

August 8, 2022

The Honorable Kathy Hochul  
Governor  
State of New York  
NYS State Capitol  
Albany, NY 12224

Re: A.159 (Gottfried)/S.995(Hoylman)

Dear Governor Hochul:

I write on behalf of LeadingAge New York and its not-for-profit, mission-driven members to request your veto of A.159 (Gottfried)/S.995(Hoylman). This bill makes changes to the wording of section 2801-d of the Public Health Law governing the private right of action against nursing homes which appear to do nothing more than reiterate existing law, but could be misinterpreted by the plaintiff's bar, courts and liability insurers to expand and duplicate available damages. This, in turn, may lead to increases in insurance premiums and frivolous lawsuits, which will deplete nursing homes of resources needed to deliver care to residents.

We support efforts to ensure that nursing homes provide high quality care to their residents and are held accountable when they do not. The existing provisions of Public Health Law §2801-d provide an extraordinarily powerful tool for plaintiffs seeking to recover from nursing homes. Although we believe the Legislature's intent in passing this bill was merely to clarify what is today existing law, the amendments made by this bill are more likely to create confusion than add clarity. The enhanced ambiguity created by this legislation, especially in the current environment, will likely drive up insurance premiums, generate frivolous lawsuits, and threaten the viability of non-profit and public nursing homes that are already struggling to survive in the face of skyrocketing costs and inadequate Medicaid rates.

The amendments set forth in the bill are not necessary and could mistakenly be interpreted to allow duplicative and inflated damage awards. Existing law already permits an estate representative to recover for the wrongful death of a nursing home resident. Further, New York law generally allows recoveries for the decedent's pain and suffering prior to death and/or for those distributees who have suffered pecuniary loss by reason of death. PHL §2801-d provides for sizeable statutory damages in an amount no less than 25 percent of the daily Medicaid rate "for each day that such injury exists," plus punitive damages if the violation is found to be willful or reckless, regardless of the damages or injury experienced by the plaintiff or the resident. In addition, under section 2801-d, attorney's fees may be awarded.

The legislative history of section 2801-d suggests that it was intended to provide a private right of action for nursing home residents to obtain redress for violations of rights or benefits that could not be adequately remedied through common law tort or contract actions, such as the right to privacy, to be free from emotional abuse, to present grievances without fear of reprisal, and other rights set forth in Public Health Law § 2803-c. This statute was enacted in 1975 in the wake of the nursing home abuse scandals of the early 1970s. In providing a statutory right of action in favor of nursing home residents, the legislative intent was to essentially empower residents to enforce their own rights, at a time when the survey process was ineffectual and tort actions against nursing homes were rare, with few plaintiffs' attorneys willing to prosecute actions on behalf of aggrieved nursing home residents.

Since the enactment of 2801-d, the regulatory oversight of nursing homes has been strengthened substantially, and the plaintiffs' bar has grown active in bringing lawsuits against nursing homes on various grounds. DOH and the federal Centers for Medicare and Medicaid Services now have a robust nursing home survey and complaint process, with the authority to impose civil monetary penalties and fines along with other penalties (e.g., denial of payment for

new admissions, revocation of operating certificates, etc.) against nursing homes for established violations of regulations affecting resident care. In addition, the Office of the Long-Term Care Ombudsman investigates complaints and provides a regular presence in many nursing homes. The current regulatory framework more effectively addresses resident-care violations and is more transparent to the public than in the 1970s, and there is no shortage of lawyers willing to represent nursing home residents and their families in lawsuits against facilities.

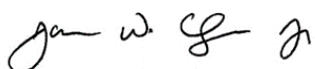
The growth of nursing home regulation and oversight raises the risk that the plaintiffs' bar will misuse section 2801-d to seek damages for all manner of violations of the law and regulations, including those that are technical or administrative, rather than the rights-related violations that were originally intended. Through the pandemic, nursing homes have faced a constantly growing and changing array of state and federal laws, regulations, and guidance documents that are often unclear and inconsistent and sometimes impossible to satisfy, creating new compliance challenges. At the same time, they are struggling to staff their facilities appropriately in the face of a declared health care workforce emergency and stiff competition from hospitals and staffing agencies that are able to pay higher wages. They must meet these challenges with a Medicaid rate well below the cost of care, which has increased by only 1 percent over the last 14 years, despite rising inflation. Notwithstanding the declared health care staffing emergency, the state continues to impose new administrative requirements (e.g., daily HERDS surveys, posting summaries of all contracts on websites, submitting 90-day notices of all contracts, etc.), while limiting the amounts that homes may spend on administration.

We are concerned that the lack of clarity introduced by this legislation, together with the current litigious environment, may raise the risk of frivolous lawsuits, substantial damage recoveries based on unreasonable and inconsistent laws and regulations, and increases in insurance premiums that will further drain the resources of struggling nursing homes. Nursing homes are already experiencing major increases in professional and general liability insurance premiums, resulting from increasing frequency and severity of claims and underlying financial challenges in the insurance marketplace. In its 2019 long term care providers study (the most recent available), insurance broker Aon estimated that loss rates under these liability policies would increase by 5 percent, and claims frequency would go up by 2 percent annually. It forecasted that annual claims costs in 2020 will average \$2,300 per occupied bed ([https://www.aon.com/getmedia/69de85a2-5aad-40af-9dc1-0296f09137f1/2019-LTC-Report\\_Executive-Summary.aspx](https://www.aon.com/getmedia/69de85a2-5aad-40af-9dc1-0296f09137f1/2019-LTC-Report_Executive-Summary.aspx)). Moreover, the liability insurance policies purchased by nursing homes often do not insure against losses as a result of violations of the Public Health Law. Thus, under 2801-d, nursing homes are potentially exposed to uninsurable losses.

Under existing law, actions may already be brought on behalf of nursing home residents by their legal representatives or by their estates. The state and federal government also have many tools for holding nursing homes accountable for poor quality care, including fines, receiverships, revocation of licenses, professional discipline, and criminal charges. This bill will only introduce more confusion over the scope of section 2801-d. The bill is not necessary and threatens to force nursing homes to divert resources from resident care to insurance premiums and defense of frivolous lawsuits. Rather than supporting access to quality nursing home care, it threatens to diminish it.

For these reasons, we recommend that A.159 (Gottfried)/S.995(Hoylman) be vetoed.

Sincerely,



James W. Clyne, Jr.  
President and CEO  
LeadingAge New York