

MEMORANDUM

TO: NYS Senate Standing Committee on Health; NYS Senate Standing Committee on Aging; NYS Senate Standing Committee on Investigations and Government Operations; NYS Assembly Standing Committee on Health; NYS Assembly Standing Committee on Aging; NYS Assembly Standing Committee on Oversight, Analysis and Investigation; et al.

FROM: Stefan Foster, NYS Certified Long-Term Care Ombudsman

RE: Public Hearing; Residential Health Facilities and COVID-19

DATE: August 3, 2020

Thank you for the opportunity to provide the Committees with testimony regarding COVID-19's impact on residential health facilities and other long-term care settings, as well as recommendations for improving protocols and practices to reduce transmission and mortality rates of contagious diseases. I volunteer with the NYS Long-Term Care Ombudsman Program ("LTCOP") as a trained resident advocate; my day job exists with the Center for Elder Law & Justice in Buffalo, New York.

INTRODUCTION

In my capacity as an Ombudsman, and as a citizen of New York State, my purpose is to protect the essentials of life for long-term care residents and disabled persons — including access to healthcare, psycho-social supports, and habilitation free of abuse or neglect. This testimony provides guidance to prevent future, detrimental and irreversible harm as sustained by 6,300+ long-term care patients in New York State, along with families and caregivers, statewide, during the COVID-19 pandemic.

Prior to the issuance of the New York State Governor's Executive Order No. 202 and No. 202.1, as a Special-Focus Ombudsman, I was assigned to multiple, underperforming Adult-Care Facilities ("ACFs") and Skilled-Nursing Facilities ("SNFs") to provide resident advocacy services. On behalf of residents and family members, I raised quantifiable and verified complaints detailing the subhuman and harmful living conditions in certain facilities monitored by the New York State Department of Health ("NYS DOH").

Insufficient regulatory-enforcement mechanisms in nursing homes, on the part of NYS DOH, stemming from a lack of legislative and executive priority, conjointly, are responsible for the lack of preparedness in ACFs and SNFs witnessed during the COVID-19 pandemic. In each setting: "Nursing homes and adult care facilities need to be held to a higher standard. Due to a history of poor quality, many of these homes are now breeding grounds for COVID-19."¹

¹ Center for Elder Law & Justice, *CELJ Statement on Nursing Home Care*, (Aug. 2, 2020, 4:17 PM), <https://www.elderjusticenyc.org/celj-statement-on-nursing-home-care/>.

NYS DOH announced that it will inspect facilities in noncompliance with requirements impacting resident safety during the COVID-19 pandemic; concerns include separation and isolation policies, staffing levels, and inadequate personal protective equipment supplies.² This regulatory schema has not yet translated to systems-wide resident safety, nor appropriate containment of infectious disease, in several long-term care facilities monitored by NYS DOH.

OMBUDSMAN TESTIMONY

During the time period of March 7 - March 12, 2020, I communicated via telephone with nursing directors of facilities that I am assigned to through LTCOP. However, under the *parens patriae* directives of NYS DOH and Executive Order No. 202 and No. 202.1, my requested visitation to each facility was denied due to the health risks presented by COVID-19; “the risk for severe illness from COVID-19 increases with age, with older adults at highest risk.”³ Knowing that older adults are at the greatest risk for infection from COVID-19, the New York State Governor implemented an unfamiliar policy, thereafter, that prohibited nursing homes from refusing admission of COVID-19 positive patients transferred from general hospitals.⁴ This policy was later reversed on May 10 after the State’s death toll, in nursing homes specifically, had reached among the highest in the nation.

Prior to the aforementioned policy reversal, while COVID-19 patients were being transferred into nursing homes under the New York State Governor’s order — at the expense of an administratively-amalgamated resident body — Ombudspersons presenting *no* symptoms of COVID-19 were refused access to their respective facilities and populations in need. Prior to, during the pandemic, and still, when I attempt phone calls to residents in certain facilities, I am refused access; or, too often, the phone line rings indefinitely never to be answered.

As an Ombudsman, I have raised formal complaints to NYS DOH referencing similar concerns to the aforementioned — on more occasions than can be recalled here. The question must be asked: “How many times in a row is the Department going to issue deficiencies before action is taken?”⁵ Basic technologies, in certain facilities, were not implemented to afford residents access to critical advocacy resources during the most severe public-health crisis of this century.

² *Id.* at <https://www.elderjusticeny.org/celj-statement-on-nursing-home-care/>.

³ Centers for Disease Control and Prevention, *Older Adults*, (Aug. 2, 2020, 4:15 PM), <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/older-adults.html>.

⁴ Governor Andrew M. Cuomo, *Governor Cuomo Issues Guidance on Essential Services Under The 'New York State on PAUSE' Executive Order*, (Aug. 2, 2020, 4:12 PM), <https://www.governor.ny.gov/news/governor-cuomo-issues-guidance-essential-services-under-new-york-state-pause-executive-order>.

⁵ Center for Elder Law & Justice, *Testimony: Department of Health Safe Staffing Study*, (Jul. 31, 2020, 7:00 PM), <https://www.elderjusticeny.org/celj-staffing-study-written-comments/>.

The risk of potential COVID-19 transmission in ACFs and SNFs was weighed against the necessity of advocacy services rendered by LTCOP in long-term care facilities. In view of the foregoing, per Executive Order No. 202 and No. 202.1, specially-trained volunteer Ombudsmen were treated as common visitors. Ombudspersons were flatly refused visitation and access to residents in long-term care facilities, statewide, until July 10, 2020. A considerable number of regional offices have yet to disseminate volunteers back into facilities as of the date of this submission.

When utilized, volunteer Ombudspersons document cases of abuse, neglect and deficient conditions in realtime. Historically, when investigating long-term care facilities, I have observed severe incidents of mistreatment that, otherwise, I would not have had the ability to report (as later-substantiated deficiencies) — had I not visited facilities and residents *in person*. These incidents include, but are not limited to: staff members over-administering psychotropics to residents; systems-wide hazards and deficient environmental conditions; abuse; neglect; and poor management of pain. Ombudsmen cannot observe physical conditions, tampered-with records, potential for harm or unanswered call lights from a telephone call.

Many long-term care residents, caregivers, and family members agree: “Visitors play a key role in fulfilling resident needs because facilities are often understaffed and DOH allows facilities to operate short-staffed by its continual failure fully enforce laws and regulations.”⁶ Ombudsmen, visitors and family members of long-term care residents are the primary reporters of abuse and neglect concerns in nursing homes. Due to risks presented by COVID-19, visitors including certified Ombudspersons were refused entry into nursing homes. This reality caused thousands of long-term care residents to experience disproportionate isolation, and subsequent illness, due to infectious disease that could not be adequately contained nor monitored in highly-populated, institutional settings.

In New York State, LTCOP, as a primary advocacy resource for long-term care residents and disabled persons residing in ACFs and SNFs, operates similar to the the State’s Justice Center for the Protection of People with Special Needs (“Justice Center”). However, during the COVID-19 pandemic, the Justice Center continued its operations — “investigating allegations of abuse and neglect... to the full extent possible with modifications made to address social distancing and any special individual circumstances.”⁷ Unlike the Justice Center, LTCOP relies primarily on trained *volunteers* who render in-person advocacy services. A great disparity exists where thousands of long-term care residents were deprived of advocacy services during the

⁶ Center for Elder Law & Justice, *NYS Lifts Visitor Ban on Nursing Homes*, (Aug. 2, 2020, 4:04 PM), <https://www.elderjusticenyc.org/nys-lifts-visitor-ban-on-nursing-homes/>.

⁷ New York State Justice Center for the Protection of People With Special Needs, *COVID-19 Impact on Justice Center Operations*, (Aug. 2, 2020, 4:01 PM), <https://www.justicecenter.ny.gov/>.

COVID-19 pandemic — under directives, stemming from a lack of preparedness, of NYS DOH and the New York State Governor. As an Ombudsman, I take seriously my mission to protect persons residing in long-term care facilities and comparable ACFs. Sadly, during the COVID-19 pandemic when long-term care residents were most susceptible to illness and mistreatment, I was not allowed entry into the nursing homes that I am assigned to through LTCOP. My repeated requests to render advocacy services while adhering to social distancing and health guidance were refused. As a citizen-volunteer Ombudsman, I mourn for the loss of my friends and residents, whose names have not been shared with me as of the date of this submission.

CONCLUSION

Historically, our State witnessed policy reform to support the rights of disabled persons after decades of inappropriate institutionalization practices. Overcrowded settings were reduced; self-directive and residential-care programs found instauration in communities. Today, thousands of disabled persons are faced with decades-long waiting lists for appropriate-level care services; an adequate number of residential-care programs have not been established.⁸ Persons residing in nursing homes remain in institutional settings for prolonged periods of time when appropriate-level services do not exist for transfer. Studies support a collective finding: Many persons residing in long-term care facilities and institutional settings would be more appropriately served in home-type, residential-care programs. However, a sufficient number of said cost-effective programs have not been established, despite decades of time, opportunities and court mandates directed to the New York State Governor.

Persons residing in long-term care facilities *not* requiring skilled services should be placed in appropriate-level, non-institutional settings. This would allow advocates, including the corps of LTCOP, to serve vulnerable persons more effectively moving ahead. COVID-19 still presents risks; each day must involve dutiful efforts to reduce inappropriate institutionalization. My proposal to expand accessibility of the Family-Type Homes for Adults program in New York State — in efforts to divert more persons away from institutionalization and to reduce the transmission and mortality rates of contagious diseases — is annexed with this testimony herein.

⁸ E.B. by his guardians M.B. and R.B., et al. v. Cuomo, et al., 1:16-cv-00735 (W.D.N.Y. 2016).