.; and Goldberg, M., "Unavoidable Pressure Injury: State of the Science and Consensus Outcomes," *Journal of Wound, Ostomy & Continence Nursing*: July/August 2014 - Volume 41 - Issue 4 - p 313–334. Abstract accessed in February 2017 at http://journals.lww.com/jwocnonline/Abstract/2014/07000/Unavoidable_Pressure_Injury__State_of_the_Science.6.aspx.

[4] Based on MDS Frequency Reports for 2017Q3. Available at https://www.cms.gov/Research-Statistics-Data-and-Systems/Computer-Data-and-Systems/Minimum-Data-Set-3-0-Public-Reports/Minimum-Data-Set-3-0-Frequency-Report.html.

[5] Pressure ulcer data are for 2016, derived from the Nursing Home Compare database at data.medicare.gov.

[6] Mollot, Richard, *Safeguarding Residents & Program Integrity in US Nursing Homes* (2015). Available at http://nursinghome411.org/national-report-safeguarding-nursing-home-residents-program-integrity/.

Antipsychotic Drugging

Inappropriate antipsychotic drugging is a serious and widespread problem in nursing homes across New York and the United States. Antipsychotics are extremely dangerous, particularly to elderly individuals with dementia. They are indicated only for certain clinical conditions and are not indicated for so-called dementia behaviors. Nevertheless, too many residents receive these drugs to make them easier to care for or for other reasons for which there are not clinical indications. Too frequently, these drugs are administered as a form of chemical restraint, and as a substitute for good care.

In 2012, the U.S. DHHS Inspector General stated, in regard to the "overmedication of nursing home patients" that the "[g]overnment, taxpayers, nursing home residents, as well as their families and caregivers should be outraged - and seek solutions."[7] Since that time, the nursing home industry has taken some steps to reduce inappropriate antipsychotic drugging. Nevertheless, this continues to be a significant and acute problem in too many nursing homes. According to the latest federal data (2017Q3), close to 18% of NY nursing home residents are being administered antipsychotic drugs. Yet less than two percent (2%) of the population will ever have a diagnosis for which CMS risk-adjusts for potentially appropriate use. Basic math reveals the stark reality: far too many of our residents continue to receive inappropriate and potentially lethal (not to mention expensive) antipsychotic drugs every day.

Though CMS promised in 2012 that the state agencies would be stepping up enforcement of protections against chemical restraints and inappropriate drugging, that has not happened in New York. In our 2015 study, we found that DOH was the seventh lowest in the country in respect to citing for inappropriate drugging and that, even when DOH cited a facility for inappropriate drugging, it only identified this as harmful to residents 2.3% of the time.[8] Unfortunately, since we conducted that study, this situation has gotten worse: as of this month, DOH has only cited inappropriate drugging as resulting in resident harm or immediate jeopardy six times in the last three years (1.5% of the time it finds a deficiency). To date, federal records indicate that there was not a single time in 2017 that DOH identified resident harm in an inappropriate drugging deficiency.[9]

Inadequate Enforcement

Despite the persistence of substandard care, resident abuse and the provision of "Worthless Services" in too many New York nursing homes, enforcement is weak in respect to both properly identify problems and holding providers accountable. The result is a self-perpetuating system in which, far too often, New York residents, families and taxpayers are the losers.

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[7] Statement of Daniel R. Levinson, Inspector General, Department of Health and Human Services in respect to the OIG report, *Medicare Atypical Antipsychotic Drug Claims for Elderly Nursing Home Residents*, OEI-07-08-00150 (May 2011). Available at https://oig.hhs.gov/oei/reports/oei-07-08-00150.pdf.

[8] Mollot, Richard, *Safeguarding Residents & Program Integrity in New York Nursing Homes* (2015). Available at http://nursinghome411.org/ny-state-report-safeguarding-residents-program-integrity-in-new-york-state-nursing-homes-an-assessment-of-government-agency-performance/. Note that our 2015 study resulted in two reports, one national in scope and one focused on New York State.

[9] Data retrieved from data.medicare.gov on November 6, 2017 and available upon request from LTCCC. Note that deficiencies are for all inappropriate drugging (including, but not limited to, antipsychotics).

- **Widespread health deficiencies**. Despite weak enforcement, NYS nursing homes have an average of eight cited failures to comply with minimum health and safety standards every year.
- **Too many facilities have chronic deficiencies**. Our assessment of federal data last year indicated that about 25% of NYS nursing homes have been cited for the same regulatory violation three or more times in the last three years. While regulatory standards vary in their scope and potential impact on vulnerable residents, this indicates that the enforcement system is failing to ensure that, when cited for substandard care, a facility operationalizes a correction to the identified deficiency. Nursing homes receive significant payment to provide quality staffing and services 365 days of the year and DOH is paid by CMS to enforce the standards in a manner that ensures quality and safety for every one of those days, not just the few days a year when surveyors inspect a nursing home. The whole point of the regulatory and survey system is to make sure that problems are few and, when they occur, that long-term, system-wide corrections are implemented across a facility. Instead, too often, we see what the federal government and others call "yo-yo compliance." Too often, New Yorkers and their families cannot count on a facility being safe, even when DOH has given it a "clean bill of health." That, in our opinion, is a serious problem.
- **DOH does not take the necessary steps to verify corrections of deficiencies**. A federal audit released exactly one month ago yesterday found that DOH "did not obtain the nursing homes' evidence of correction for 72 percent of the deficiencies identified during surveys in CY [calendar year] 2014."[10]
- **Facilities with persistent, serious deficiencies remain open for business**. Unfortunately, even when the most serious violations (harm and immediate jeopardy) are identified, too many nursing homes are allowed to continue to care for vulnerable residents, hold themselves out to families as safe places and take in public monies for substandard care. Nursing homes are rarely, if ever, closed, even when they are identified as being amongst the worst in the country. There should be no place for a "caveat emptor" approach to nursing home care in our state.[11]

III. Funding is NOT the Problem

One-Third of Medicare Short-Term Rehab Residents are Harmed

A 2014 Office of Inspector General study, *Adverse Events in Skilled Nursing Facilities: National Incidence Among Medicare Beneficiaries*,[12] found that an astonishing one-third of residents who went to a nursing home for short-term care were harmed within an average of 15.5 days, and that almost 60% of that harm was preventable and likely attributable to poor care.

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[10] New York Did Not Always Verify Correction of Deficiencies Identified During Surveys of Nursing Homes Participating in Medicare and Medicaid, Audit # A-02-15-01024. Available at https://oig.hhs.gov/oas/reports/region2/21501024.asp.

[11] See, for examples, the Special Focus Facility Program (https://www.cms.gov/Medicare/Provider-Enrollment-and-Certification/CertificationandComplianc/downloads/sfflist.pdf) and nursing homes with "Double G" citations (available on the CMS website as well as recently compiled by LTCCC at http://nursinghome411.org/nursing-home-double-g-citations-by-state-2016/).

[12] Available at https://oig.hhs.gov/oei/reports/oei-06-11-00370.asp. Six percent of those who were harmed died, and more than half were rehospitalized.

This is particularly striking because Medicare reimbursement rates are extremely high. The Medicare Payment Advisory Commission (MedPAC) has reported that nursing homes are overpaid by the Medicare program and have enjoyed Medicare margins exceeding 10% for more than 14 consecutive years.[13] Why can't nursing homes take care of these highly profitable patients? What are the implications for our elderly residents, particularly the majority of residents who have dementia?

Private Enterprises Continue to See NY Nursing Homes as Valuable & Profitable

We continue to see private, for-profit companies buying up nursing homes in New York. In 2015, *The New York Times* reported on the "bull market" for nursing homes, noting that "[s]ale prices of nursing homes averaged $76,500 per bed last year — the second consecutive year of record-breaking prices….[14] We do not believe that these individuals, for-profit companies, LLCs, etc… are gobbling up nursing homes in New York so that they can lose money as a result.

V. Recommendations

Minimum Safe Staffing

New York is now one of the minority of states that fails to set minimum safe staffing requirements for its nursing homes. Staffing standards are needed now more than ever to counter abuse and neglect, the increasing corporatization of nursing home care and current efforts by the provider industry lobbyists to quash nursing home requirements and accountability.

LTCCC strongly supports the Safe Staffing for Quality Care Act. We thank Assembly leaders for their support last year and urge the Governor & State Senate to do their parts to make this happen in 2018.

Meaningful Financial Penalties

Minimum standards are only meaningful if they are enforced. For too many facilities, it makes financial sense to hire less staff and provide inferior services since there are minimal (if any) penalties when they fail to provide decent care. Following are some of our recommendations to improve accountability. All of them have been either adopted by or proposed in other states.

1. Texas provides its state agency the ability to fine repeat noncompliant nursing facilities without offering the facility a chance to first correct the violation.[15]
2. Texas law also provides for additional penalties if a facility fails to maintain a correction of certain deficiencies "until at least the first anniversary of the date the correction was made."[16]
3. California law provides for a fine of up to $100,000 when a deficiency has resulted in a resident's death.[17]

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[13] See http://www.medpac.gov.
[14] Thomas, Katie, "In Race for Medicare Dollars, Nursing Home Care May Lag," *The New York Times* (April 14, 2015). Available at https://www.nytimes.com/2015/04/15/business/as-nursing-homes-chase-lucrative-patients-quality-of-care-is-said-to-lag.html.
[15] Tex. Health & Safety Code Ann. § 242.0665.
[16] *Id*.
[17] Cal. Health & Safety Code §1424.5.

Increase Transparency of Nursing Home Ownership and Profits

While the NY nursing home industry is experiencing unprecedented corporatization, there is little knowledge of, no matter accountability for, how public monies that pay for nursing home care are actually spent. There are no limits in respect to profits taken from a nursing home's operations. Importantly, in respect to both for-profit and non-profit providers, there are no meaningful restrictions in respect to self-dealing, expenses paid for administrative and other (non-care) expenses, rental arrangements for underlying property, etc…

Conversely, there are no requirements that a certain portion of the funds given to nursing homes to provide care are actually used to provide that care. There is no minimum amount that must go to pay care staff, furnish palatable food or ensure that a facility is clean. A family member who I spoke to last week told me that when she recently had a birthday party for her 100+ year mother she was told that she would have to furnish her own toilet paper (in addition to the birthday cake).

Following are some of our recommendations to improve transparency:

1. We call on the state to conduct an annual independent assessment of our nursing homes' profits and losses and issue the results in a report to the public. In the past, DOH published what it called an "annual" report but that appears to have stopped many years ago.
2. Illinois requires nursing facilities to submit annual financial statements to that state's DOH. The statement must include ownership information, general service costs (such as dietary, food, housekeeping, laundry, utilities, and plant operation and maintenance), health care costs (such as medical director, nursing, medications, oxygen, activities, medical records, other medical services and social services), etc….[18]
3. Massachusetts is proposing (2017) to require various state departments to examine nursing facility cost trends and financial performance to verify that Medicaid funds are being used in the best interest of residents.[19]

Informed Written Consent for Antipsychotic Drugs

LTCCC strongly supports the Bill to Ensure Informed Consent for The Use of Psychotropic Medication in Nursing Homes and Adult Care Facilities. In speaking to federal officials, they often say that they consider federal requirements to require informed consent for use of antipsychotic drugs. Nevertheless, too many families that we speak to in NY state that their loved one has been given an antipsychotic without their knowledge (no matter their permission). Requiring written permission is a critical, yet easy-to-implement way to address this widespread and dangerous problem.

Improve Emergency Preparedness & Communications

The recent tragedy in the Hollywood Hills nursing home in Florida, in which over a dozen residents perished following Hurricane Irma, is but the latest indicator that facilities need to be doing much more to protect residents in times of emergency. We in NY are no strangers to emergency situations. Florida is now trying to take steps to improve emergency preparedness. Unfortunately, even in the face of a

[18] Ill. Admin. Code tit. 77, § 300.210.
[19] S. 353, 2017 Leg., 190th Sess., (Ma. 2017).

horrible, likely preventable tragedy, the Florida office of LeadingAge, a national industry lobby, is fighting to prevent imposition of those protections.

New Yorkers cannot wait for the next tragedy where residents are lost or harmed before action is taken. Thus, we urge NY to pass legislation similar to two requirements passed in California:

1. California requires nursing homes to notify a resident's family, guardian and the ombudsman of steps that the facility is taking to ensure the well-being of the resident. Nursing facilities are further required to provide prompt medical assessment to residents who have or may suffer adverse health consequences resulting from an emergency.
2. California also requires nursing facilities to develop a unified medical command, convert useable space to emergency care areas, develop an emergency discharge plan and perform disaster drills every six months.

Protect Residents in Respect to Transfer & Discharge

NY nursing home residents are experiencing what appears to be a growing wave of inappropriate and potentially unlawful discharges. While this itself could be the subject of an assembly hearing, we think it is worth noting here that we are extremely alarmed by nursing homes discharging residents to homeless shelters (with the explicit approval of DOH) and of nursing homes which are holding themselves out publicly as providing only short-term rehab when, in fact, there is no such designation in New York. New York has never permitted "Medicaid Mills" in the past, but we are now faced with a movement towards ghettoization of nursing homes in this state.

To address these and other transfer/discharge problems, our recommendations include:

1. DOH should be held responsible for ensuring that every resident discharge is safe and appropriate and that residents have access to the services they need to adequately appeal a facility discharge.
2. NY should adopt the protection that CA has promulgated for its residents, which requires nursing facilities to follow certain additional requirements prior to transferring residents. These requirements include medical and psychological assessments and an evaluation of the resident's relocation needs.[20]
3. We also recommend a second protection adopted by CA, which requires that nursing facilities agree to an additional 60 day extension when there is difficulty in placing a resident, and the provision of staff assistance in finding another facility.

Bolster the Voice of Residents and Families

Resident and family councils can play an important role in improving conditions in their nursing homes. The new federal regulations for nursing homes foster the role of family and resident councils and also require that every facility have a grievance officer. This does not need to be an additional staff person but, rather, simply someone in the facility to whom residents and families can turn when they have a

[20] See Cal. Health & Safety Code § 1336.2 available at https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201720180AB275.

problem and know that they will receive some kind of response from him or her within a reasonable time frame.

Unfortunately, some in the nursing home industry, including powerful lobbyists at AHCA and LeadingAge, are calling for removal of many basic federal standards. Even the requirement to have a designated grievance officer is under attack.

Our recommendations include:

1. Explicitly adopt the federal requirement that facilities have an assigned grievance officer, with responsibilities to be responsive to residents and families, in NY law.
2. Adopt requirements similar to those in California, which requires nursing facilities to provide family councils access to bulletin boards, respond to concerns within ten days, include a notice of council meetings in mailings, inform the representatives of new residents about the existence of the family council and not willfully interfere with council activities.

VI. Conclusion

Many of our nursing homes do a good job in caring for their residents. However, increasing corporatization, the largely unbridled power of industry lobbyists, and lack of accountability perpetuate a system in which, far too often, it is both acceptable and profitable to provide poor care.

I thank you again for your interest in the well-being of our nursing home residents and for this opportunity to present testimony. We would welcome the opportunity to work with you and other legislative and state leaders to ensure that our nursing homes residents are safe and able to live with the dignity that we all desire and deserve.