

## Introduction

As of January 30, 2022, more than 200,000 nursing home residents and staff in the United States have died from COVID-19. These deaths make up at least 23 percent of all deaths in the US<sup>1</sup> and are likely undercounted as they exclude many resident deaths that have resulted from social isolation, insufficient staffing, and overall failure of many nursing home operators to meet minimum health and safety standards. These numbers also do not account for the over two million resident and staff COVID infections<sup>2</sup> which can have long-lasting negative health implications, especially for vulnerable individuals.

These COVID-related deaths and infections were not inevitable. Nor were the many needless and untimely deaths of nursing home residents that occurred prior to the pandemic. They are largely the product of widespread and longstanding failures by regulators, over the course of decades, to effectively enforce the basic standards of care for nursing homes, and of the nursing home operators that have taken advantage of this environment of lax enforcement to maximize their income at the expense of their residents' safety and dignity.

Because of lax oversight, many nursing home owners and operators have become increasingly sophisticated in using taxpayer dollars to benefit themselves rather than those for whom these funds are intended – their residents. The millions of dollars of Medicare and Medicaid funds (including COVID-19 related funds) operators receive to care for nursing home residents are increasingly diverted away from resident care and towards items such as administrative salaries, capital expenditures, and other unrelated expenses. Public funds that are paid to operators for resident care often find their way into the coffers of companies owned or controlled by these operators. These “related-party” transactions have become a common business arrangement.

Another development in recent years has been the growth in the number of private equity-owned nursing homes. An increasingly robust and disturbing body of research finds that quality of care for residents declines when private equity firms take over nursing facilities.<sup>3</sup> Because private equity firms strive to generate high, short-term

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<sup>1</sup> Chidambaram, P., *Kaiser Family Foundation*, “Over 200,000 Residents and Staff in Long-Term Care Facilities Have Died From COVID-19,” (February 3, 2022). Available at <https://www.kff.org/policy-watch/over-200000-residents-and-staff-in-long-term-care-facilities-have-died-from-covid-19/>

<sup>2</sup> *Centers for Medicare & Medicaid Services* <https://data.cms.gov/covid-19/covid-19-nursing-home-data> (data downloaded March 17, 2022).

<sup>3</sup> Braun, R.T., Jung H., Casalino L.P., Myslinski Z., and Unruh, M.A., *JAMA Health Forum*, “Association of Private Equity Investment in US Nursing Homes With the Quality and Cost of Care for Long-Stay Residents,” (November 19, 2021). Available at <https://jamanetwork.com/journals/jama-health-forum/fullarticle/2786442>.; Gupta, A., Howell, S.T., Yannelis, C., and Gupta, A., *National Bureau of Economic Research*, “Does Private Equity Investment in Healthcare Benefit Patients? Evidence from Nursing Homes,” (February 2021). Available at <https://www.nber.org/papers/w28474>.

profits for their investors, the facilities they own tend to reduce spending on nurse staffing and other resident-facing services and supplies, and increase spending on management expenses, related-party fees and antipsychotic drugs, the latter too often used as a substitute for adequate nursing staff.

The Biden Administration's recent nursing home reform proposals<sup>4</sup> underscore the growing awareness of this environment, and the urgent need for swift action "to ensure taxpayer dollars go toward the safe, adequate, and respectful care seniors and people with disabilities deserve – not to the pockets of predatory owners and operators who seek to maximize their profits at the expense of vulnerable residents' health and safety."

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Contrary to the nursing home industry's claims, COVID has had little negative impact on nursing home finances.<sup>5</sup> In response to the pandemic, the country's nursing homes have received millions of dollars from the Provider Relief Fund, the Paycheck Protection Program, and Medicare accelerated payment funds. These funds are in addition to the large sums of money nursing homes regularly receive from Medicare, Medicaid, and private pay residents.

Until recently, nursing homes have not been required to spend a set minimum percentage of the funds they receive on the care of their residents, nor have the public or policymakers had an effective tool to require accountability for these expenditures. In May 2020, as the number of COVID-19 deaths continued to mount in New Jersey, that state enlisted the Manatt Health consulting firm to make a series of substantive recommendations for reforming its troubled nursing home industry during the pandemic and beyond. One of the recommendations, designed to address both the lack of transparency on how taxpayer funds are spent, as well as the need to require that the bulk of funds be spent on resident care, called for the establishment of a nursing home direct care ratio reporting and rebate requirement.<sup>6</sup>

In September 2020, the New Jersey Legislature passed and the Governor signed legislation (A4482/S2758) establishing a direct care ratio (DCR) requirement for nursing homes.<sup>7</sup> The New Jersey DCR requires that 90 percent of a facility's aggregate revenue in each fiscal year is to be expended on the direct care of residents, and facilities that fail to meet the DCR will be required

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<sup>4</sup> Fact Sheet: Protecting Seniors by Improving Safety and Quality of Care in the Nation's Nursing Homes (February 28, 2022). Available at <https://www.whitehouse.gov/briefing-room/statements-releases/2022/02/28/fact-sheet-protecting-seniors-and-people-with-disabilities-by-improving-safety-and-quality-of-care-in-the-nations-nursing-homes/>.

<sup>5</sup> Kingsley, D.E., and Harrington, C., *Journal of the American Geriatrics Society*, "COVID-19 had little financial impact on publicly traded nursing home companies," (May 24, 2021). Available at <https://agsjournals.onlinelibrary.wiley.com/doi/10.1111/jgs.17288>.

<sup>6</sup> Manatt, "Recommendations to Strengthen the Resilience of New Jersey's Nursing Homes in the Wake of COVID-19," (June 2, 2020). Available at <https://manatt.com/Manatt/media/Documents/NJ-LTC-Report.pdf>.

<sup>7</sup> P.L. 2020, c. 89. Available at [https://www.njleg.state.nj.us/Bills/2020/PL20/89\\_.PDF](https://www.njleg.state.nj.us/Bills/2020/PL20/89_.PDF).

to pay a rebate to the state. The state is authorized to audit the financial information reported by nursing facilities to ensure accuracy and compliance with the law. New Jersey's legislation was enacted nearly the same time that the Commonwealth of Massachusetts established a similar requirement for nursing homes to spend at least 75 percent of their revenue on direct care staffing costs, effective October 1, 2020.<sup>8</sup> New York followed soon after in April 2021 with the passage of its own direct care spending law, which requires nursing homes to spend at least 70 percent of their operating revenue on direct resident care, of which 40 percent must be spent on resident-facing staffing.<sup>9</sup> In 2022, other states are considering similar legislation.<sup>10</sup>

Similar laws requiring health insurers to spend a set minimum amount on healthcare have existed for decades. These laws, called Medical Loss Ratios (MLRs), have given policymakers and regulators the ability to ensure accountability for taxpayer funds, and prioritize their use for health care. Applying this concept to nursing homes – requiring nursing homes to spend an appropriate amount of revenue on the direct care of their residents is urgently needed. These laws will improve safety, quality of care, and quality of life for the nation's nursing home residents and will provide a critical tool for sorely needed transparency and accountability.

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<sup>8</sup> 206.12: Direct Care Cost Quotient (2020). Available at [https://www.sec.state.ma.us/reg\\_pub/pdf/911/E101206.pdf](https://www.sec.state.ma.us/reg_pub/pdf/911/E101206.pdf).

<sup>9</sup> Section 2828 of Public Health Law, Part 415 Title 10 of NYCRR 414.34. Available at <https://www.manatt.com/Manatt/media/Documents/Articles/Proposed-Minimum-Direct-Resident-Care-Spending-regulation.pdf>.

<sup>10</sup> See California Assembly Bill No. 2079 (2022). Available at [https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill\\_id=202120220AB2079](https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=202120220AB2079). See also Connecticut House Bill No. 5310 (2022). Available at [https://www.cga.ct.gov/asp/cgabillstatus/cgabillstatus.asp?selBillType=Bill&bill\\_num=HB-5310](https://www.cga.ct.gov/asp/cgabillstatus/cgabillstatus.asp?selBillType=Bill&bill_num=HB-5310).