

**JOINT NEW YORK SENATE AND ASSEMBLY PUBLIC HEARING ON
RESIDENTIAL CARE FACILITIES AND COVID-19**

**Testimony of Nina A. Kohn
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Thank you, Chairpeople, Senators, and Assembly Members for this opportunity to testify. My name is Nina Kohn. I am professor at Syracuse University College of Law, and the Solomon Center Distinguished Scholar in Elder Law at Yale Law School. My research focuses on the civil rights of older adults, including those in congregate care settings.

My testimony will focus on policies and practices that make residents of residential care facilities vulnerable to COVID-19 and its impacts, and policies that could improve their well-being going forward.

One source of vulnerability is facilities' over-reliance on part-time staff and staff who work in multiple jobs—as an estimated [15-17%](#) long-term care staff do. Adopting a one-site rule limiting staff to working in one care facility during the pandemic, as [Canadian provinces](#) have done, could reduce infection spread between facilities. Indeed, a new [study](#) estimates that eliminating staff linkages could reduce COVID-19 infections in nursing homes by 44 percent. A one-site policy, however, must be paired with policies incentivizing hiring full-time direct care workers, or it risks creating a worker shortage and financial distress for caregivers.

Another factor that makes residents vulnerable is a lack of accountability for facilities—including around infection control. This [gap](#) is well-documented in nursing homes. Even when state inspectors find that a nursing home violated regulations designed to protect residents, the home is often merely directed to correct the situation, and the state may [not even confirm](#) that corrections are made. The rare fines are typically so small as to be toothless—this is a problem nationwide, but especially in New York where [average fines](#) are well below the national average.

Going forward, the state must impose consequences for regulatory violations that put residents at risk that actually deter bad behavior. This includes fully rolling back [Section 3082](#) of this year's budget bill, which rewards neglect and dangerous behavior by granting facilities, owners and administrators astonishingly broad immunity for [unreasonably causing foreseeable harm](#) to residents. Given the anemic nature of the public enforcement system, the deterrent effect created by possible liability is critical to protect residents.

Another factor increasing resident vulnerability is insufficient direct care staff. [Most nursing homes](#), and [especially for-profit facilities](#), were dangerously understaffed even before the epidemic. Now, research links [nurse staffing levels](#) to facilities' ability to control COVID-19 outbreaks, and [staffing levels](#) more broadly to the presence of COVID-19 in facilities. Minimum staffing requirements like those proposed in the [Safe Staffing Quality Act](#) are essential to ensure that facilities have the staff [needed](#) to avoid systemic neglect. Any increased funding for facilities during this crisis therefore should be conditioned on adequate direct care staffing levels and appropriate staff mix.

Another factor that endangers residents is isolation. Isolation is itself a harm, causing unprecedented loneliness, psychological suffering, and poor health outcomes. It is also a risk factor for abuse and neglect. Research shows that the presence of non-staff in residential care facilities is protective for residents.

The ombudsmen program could be a powerful tool to counter isolation and strengthen oversight, but current policies undermine it. Rather than helping ensure that ombudsmen can safely go into facilities, the New York Department of Health has encouraged “[remote advocacy](#).” This is a farce for the residents who most need ombudsmen. It enables facilities and staff to effectively block access to the very people who might report their bad behavior.

Going forward, ombudsmen should be prioritized for personal protective equipment (PPE) and encouraged—perhaps even required—to regularly visit all residential care facilities even amid the pandemic. To further this, the state should promulgate protocols that (unlike current [Department of Health protocols](#)) do not allow facilities to act as gatekeepers for ombudsmen. In addition, the state should invest in expanding the ranks of professional ombudsmen as the pandemic has exposed the danger of overreliance on volunteers.

Combatting isolation also requires recognizing residents’ right to associate with family and friends. The state must unambiguously require facilities to facilitate virtual visits—by phone or by video-conference—when in-person is infeasible, and rescind [guidance](#) that gives facilities discretion to deny residents in-person visits. That discretion allows poorly performing facilities to avoid scrutiny by further depriving residents of their civil and human rights—and, in many cases, by also depriving residents of [essential family caregivers](#). Instead, the state should require facilities to allow in-person visitation in accordance with reasonable protocols adopted by the state. In doing so, New York should consider the [evidence-based protocol](#) created by an institute at Canada’s Ryerson University in collaboration with provider and advocacy groups.

Finally, Covid-19 shows the danger of under-funding of home and community-based care, and the over-reliance on congregate care to begin with.