

**NEW YORK STATE DEPARTMENT OF HEALTH**  
**PUBLIC HEALTH AND HEALTH PLANNING COUNCIL**  
**NOVEMBER 18, 2021**  
**TRANSCRIPT**  
**CONCOURSE MEETING ROOM 6, ALBANY AND ZOOM**

**Dr. Gutierrez** Thank you very much. Thank you. Thank you. Thank you.

**Dr. Gutierrez** Good morning, everyone. I'm Angel Gutierrez, and I Chair the Committee on Codes, Regulation and Legislation, and I have the privilege to call to order a special coach committee meeting and welcome members, participants and observers.

**Dr. Gutierrez** Regarding webcasting, I would like to remind council members, staff and the audience that this meeting is subject to the open meeting laws and is broadcast over the internet. The webcast access at the Department of Health website. The On-Demand webcast will be available no later than 7 days after the meeting for a minimum of 30 days, and then a copy would be retained in the department for 4 months.

**Dr. Gutierrez** Here are some suggestions or ground rules to follow in order to make this a successful meeting. Because there is synchronized captioning, it is important that people do not talk over each other. Captioning cannot be done correctly with two people speaking at the same time. The first time you speak, please state your name and briefly identify yourselves as a council member or DOH staff. This will be of assistance to the broadcasting company to record this meeting. Please note, the microphones for those that are on site and present at the health department sites, the microphones are hot, meaning that they pick up every sound. I therefore ask that you avoid rustling of papers next to the microphones and also to be sensitive of our personal conversations or sidebars, as the microphones would pick up this chatter. I believe that that applies also to people that are in Zoom like I am.

**Dr. Gutierrez** As a reminder for our audience, there is a form that needs to be filled out before you enter the meeting room with records your attendance at meetings. It is required by the Joint Commission on Public Ethics in accordance to Executive Law Section 166. This form is also posted on the Department of Health website under Certificate of Need. So in the future, you can find out the form prior to the council meetings. Thank you for your cooperation in fulfilling our duties as prescribed by law.

**Dr. Gutierrez** I now move on to opening the meeting of the Codes, Regulation and Legislation. Good morning. I'm Dr. Gutierrez. I am calling to order the Committee on Codes, Regulations and Legislation.

**Dr. Gutierrez** Will the members of the public present today, please limit if you come to make comments about the differing rules that are being presented, please limit your comments to three minutes or less. I will limit one presenter per organization and please in order to expedite the process, be prepared to deliver your comments promptly after your name is called. To that effect, your name will be announced in advance and in order of appearance. Please move closer to the position and front in order to deliver your remarks.

**Dr. Gutierrez** We have six regulations on the agenda for consideration today, four of these are emergency regulations that are also on today's agenda for information and discussion purposes as the department begins to process for regular adoption on this regulations.

**Dr. Gutierrez** The first one for emergency adoption and also for information is the investigation of communicable diseases, isolation and quarantine. This Ms. Vanessa Murphy of the department is available, and will provide us with information on this proposal.

**Dr. Gutierrez** I would appreciate if people that are not talking put themselves on mute to avoid echoing the noise from the background.

**Dr. Gutierrez** Ms. Murphy.

**Vanessa Murphy** Good morning. My name is Vanessa Murphy and I'm an attorney for the Department of Health. I'm here this morning to ask council members to vote on a renewal of the Communicable Disease and Isolation and Quarantine Emergency Regulation package. To briefly summarize, amendments have been made to Part 2 of the State Sanitary Code to update and clarify the department's authority, as well as that of the local health departments to take actions to control the spread of disease. Updates were also made to the isolation and quarantine provisions. Amendments were made to Part 405 of Title 10 to require hospitals to report syndromic surveillance data during an outbreak of a highly contagious communicable disease. Language was also added to permit the Commissioner to direct hospitals to take patients during such an outbreak. Lastly, a new Section 58/1.4 was added to Title 10 to clarify clinical laboratory reporting requirements for certain communicable diseases. Minor changes have been made since the last time this package was before you in July for a vote on emergency adoption, so I wanted to briefly address those. Section 2.6 Was titled Investigations and Response Activities in the version you voted on in July, and the same is the case with the version before you today. It's the same title. We just carried that edit through Section 2.6 for consistency and clarity. Specifically, response activities has been added to Subdivisions A and D of this section. We also made clarifying non substantive edits throughout the package, fixing formatting issues and streamlining language and a few areas. We are asking council members to vote on a renewal of this emergency regulation as cases in New York are over tenfold their level since late June and greater than 99 percent of the sequenced recent positives in New York State were the Delta variant. I know it's elsewhere on the agenda, but we also wanted to advise council members that the department intends on moving forward with proposed rulemaking for permanent adoption. The renewal of the emergency regulation, which is the only part that council members are voting on today, will enable the department to continue our public health prevention measures to stop the spread of disease without a lapse while we work through the permanent rulemaking process.

**Jeffrey Kraut** Dr. Gutierrez, you're on mute.

**Dr. Gutierrez** Well, that sometimes is good.

**Dr. Gutierrez** Are there any questions from members of the committee or members of the council?

**Dr. Gutierrez** Are there any members of the public who would like to comment on this proposal?

**Dr. Gutierrez** Can I have a motion for a recommendation of adoption of this emergency regulation to the full Public Health and Health Planning Council?

**Dr. Young** I will.

**Dr. Gutierrez** I have Dr. Young.

**Dr. Gutierrez** Dr. Watkins.

**Dr. Gutierrez** Let's have a vote.

**Dr. Gutierrez** All in favor?

**Dr. Gutierrez** Anybody opposed?

**Dr. Gutierrez** Any abstentions?

**Dr. Gutierrez** The motion carries.

**Dr. Gutierrez** The regulation will now go into the full council for its adoption. Please note on the record, this regulation is also on the agenda for information purposes as the department moves toward regular adoption. For this purpose is a regulation after the initial public comment period will come back for adoption on the regular order.

**Dr. Gutierrez** Number two for emergency adoption and also for information is face coverings for COVID-19 prevention. Ms. Murphy from the department is available for this regulation also and will provide us with information on this proposal.

**Dr. Gutierrez** Ms. Murphy, please go ahead.

**Vanessa Murphy** Thank you.

**Vanessa Murphy** I'm also here this morning to ask council members to vote on a renewal of the emergency regulation that added new Section 2.60 to Part 2 of the State Sanitary Code and repeal Subpart 66/3 of Title 10. The express terms of the regulation are the same as when you voted on it on July 29th, 2021. This regulation permits the Commissioner to issue determinations to require face coverings in certain settings based on COVID-19 incidence and prevalence, as well as any other public health or clinical risk factors related to COVID-19 disease spread. As you may be aware, the Commissioner issued a determination pursuant to Section 2.60 requiring masking in health care settings, adult care facilities regulated by the department, school settings, correctional facilities and detention centers, homeless shelters, public transportation conveyances and transportation hubs. We are asking council members to vote on a renewal of this emergency regulation as cases in New York are over tenfold their level since late June and greater than 99 percent of the sequenced recent positives in New York state were the Delta variant. As mentioned, we also wanted to advise council members that the department intends on moving forward with proposed rulemaking for permanent adoption. The Emergency Regulation, which is the only part council members are voting on today, will enable the department to continue our public health prevention measures to stop the spread of COVID without a lapse while we work through the permanent rulemaking process.

**Dr. Gutierrez** Thank you.

**Dr. Gutierrez** Are there any questions from the committee or the council?

**Dr. Gutierrez** Are there any members of the public who would like to comment on this proposal?

**Dr. Gutierrez** Can I have a motion to recommend for adoption of this?

**Dr. Gutierrez** Yes, I have Dr. Yang.

**Dr. Gutierrez** I need a second.

**Dr. Watkins** I'll second it.

**Dr. Gutierrez** Dr. Watkins.

**Dr. Gutierrez** All in favor?

**Dr. Gutierrez** Anybody opposed?

**Dr. Gutierrez** Any abstentions?

**Dr. Gutierrez** The motion carries. This regulation now goes to full council for adoption. And for the record, noted that this regulation is also on the agenda for information purposes as a department moves toward regular adoption. For this purpose is a regulation after the initial public comment period will come back for adoption and the regular rule.

**Dr. Gutierrez** Number three for emergency adoption and also for information. Personal care giving and compassionate care giving visitors in nursing homes and adult care facilities. Mr. Mark Furnish and Mr. Jonathan Kamel of the Department are available and will provide us with information on this report.

**Dr. Gutierrez** Gentlemen, please go ahead.

**Mark Furnish** Good morning. My name is Mark Furnish and I'm with the Department of Health. This is the personal care giving and compassionate care giving visitation guidelines regulations that you have all passed as emergency regs back in August. They're up for expiration and they're coming to you again for an additional emergency regulation. They will come back to the department and filed in the state register for public comment for the regular regulation process, so there'll be plenty of time for public comment and additions or changes. I want to give some merit, some context to this. This law passed during the 2021 legislative session. It's prescriptive and states that in the statute that within 45 days of the effective date, the department shall issue regulations, so that's why we are issuing these regulations. It's in the statute. We must have the regulations in place to comply with the law enacted by the Legislature. Both the statute and regulation states no conflicts with state or federal laws and regulations, so that's a conflict clause. It also states that the department in the regulation that permits you will have the discretion to review and require modification to a facility personal care giving visitation and compassionate care giving visitation policies and procedures to ensure conformity and any applicable visitation guidelines issued by the Department or the Centers for Medicare and Medicaid Services. The Department has discretion within this regulation to amend based on the guidelines based on the CMS guidelines. CMS issued new guidelines on November 12th. We're fully aware of that, and we've issued a dear administrative letter on November 16th, which states that we are going to comply with the CMS regulation. So, that's the context of why this is here today and why we're doing this in

light of the CMS regulations. The merits of the regulation states that personal care givers shall be allowed in a facility, either a nursing home or adult care facility. During a public health emergency, each resident is allowed up to two based on however the facility can in certain instances, whether it's public health or something wrong with the facility an elevator, heat breaks down, something like that can limit that personal caregiver visitation. However, it must be done with remote access. The facility must develop policies and guidelines for this as well, and will work with facilities developing guidance for this. It also has compassionate caregivers, and those are for people, residents with end of life or crisis in their life. They're allowed in even during a public health emergency. So again, the reason why we're doing this is because it's in the statute.

**Mark Furnish** And if you have any questions or concerns, we can take them now.

**Mark Furnish** Thank you.

**Dr. Gutierrez** Thank you very much, Mr. Furnish.

**Dr. Gutierrez** Are there any questions from the committee or the council?

**Dr. Gutierrez** I have Scott La Rue.

**Dr. Gutierrez** Go ahead.

**Scott La Rue** Good morning, Scott La Rue. Mark, I just wanted to confirm, so it's the intent that this regulation is going to be aligned with the CMS relations that came out earlier this month?

**Mark Furnish** Correct, and it states in the regulation that we have the ability to do that to comply.

**Scott La Rue** And in terms of penalties, is it the intention that it will default to whatever the process is for CMS in terms of penalties? Does the regulation allow for additional penalties by the state?

**Mark Furnish** There's no additional special penalties. It's the regular penalty scheme that the department utilizes for any violation.

**Scott La Rue** Thank you.

**Dr. Gutierrez** Before we continue with further discussion, I'd like to have a motion on this.

**Dr. Gutierrez** Do I hear a motion from members of the committee?

**Kathleen Carver** I move.

**Dr. Gutierrez** Thank you.

**Dr. Gutierrez** A second?

**Dr. Gutierrez** Dr. Yang.

**Dr. Gutierrez** And now we have have Mr. Kraut, anybody else that wants to advise me, please.

**Jeffrey Kraut** So Mark, I think you clarified this with Scott. I'm just going to be a little more precise. We got a letter from Leading Age that basically said there was potential conflict, but what I heard you said, the Dear Administrator Labrador of November 16th, clarified that that there will be no conflict. Is that correct?

**Mark Furnish** Correct.

**Jeffrey Kraut** Thank you.

**Dr. Gutierrez** Any other questions or comments from members of the committee or the council on this particular proposal?

**Dr. Gutierrez** I have one member of the public who has listed herself. This is Karen Lipson from Leading Age. I do not know where Ms. Lipson is located. Is it Albany? Please come forward to the microphone. Let me state that if this is related to the letter we received from Leading Age, this was passed to the entire council. I would appreciate if you limit your comments to the points that need emphasis or things that were not included in the letter. You have three minutes.

**Dr. Gutierrez** Thank you very much.

**Karen Lipson** Thank you, Dr. Gutierrez.

**Karen Lipson** Can you hear me okay?

**Dr. Gutierrez** I can hear you.

**Karen Lipson** Good morning. I'm Karen Lipson. I'm with Leading Age New York. I appreciate Mr. Furnish's clarifications. I want to point out about this regulation and the vaccination regulation on your agenda today that these regulations, along with the minimum hours and direct care threshold regulations you considered last month do not recognize the staffing crisis that we are currently confronting in our long term care system. You're all well aware of this crisis. We talked about it at length last month. There's the state of emergency that the Governor has ordered. Unfortunately, the executive orders issued in relation to that state of emergency provide very little, if any, relief to the long term care system. Unfortunately again, throughout this pandemic, New York State has offered no financial support to long term care providers to address skyrocketing costs and to address the vulnerability of the population we serve. None. Most other states raised their Medicaid rates for long term care providers during the pandemic. New York State cut them. Last month you considered the minimum nurse staffing hours regulation. That regulation is completely impossible to comply with under current conditions. That regulation was published in yesterday's state register. And as far as I could tell, it has no changes in response to the concerns that we discussed last month. That regulation would impose fines on providers, even if extraordinary circumstances prevent them from complying. And that level of fine is not required by statute. It is just in the regulation. Nursing homes need an immediate infusion of Medicaid dollars to continue to staff their facilities appropriately and to provide the care that their residents need. The regulations on your agenda today impose more fines on providers to meet requirements that are in some cases impossible to comply with or duplicate fines at the federal level. There's no need for

additional layers of fines that are simply going to deprive them of resources that they need to serve their residents. We need to focus on the residents. Turning to the personal caregiving regulations.

**Dr. Gutierrez** 30 seconds.

**Karen Lipson** The DAL yesterday did not reference personal care giving regulations. It only referenced the typical visitation. We don't know whether these regulations, which are more stringent than federal law and than the state law would continue to apply. We don't know whether we are currently in a state of emergency that would trigger these regulations. Facilities are also required under these regulations to collect information either quarterly or semi-annually. Administrators and Supervisors do not have time right now to go around collecting information quarterly and semi-annually from every resident about caregiving visitors who are completely irrelevant to the current state of affairs because every visitor that wants to come into a facility can come into a facility. The personal caregiving visitors, that designation is not needed right now.

**Dr. Gutierrez** Thank you, Ms. Lipson.

**Dr. Gutierrez** I have a question from Dr. Watkins.

**Dr. Watkins** Yes, I do have a question.

**Dr. Watkins** Just a question for Mark. I'm looking at Page 20 of this regulation under federal standards, and it indicates that you have looked at the CMS guidance. The latest CMS guidance on Page 20, says Revised as of April 27, 2021. I know earlier in your comment you've indicated that this document should be in accordance with CMS guidance as of November 12th, 21. Is that something that we need to refine here on this document before we are adopt it?

**Mark Furnish** No, this is not part of the regulation. This is the back up documentation that outlines why we went for an emergency regulation. That should be changed and it will be, but it doesn't affect the regulation as a whole. I can read the first paragraph of the November 16th Desr Administrative letter that was just issued. This DLA serves to notify all New York state nursing homes that the department will expect all nursing homes across the state to adhere to the provisions of the updated nursing home visitation guidelines issued by CMS on November 12th 2021, detailed in the CMS guidance and to immediately implement and comply with these provisions. That takes precedence.

**Mark Furnish** Thank you for pointing out that that guidance was revised again on November 12th, and that should be corrected. Thank you for pointing that out.

**Dr. Gutierrez** Any other questions or comments from members of the committee or the council?

**Nilda Soto** I have a question about. This is Nilda Soto. For the last speaker, I was trying to follow her description. She says that there is a staffing shortage and they need a major infusion of funding. Well, how would additional money address not having enough staff? I want to understand better the correlation. If we got more money where would this additional staff come from?

**Karen Lipson** Are you addressing that question to me?

**Dr. Gutierrez** Yes.

**Karen Lipson** And the question is without more money, where will the stuff come from? Is that correct?

**Nilda Soto** Part of your suggestion, recommendation is you need an infusion of dollars. However, there is what we've heard repeatedly. There isn't insufficient staff anywhere. I'm just curious if you did get additional funding, where do you think you'll be able to identify those additional staff?

**Karen Lipson** It's a great question, because we are facing a very tight labor market. But the truth is, long term care providers can't compete with other employers for staff because we rely heavily on Medicaid funds. In nursing homes, Medicaid pays for 72 percent. We can't raise prices on commercial payers. We can't raise prices on individuals who pay out of pocket, because we don't have those types of payers. We have to count on Medicaid. Medicaid rates have not been increased in 14 years, and they are well below the cost of care and we can't compete with hospitals or physician practices or even retail sites for staff. If Medicaid raised money, raised our rates, then we would be able to pay competitive wages and salaries to our workers. And don't forget, nursing homes don't just employ nurses and aides and physicians. They also need people to work in their kitchens and their dining rooms and in housekeeping. We're competing with a whole range of employers for staff, but we don't have the luxury of raising our prices in order to pay our staff better, because Medicaid won't pay us more.

**Dr. Gutierrez** Thank you.

**Dr. Gutierrez** Any further questions or comments from members of the committee or council?

**Dr. Gutierrez** If not, I will call the vote.

**Dr. Gutierrez** All in favor of this proposal?

**Dr. Gutierrez** Anybody opposed?

**Dr. Gutierrez** Are there any abstentions?

**Dr. Gutierrez** The motion carries. The regulation now goes to the full council for adoption. Please note on the record, this regulation is also on the agenda for information purposes as a department moves toward regular adoption. For this purpose as a regulation after the initial public comment period will come back for adoption in the regular order.

**Dr. Gutierrez** Number four for emergency adoption and also for information is a prevention of COVID-19 transmission by covered entities. Mr. Jonathan Karmel of the Department is available and will provide us with information on this proposal.

**Dr. Gutierrez** Mr. Kamal, please go ahead.

**Jonathan Karmel** Hello. My name is Jonathan Kamel. I'm an attorney for the Department of Health. This is the second emergency regulation requiring COVID-19 vaccination for health care workers. Already approved the vaccine mandate for health care workers. The



first emergency regulation required general hospital and nursing home personnel to receive their first dose of COVID-19 vaccine by September 27th, and required personnel of all other covered entities to receive their first dose of COVID-19 vaccine by October 7th. This vaccine mandate is working. It has greatly increased the percentage of health care workers who are vaccinated against COVID-19. For example, between August 31st and October 26th, vaccination rates of hospital personnel increased from 79 percent to 93 percent, and vaccination rates of nursing home personnel increased from 70 percent to 90 percent. The second emergency regulation and the identical proposed rule making that would be published for public comment continues to require that personnel of hospitals, nursing homes, diagnostic and treatment centers, hospices, home care services agencies and adult care facilities be vaccinated against COVID-19. The rule is applicable to personnel who could potentially expose patients, residents or other personnel to COVID-19. There are minor changes in this second emergency regulation compared to the first emergency regulation. It replaces the compliance dates which are now in the past that personnel must have their first dose now, if there could potentially exposed patients, residents or other COVID personnel to COVID-19. The regulation continues the requirement that all facility types continuously require personnel to become and remain fully vaccinated. The second emergency regulation also adds physician assistance to the health care practitioners who can certify that personnel have a medical exemption. A medical exemption means that immunization with COVID-19 is detrimental to the health of the individual. Since the purpose of the regulation is to reduce morbidity, personnel do not have to get the vaccine if the vaccine is detrimental to their health. Just to be clear, the medical exemption is not a belief exemption. In general, people with medical exemptions wish they could get the vaccine, but they can't because it's medically contraindicated. The department's frequently asked questions guidance, issued September 20th and then updated on November 8th, provides guidance regarding medical exemptions in FAQ's number 15, 16, 17, 18 and 19. Based on the recommendations of the Advisory Committee on Immunization Practices and Others, the CDC has published evidence based recommendations regarding contraindications and precautions for COVID-19 vaccination.

**Jonathan Karmel** We're be happy to take your questions.

**Dr. Gutierrez** Thank you very much.

**Dr. Gutierrez** Before we move onto questions or discussions, can I have a motion to recommend adoption of these emergency regulations.

**Dr. Gutierrez** Need a motion from members of the committee.

**Dr. Gutierrez** Voice it, please. I cannot see everybody.

**Dr. Gutierrez** Dr. Yang.

**Dr. Watkins** I'll make a motion.

**Dr. Gutierrez** Second, Dr. Watkins.

**Dr. Gutierrez** Let's continue with the discussion.

**Dr. Gutierrez** Are there any members of the committee or the council that have questions?

**Dr. Gutierrez** Yes, Mr. La Rue, please.

**Scott La Rue** Good morning. Scott La Rue, member of the full council. In terms of this regulation First, I start off, I fully support mandating the vaccine. My questions are not about the necessity of the regulation, but CMS has now also required the vaccine. Is this duplicative and is it the intent of this emergency regulation will go away and that we will just default to the CMS regulation? How do you see this moving forward?

**Jonathan Karmel** That's an excellent question. Thank you. We'll have to consider that as the federal regulation rolls out. They probably are duplicative, but if there are two different laws requiring vaccination, then I guess it's suspenders and a belt. I mean, either way, they're required to be vaccinated.

**Scott La Rue** Yeah, it just creates unnecessary requirements on the operators to follow two different regulations for the same purpose.

**Scott La Rue** In terms of this regulation, is there not still penalties for failure to adhere to the regulation for nursing home operators?

**Jonathan Karmel** Yes, there are penalties for failure to comply with this regulation, the same as any other regulation, and we're surveying for compliance.

**Scott La Rue** Right, but I believe there are financial penalties in here on top of what would be a regulatory issue for failing to comply.

**Jonathan Karmel** Right, so as I mentioned previously, we're seeing excellent compliance by the health care facilities around the state, and we're grateful for it. We imagine that'll continue.

**Scott La Rue** Yeah, I don't think that answered my question, though. Is there a financial penalty in the state regulation for failure to comply?

**Jonathan Karmel** Yeah, we're really at this point at an information phase. We're not really an enforcement phase yet. And so that's where we're at right now.

**Scott La Rue** Well, just for the record, I would object to any additional financial penalties on nursing home operators for this. I wouldn't understand why nursing homes were being put in a different category than every other health care provider and having additional penalties put on. When the CMS regulation is implemented, there already is a mechanism for financial penalties for failure to follow, as well as regulatory ramifications. Again, my primary point here is to avoid duplication and not to expose operators to an additional process for fining them when there's already one in place once the CMS regulations go in place.

**Jonathan Karmel** I think that's an excellent point and we'll definitely respond to that in our assessment of public comment when these regulations are put out for public comment. We will take that into consideration before this is finalized and permanent.

**Jonathan Karmel** Thank you.

**Scott La Rue** Thank you very much.

**Dr. Gutierrez** Thank you, Scott La Rue.

**Dr. Gutierrez** Before I ask for any other questions, I'd like to ask Karen Lipson to move forward to the podium. She has remarked she wants to make any other questions or comments from members of the committee or from the council.

**Sabina Lim** Sorry, Dr. Gutierrez, it's Sabina Lim.

**Dr. Gutierrez** Yes, go ahead.

**Sabina Lim** Sabina Lim, member of the council. I just have a question about whether there is any flexibility in the date of 11/22. And the only reason why I ask is that, or there's actually a couple of reasons. There have been a lot of questions, particularly about the religious exemptions. I think that's over really been over the past couple of weeks to a month. And I understand and again, like Scott, everyone in the committee, I fully support the mandate. But I think because of the removal of the religious exemptions and recognizing that exemptions will not be allowed, but that people with sincerely held religious beliefs still need to be accommodated. That can be a very long process, and that can also be particularly challenging for facilities that have very large numbers of people who are requesting accommodation. In light of the staffing challenges that people have already referenced before and the holidays and just sort of due diligence that's required to do the proper accommodations. Just inquiring because I think a lot of different hospitals are maybe dealing with this. Is there any flexibility, even a couple of weeks, let's say, in the deadline of November 22?

**Jonathan Karmel** Yeah, I understand and appreciate that comment. I agree that there are going to be cases where reasonable accommodation requests are in process and that can be a difficult determination. I understand the comment, and that's something that we'll certainly take into consideration.

**Sabina Lim** Thank you.

**Dr. Gutierrez** Any further questions or comments.

**Dr. Gutierrez** If not, I'll move onto Ms. Lipson from Leading Age. Same criteria limits apply.

**Dr. Gutierrez** Ms. Lipson, please go ahead.

**Karen Lipson** Yes, thank you, Dr. Gutierrez. I'll be brief.

**Karen Lipson** I would echo the comments of Mr. La Rue and Dr. Lim that these requirements are duplicative of the CMS requirements for most providers, and they impose a double layer of penalties on providers who are unable to comply, because they have to staff their facilities some way. They have residents and patients who need care daily, and the penalties are not going to help them in assembling the resources necessary to recruit and retain appropriate levels of staff. The vaccination rates among providers look good in the data presented by the Department of Health, 94 percent vaccination rates among staff in nursing homes and adult care facilities. But what those data failed to show is the denominator and the trend in that denominator. And anecdotally, we believe that long term care providers have seen a shrinking number of staff since the pandemic began. And that number of staff has declined more sharply since August, when the vaccination mandate

was announced. And so with the shrinking denominator, of course, you have a higher percentage of vaccinated staff, but the shrinking denominator is not a good thing for residents or patients. We do not oppose a vaccination mandate. We want every staff member and every resident and patient to be vaccinated, but the state needs to be cognizant of the challenges that providers face and the needs of patients and residents.

**Karen Lipson** That's all I have.

**Karen Lipson** Thank you.

**Jonathan Karmel** Can I make a clarifying point regarding that? It's very typical that our operational standards regulations repeat things that are in conditions of participation that are in the Code of Federal Regulations. That does not result in double penalties. The surveyors use our regulations to survey, and it's very typical that we have things in our regulations that are the same, intentionally the same as the federal conditions of participation, so the idea of double penalty is one for a federal one per state, that's not going to happen.

**Karen Lipson** I'm very happy to hear that.

**Dr. Gutierrez** Are there any questions or comments?

**Dr. Gutierrez** If not, I need a vote.

**Dr. Gutierrez** All in favor of this regulation?

**Dr. Gutierrez** Anybody opposed?

**Dr. Gutierrez** If opposed, please raise your voice and identify yourself.

**Dr. Gutierrez** Anybody abstaining?

**Dr. Gutierrez** Hearing none, the motion carries. The regulation now goes for full council for its adoption. Please note on the record, this regulation is also on the agenda for information purposes as a department moves toward regular adoption. For the purposes of regulation after the initial public comment period come back for adoption on the regular order.

**Dr. Gutierrez** Number five for an emergency adoption is COVID-19 reporting and testing. Ms. Murphy of the department is available and will provide us with information on this proposal.

**Dr. Gutierrez** Ms. Murphy, please go ahead.

**Vanessa Murphy** Thank you.

**Vanessa Murphy** I am here today asking the council members to vote on a renewal of the COVID-19 Testing and Reporting Emergency Regulation Package, which adds two new sections to Part 2 of the state sanitary code, Sections 2.9 and 2.62. This emergency regulation was adopted by council members on September 2nd. Section 2.9 requires schools to submit daily reports to the Department of All COVID-19 testing, including positive test results, which assist the department in closely monitoring incidents and

prevalence of COVID-19 in school settings. Section 2.62 permits the Commissioner to issue determinations requiring routine COVID-19 testing in certain settings based upon incidence and prevalence of COVID-19, as well as any other public health or clinical risk factors related to COVID-19. This section also permits the Commissioner to make such testing requirements contingent upon whether an individual is fully vaccinated. As you may be aware, the Commissioner issued a determination pursuant to Section 2.62 in September, which outlines the specific requirements for testing in school settings. We are asking council members to vote on a renewal of this emergency regulation due to the continuing national trend identified by the CDC and the Department of Increasing Circulation of the SARS-CoV-2 Delta variant as previously described cases in New York are over tenfold their level since late June and greater than 99 percent of the sequence recent positives in New York state are the Delta variant.

**Dr. Gutierrez** Thank you very much, Ms. Murphy.

**Dr. Gutierrez** Before we proceed with further comments or questions, may I have a motion for this regulation which is coming to us after approval in the previous session?

**Dr. Gutierrez** Can I have a motion?

**Dr. Watkins** Motion.

**Dr. Gutierrez** Dr. Watkins.

**Dr. Gutierrez** A second?

**Dr. Gutierrez** Dr. Yang.

**Dr. Gutierrez** Let's continue the discussion.

**Dr. Gutierrez** Are there any members of the committee council that wish to ask questions of Ms. Murphy?

**Dr. Gutierrez** Yes, Mr. Kraut.

**Jeffrey Kraut** Is this the regulation where we also clarified the role of the physician assistant?

**Vanessa Murphy** No, that was the previous regulation that Mr. Karmel just presented on 2.61.

**Jeffrey Kraut** Okay.

**Dr. Gutierrez** Any other questions or comments?

**Dr. Gutierrez** If not, are there any questions or comments from the public?

**Dr. Gutierrez** I don't have anybody listed.

**Dr. Gutierrez** Let's put it to a vote.

**Dr. Gutierrez** All in favor?

**Dr. Gutierrez** Opposed?

**Dr. Gutierrez** Abstentions?

**Dr. Gutierrez** The motion carries. This regulation now goes to full council.

**Dr. Gutierrez** Last on the agenda is one regulation for information purposes only, and this deals with abortion services. Ms. Carol of the Department is available to provide us with information on this proposal.

**Dr. Gutierrez** Ms. Carol, please go ahead.

**Ms. Carol** Hi. Thank you for having me today. My name is Megan Carol. I'm an employee at the New York City Department of Health. Today, we're providing information on an update to Section 756.3 and a repeal and update to Section 756.4 of the Title 10 Public Health Law. The amendments to 756.3 represent a few changes to the language to remove outdated language and requirements in the current abortion regulation to ensure that the regulations better align with current standards of practice nationally recognized standards of care. They also update outdated and stigmatizing language, requiring emotional assessment of abortion patients, and they allow providers to use their clinical judgment in making care decisions around required testing. The repeal and replacement of section 756.4 removes a requirement that would help ensure that New York state's regulation is compliant with federal case law on admitting privileges for providers. This also aligns with other New York State abortion laws passed and as part of the Reproductive Health Act, and it changes the language from being physician focused to allowing health care practitioners within a broader scope of practice to provide abortion services. So that's the sort of substance of those updates.

**Dr. Gutierrez** Thank you very much, Ms. Carol.

**Dr. Gutierrez** Remember, this is just for information only.

**Dr. Gutierrez** Are there any questions from the committee or the council for Ms. Carol?

**Dr. Gutierrez** Yes, I have Mr. Berliner.

**Dr. Gutierrez** Dr. Berliner, go ahead.

**Dr. Berliner** Just a question. Why would we want to come into accord with the federal guidelines on abortion, given that it's likely that those are going to become much more strict?

**Ms. Carol** It's to help us come in accordance with actually federal case law that prohibits requiring physicians performing abortions have admitting privileges at a local facility. A federal case law struck down that requirement, and that was written into our old regulation. This removes that requirement.

**Dr. Gutierrez** Any other questions or comments. Please raise your voice on this, I cannot see the entire screen.

**Dr. Gutierrez** I see a hand up, I think is Ann Monroe.

**Ann Monroe** Yes, thank you.

**Ann Monroe** Is this on?

**Dr. Gutierrez** Yes.

**Ann Monroe** I would just like you to restate the question that Dr. Berliner raised or your answer to that. Is there anything that would change our commitment if and when the federal regulations change by tying these changes to the federal regs?

**Ms. Carol** I can just clarify. It's making sure we comply with federal case law, not federal regulations. So the case law that we're going to we have to comply with. I'm just going to pull up the title of it. It was in *Whole Women's Health v. Hellerstedt* and *June medical services*, which both came out in 2020, which struck down state laws that required providers have admitting privileges. Our regulations still had some language around that admitting privileges requirements, so this make sure that our regulations comply with that federal case law.

**Ann Monroe** Excuse me. What did you say? States that require what? It's just hard to hear you.

**Ms. Carol** Sorry. States that would require physicians have admitting privileges at a hospital.

**Ann Monroe** We're taking that out.

**Ms. Carol** Yes, correct. We're removing that.

**Ann Monroe** Thank you.

**Dr. Gutierrez** Any other questions or comments?

**Dr. Gutierrez** Since this is only for information, there is no vote necessary for this today.

**Dr. Gutierrez** This complete today's business of the Codes, Regulation and Legislation Committee.

**Dr. Gutierrez** I hand over the Chair to Mr. Kraut.

**Jeffrey Kraut** And before we end the committee, I just want to bring something to your attention, which we had sent to you. At the October 7th Codes Committee, we had an extensive discussion regarding the proposed draft regulations about the nursing home minimum direct care spending, clinical staffing in both the general hospitals and minimum staffing for nursing homes. We discussed the draft regulations and we were informed that these had closely followed the legislative actions that were enacted as part of the 2021/2022 executive budget. Now, the members raised a number of questions about aspects of those relationships, and we asked our concerns to be shared with the legislative leaders who drafted those regulations, and we did receive a substantive letter from Assemblyman Richard Godfrey to Chair the Assembly Health Committee and Senator Gustavo Rivera, whose Chair of the Senate Health Committee. We had a letter which addressed those concerns that we raised to the best of their ability. They also urged

us to expeditiously approve the proposed regulations. Those regulations will be returning to us. I just wanted to remind everybody of the letter we got when it gets published in the state register, they'll be public comment and it's going to be returning back to the council. I just wanted to acknowledge and thank the legislative leaders for responding to our questions and sending us a letter.

**Jeffrey Kraut** Is there any other comment?

**Jeffrey Kraut** Mr. La Rue.

**Scott La Rue** Good morning. Scott LaRue, a member of the full council. Mr. Kraut, I just wanted to comment. Of course, we appreciate the response from the legislative leaders on this very significant issue facing the long term care homes. They point out in the letter that there was 64 million allocated for this. I just want to mention that 64 million does not even cover one third of the cost of this requirement, and that funding would have been for one year and it doesn't cover a third. And the homes that don't meet the 70/40 requirement of staffing are not eligible for the 64 million. You're going to have homes that are doing everything in their power to meet the requirement and want to meet the requirement, but are in rural areas or other places given this significant staffing shortage that are not able to meet it and are going to be financially penalized for doing so. I continue to have very significant concerns about this pending implementation of this legislation.

**Jeffrey Kraut** Can I just add something?

**Dr. Gutierrez** Of course.

**Jeffrey Kraut** If you take Scott's comments and others, Mr Holt and others that represent long term care, and you also add on the comments that were made by Ms. Lipson and the letters we've received from other industry representatives. What we're actually seeing is significant stress and trouble in long term care. Instead of approaching this piecemeal and I think this is something that we've discussed a desire to have a concern, a kind of a more holistic discussion from a policy perspective on the future of long term care in the state and the manner in which that a future vision is going to be funded. We're constantly hearing comments like this, and it's one of the things we've tried to put on our topics of discussion. I hope that our, you know, the leadership of the department that obviously is here with us today would be able to make this a priority because it is increasingly without being repetitive, the challenges are coming in a very difficult way, and the economics only exacerbate those challenges, as Scott has and others have pointed out. I don't know if we expect the department necessarily to respond to each point. I think you're hearing a major concern that that requires a comprehensive policy revisiting on so many levels.

**Jeffrey Kraut** I'll just leave it at that.

**Tom Holt** Tom Holt, member of the council. A question and a comment, please.

**Dr. Gutierrez** Go ahead.

**Tom Holt** Wwhat we discussed last month, will that be coming to the full council for the December meeting?

**Jonathan Karmel** Two of the nursing home staffing regulations, the 3.5 and the 70/40 were just published yesterday in the state register, so that 60 day public comment.



Mathematically, it won't be ready by January. However, the statute does take effect January 1st of 2022, and it is prescriptive enough where that would be followed.

**Ann Monroe** Can you speak up a little bit?

**Jonathan Karmel** Sure. It will with the statute is prescriptive enough where it will become, you know, the law without the regulation in place at that time, but it should be done very shortly after that.

**Tom Holt** And then just a comment, and it aligns with what's been said previously. What will be coming back to us at some point presents a particular challenge for someone like me who's going to be asked to vote for a code that despite having ever desire to want to comply with, won't be able to. And it just creates a pretty unique challenge for at least me personally here.

**Jonathan Karmel** I understand.

**Dr. Gutierrez** Thank you very much.

**Dr. Gutierrez** Any other questions or comments?

**Dr. Gutierrez** If not, move with what I presented before. The committee is done with this agenda.

**Dr. Gutierrez** Thank you very much.

**Dr. Gutierrez** And on to Jeffrey Kraut, please.

**Jeffrey Kraut** Thank you very much. Dr. Gutierrez, members of the committee.

**Nilda Soto** Oh, I'm sorry. Dr. Soto, do you want to say something?

**Jeffrey Kraut** You went on mute.

**Nilda Soto** I said somebody in Albany was raising their hands.

**Jeffrey Kraut** Ann Monroe.

**Dr. Gutierrez** Go ahead.

**Ann Monroe** Ann Monroe, member of the council. I just have a process question, and I don't know if it's for the council or the department. But yesterday, at a legislative hearing, several representatives from various associations came and expressed their concern that the executive order that allowed people to work perhaps without the normal supervision or really step up to work that that executive order expires before the end of November. I'm just wondering if those executive orders come before this council or how those become either permanent regulations or just expire. It's a process question for, as I said, either the council or the department.

**Jeffrey Kraut** Why don't we have the attorneys, our counsel, answer that in the department?

**Jonathan Karmel** The executive orders are issued by the Governor, so they wouldn't necessarily become permanent unless there was a statutory change to the extent that statute is being expressly waived pursuant to the executive order. To answer your other question, they would not come before.

**Ann Monroe** What we look at is different from the governor's executive orders. The emergency regs that have been adopted are not considered executive orders?

**Jonathan Karmel** That's correct.

**Ann Monroe** One would assume it will just expire towards the end of November. Is that accurate?

**Jonathan Karmel** I couldn't tell you. The original executive order was renewed, so that was set to expire. Now, we're coming up to another deadline. I think that there's that expectation that it would continue so long as the the executive order the emergency identified in the executive order is the staffing shortage. I expect that to the extent that that continues, that the executive order would continue.

**Ann Monroe** We do not look at those here in the council.

**Jonathan Karmel** Correct.

**Ann Monroe** Thank you for clarifying that.

**Jeffrey Kraut** If there's no other questions, I'm going to call to order the meeting of a special meeting of the Public Health and Health Planning Council for November 18th, 2021. I want to welcome members, participants and observers. In the previous meeting, Dr. Gutierrez laid out some of the requirements of the public meeting law, which this meeting is bound by. We are webcasting it. Anybody who's appeared that should record their record of appearance. And as being webcasted, we want to make sure that everybody has the ability to speak and recognize that the microphones are hot. With those of you participating via Zoom, we ask you to mute your line until such time as you want to make a comment and or are going to vote on a matter.

**Jeffrey Kraut** Today's special meeting has one agenda item. It's going to be a presentation by Dr. Gutierrez and the Codes Committee and Regulations Committee. And then following that meeting, I'll adjourn it and we will now return to the committee day activities of Mr. Robinson and the project review.

**Jeffrey Kraut** I'll ask Dr. Gutierrez to please present regulations for emergency adoption.

**Dr. Gutierrez** Thank you very much, Mr. Kraut.

**Dr. Gutierrez** Good morning. At today's meeting of the Committee on Codes, Regulation and Legislation, the committee review and voted to recommend the adoption of the following five emergency regulation proposals for approval before the full council. The first one was for emergency adoption in the investigation of communicable diseases, isolation and quarantine. Ms. Murphy from the department is presence, should there be any questions for the members. At this moment, I move to accept this emergency regulation.

**Jeffrey Kraut** I have a motion from Dr. Gutierrez.

**Jeffrey Kraut** May I have a second?

**Jeffrey Kraut** I have a second by a Dr. Berliner.

**Jeffrey Kraut** I think you've heard the presentation made by the department on these emergency regulations. Are there any questions from any member of the council who either on the Codes committee or not? Any member about any one of the regulations we're being asked to adopt?

**Jeffrey Kraut** Hearing and seeing none, I am going to call a vote.

**Jeffrey Kraut** All those in favor?

All Aye.

**Jeffrey Kraut** All those opposed?

**Jeffrey Kraut** You can say opposed or raise your hand.

**Jeffrey Kraut** I do not see any.

**Jeffrey Kraut** Any abstentions?

**Jeffrey Kraut** I see none.

**Jeffrey Kraut** The motion carries and is approved.

**Jeffrey Kraut** Thank you very much.

**Jeffrey Kraut** I'm now going to adjourn the special meeting of the Public Health and Health Planning Council.

**Jeffrey Kraut** Go ahead.

**Colleen** Jeff, this is Colleen.

**Colleen** We have over other regulations to adopt.

**Jeffrey Kraut** Go ahead, Dr. Gutierrez.

**Dr. Gutierrez** Thank you.

**Dr. Gutierrez** For emergency adoption also, we have face coverings for COVID-19 prevention. And again, Ms. Murphy from the department is present should there be any questions of the members. I move to accept this emergency regulation.

**Jeffrey Kraut** I have a motion. I have a second by Dr. Yang.

**Jeffrey Kraut** Are any questions from any members?

**Jeffrey Kraut** Hearing none, seeing none, I call for a vote.

**Jeffrey Kraut** All those in favor?

All Aye.

**Jeffrey Kraut** Anyone opposed?

**Jeffrey Kraut** Any abstention?

**Jeffrey Kraut** The motion carries.

**Dr. Gutierrez** Number three for an emergency adoption, personal care giving and compassionate care giving visitors and nursing homes and adult care facilities. Mark Furnish and Jonathan Gomel from the department are presents should there be any questions of the members. I move to accept this emergency regulation.

**Jeffrey Kraut** I have a motion from Dr. Gutierrez. I have a second from Dr. Berliner.

**Jeffrey Kraut** Are there any questions from the council?

**Jeffrey Kraut** All those in favor?

All Aye.

**Jeffrey Kraut** Opposed?

**Jeffrey Kraut** Abstentions?

**Jeffrey Kraut** The motion carries.

**Jeffrey Kraut** Number four for emergency adoption prevention of COVID-19 transmission by covered entities. Jonathan Karmel from the department is pressing should there be any further questions from members of the council. I move to accept this emergency regulation.

**Jeffrey Kraut** I have a motion.

**Jeffrey Kraut** May I have a second?

**Jeffrey Kraut** Dr. Berliner, thank you.

**Jeffrey Kraut** Any questions from the council?

**Jeffrey Kraut** Dr. Lim.

**Dr. Lim** I just would like to reiterate again for the council record that if there's any flexibility that the DOH can provide, it would be very appreciated.

**Dr. Lim** Thank you.

**Jeffrey Kraut** And I think in the response to the question, the DOH acknowledged that there would be.

**Jeffrey Kraut** Mr. Thomas.

**Mr. Thomas** Thomas, a member of the council. And I, we probably covered it earlier, but just for clarification, this is an emergency adoption and will ultimately be subject to a public comment period.

**Mark Furnish** That's correct.

**Mark Furnish** Thank you, Mark.

**Jeffrey Kraut** Any other questions on this?

**Jeffrey Kraut** I think I also pointed out this was the reg where we're now acknowledging the statutory role of physicians assistants wherever it basically says physicians, and that has been an issue. I know that that's not fixed in this as well.

**Jeffrey Kraut** Any others?

**Jeffrey Kraut** Okay.

**Jeffrey Kraut** All those in favor?

All Aye.

**Jeffrey Kraut** Opposed?

**Jeffrey Kraut** Abstentions?

**Jeffrey Kraut** The motion carries.

**Dr. Gutierrez** Number five and last for emergency adoption, COVID-19 reporting and testing. Vanessa Murphy from the department is present should there be any further questions for the members. I move to accept this emergency regulation.

**Jeffrey Kraut** I have a motion. I have a second by Mr. Thomas.

**Jeffrey Kraut** Any questions or comments?

**Jeffrey Kraut** All those in favor?

All Aye.

**Jeffrey Kraut** Opposed?

**Jeffrey Kraut** Abstentions?

**Jeffrey Kraut** The motion carries.

**Dr. Gutierrez** The following regulations were also discussed for information purpose. There will be no voting on this. And it will be repetitive. Remember you mentioned that before. For information, the investigation of communicable diseases, isolation and

quarantine. For information, face covering of COVID-19 prevention. For information, personal care giving and compassionate care giving visitors in nursing homes and adult care facilities. For information, prevention of COVID-19 transmission by covered entities. And last for information, abortion services.

**Dr. Gutierrez** This completes the report of the Special Committee on Codes, Regulation and Legislation.

**Dr. Gutierrez** Thank you very much.

**Jeffrey Kraut** Thank you very much, Dr. Gutierrez.

**Jeffrey Kraut** I am now going to adjourn the Public Health and Health Planning Council.