

July 30, 2020

There is no question that the Covid-19 pandemic hit New York State hard and fast beginning in March of 2019. This crisis, however, is an opportunity to address our shortcomings as a community in how we protect and keep safe one of the most vulnerable groups among us- the residents of nursing homes.

Looking back at the sheer numbers of lives lost as a result of the corona virus in these facilities, it is clear that there were some egregious errors made and my hope is that we can make some meaningful change in the oversight and enforcement of the laws that govern nursing home care in New York State.

First, the March 25th decision by the New York State Health Department to require nursing homes to admit and/or re-admit Covid positive residents was a poor decision. I would like to address the revised report by the New York State Department of Health dated July 20th concerning the factors associated with nursing home infections and fatalities. Two of the arguments made are specious at best and it highlights the shortcomings in oversight of these facilities in New York State.

First, the revised report argues as did the initial report, that the peak of admissions of positive residents occurred a week after the peak of nursing home deaths from Covid. Therefore the report concludes that the March 25th decision was not a decisive factor in the mortality rate among nursing home residents based on the timing of admissions and infection. The report goes on to state that most of the infection came from staff at the facilities as opposed to positive residents. This argument is specious at best. There is no way to accurately gage how transmission was occurring in these facilities. Nursing home staff members are in constant contact with both residents and other staff. Given the lack of PPE in many facilities, it is very difficult to believe that adding more positive residents to a given facility did not contribute to more spread.

What should have been done in late March and into April was to require Covid positive returnees to skilled nursing facilities to be admitted to a Covid only facility. Using Javits or the USS Comfort would have been a much smarter decision and it would have been easy to manage infection and transmission. In addition the DOH claims in the July 20th report that there were numerous other nursing homes that were Covid only and available for residents who were deemed Covid positive.

Why weren't positive Covid residents sent to these facilities? Governor Cuomo stated on more than one occasion in his press conferences that nursing homes will "do the right thing" and will not accept residents they cannot keep safe.

Unfortunately this view does not take into consideration that most nursing homes are private businesses, whether they are deemed non-profit or not, for whom profit is a significant matter. Every "body" that a nursing home loses to another facility is lost revenue- and profits. It is clear

the nursing homes were ill prepared to handle the infection rates and could not curtail the spread as evidenced by over 6000 deaths. If the nursing homes were to do the right thing they would have acknowledged their inability to keep residents safe. Instead, they just complained about the lack of PPE and did not advocate for the residents by supporting transfers to Covid only facilities. The government says it is now “investigating” these claims. This smacks of greed by the facilities’ owners.

The reality is that nursing homes owners and operators are always concerned about profit and that concern can and does get in the way of adequate patient care.

Here are two examples that prove this point. First, many nursing homes put “arbitration clauses” in their Admission Agreements limiting a resident’s ability to file a case in court if they have been harmed or injured by negligent care in the facility. In addition, many nursing homes put “venue” selection clauses in their Admission Agreements so that if a claim is filed for a Public Health Law violation the claim has to be litigated in the County chosen by the nursing home in the Agreement. Many Bronx and Brooklyn based nursing homes have clauses in the Agreements which place venue in Westchester County. Why? Arbitration clauses take away the right to a jury trial. These clauses are ALWAYS buried in the middle of what is a 20 to 30 page agreement and is rarely, if ever, noticed by the signer who is frequently under significant stress at the time. These types of things are meant to increase profits by limiting damage awards for wrong doing. How does that comport with the Public Health Law’s requirements, or help keep residents safe?

Lastly, the blanket immunity given to nursing homes and other health care providers was too broad and it is dangerous. While a recent bill has somewhat mollified it’s effect, it should be noted that section 2808-a of the Public Health Law makes nursing home operators who control and oversee the facility personally liable for violations of the Public Health Law that cause injury to a resident. This law is very important in enforcing owners to spend the adequate amount of money on staffing and care for residents as opposed to profits. No law should abrogate the protections the Public Health Law provides nursing home residents. Lastly, we need more staff added to the DOH to investigate resident injuries and inadequate care. Too often an investigation consists of telephone statements given by nursing home risk managers to a DOH employee. This is inadequate oversight and needs to be addressed.

Thank you,

John Dalli

