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Tom Holt Good morning. I'm Tom Holt, and I'm the Chair of the Committee on Codes, Regulations and Legislation. I have the privilege to call to order the Special Codes Committee meeting and welcome members, participants and observers. I'd like to remind the council members, staff and the audience that this meeting is subject to the Open Meeting Law and is broadcast over the internet. The webcast are accessed at the Department of Health's website. The on demand webcast will be available no later than seven days after the meeting for a minimum of thirty days. A copy will be retained within the department for four months. There are some suggestions or ground rules to follow to make this a successful meeting. Because there is synchronized captioning, it's important that people don't talk over one another. 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 yourself as a council member or DOH staff. This will be of assistance to the broadcasting company who's recording this meeting. Please note that the microphones are hot mics, meaning that they will pick up every sound. I therefore ask that you avoid rustling papers next to the microphone and also be sensitive to personal conversations or sidebars as the microphones will pick up this chatter. A reminder for our audience, there is a form that needs to be filled out before you enter the meeting, which records your attendance at these meetings, as required by the Commission on Ethics and Lobbying in Government and in accordance with Executive Law, Section 166. The form is also posted on the Department of Health's website under Certificate of Need. In the future you can fill out this form prior to attending these meetings. Thank you for your cooperation in fulfilling our duties as prescribed by the law. I call to order the Committee on Codes, Regulations and Legislation. For members of the public, a couple of additional ground rules. You'll need to limit your comments to three minutes or less. I will be the timer and I'll give you a warning when there's one minute remaining. Presenters are limited to one person per organization. Please be prepared to deliver your comments promptly after your name is called. Your name will be called in order. Move close to the front and deliver your remarks. For folks who perhaps haven't done this in the past, I will just warn you or advise you, you got to hit the mic till the red button comes on and put it as close to you as you can in order to be heard. There are four regulation proposals on the agenda for today, the first being hospital and nursing home personal protective equipment requirements. I do note initially that the department has determined that it will not present the hospital and nursing home PPE requirement regulations for final adoption at this time. Therefore, this item is being removed from the agenda for permanent adoption and will be presented this morning for emergency adoption only.

Tom Holt Can I have a motion or a recommendation of adoption of this emergency regulation to the full Public Health and Health Planning Council.

Tom Holt Dr. Gutierrez.

Mr. Kraut Second.

Tom Holt Mr. Kraut.

Tom Holt Thank you.

Tom Holt Ms. Jaclyn Sheltry and Jonathan Karmel of the Department are available and will provide us with information on this proposal.

Jaclyn Sheltry Good morning. I'm Jackie Sheltry. This regulation has been presented to the committee before and remains unchanged from prior presentations. Specifically regarding hospitals, this emergency regulation would amend Section 405.11 of Title 10 to require hospitals to maintain a sixty day supply of PPE. It sets forth calculations for each required type of PPE, which would be multiplied by the hospital's number of staffed beds, in addition to one other specific multiplier as set forth in the regulation. It also provides that for hospitals, the Commissioner has discretion to increase the PPE supply, stockpile supply that is from sixty days to ninety days in the event of a declared local or state public health emergency. If further directs, the hospitals should rotate through their stockpile to reduce waste and maximiz shelf life. In addition, regarding nursing homes, the regulation amends Section 415.19 of Title 10, again to require nursing homes to maintain a sixty day PPE stockpile. It sets forth the calculations for each type of required PPE multiplied by the applicable positivity rate, the number of the nursing home certified beds and another specific multiplier as set forth in the regulation. The regulations further define the term applicable positivity rate and set forth three possible calculations, the greater of which must be used. As with hospitals, the regulation directs the nursing home to rotate through their stockpile to reduce waste. Again, this regulation has not been changed from prior presentations and we are presenting on an emergency basis only.

Tom Holt Thank you, Ms. Sheltry.

Tom Holt Just as a reminder, this is the Codes committee and those participating members of the committee are Dr. Gutierrez, myself, Dr. Lewin, Dr. Ruggie Dr. Yang and Mr. Kraut. I don't believe Dr. Watkins is with us this morning.

Tom Holt Are there questions from the committee or the counsel for the department?

Tom Holt Dr. Rugge, first, and then will be done in New York.

Dr. Rugge Thanks.

Dr. Rugge It seems clear that COVID has become quite a different rage due to vaccination, I mean, much less likelihood of surges and the need for the kind of extended protection that we're mandating. Have any studies have been done about in the last year, how often or whether hospitals or nursing homes are experiencing the need for this duration of supplies?

Jaclyn Sheltry Hi. This is Jackie Sheltry again. I'm not aware of any specific studies in terms of the need to go through these stockpiles, and I'll allow my DOH colleagues to interject if they think otherwise. I will note that we are, of course, as a surveillance agency as well, keeping tabs on whether hospitals and nursing homes are in compliance with this regulation. There are very low for both sectors non-compliance rates. They are able to maintain these stockpiles at appears for facilities statewide. Additionally, the intent of the

regulation isn't necessarily to have hospitals and nursing homes go through these in terms of their normal burn rate, but to be prepared for a pandemic scenario. I will note that although these regulations are presented on an emergency basis to ensure facilities maintain their current stockpiles, particularly through this Winter season, the department is reassessing the methodology to determine whether or not it still is the best methodology for hospitals and nursing homes to maintain adequate stockpiles in the event of a pandemic scenario.

Dr. Rugge At what point would this emergency regulation expire?

Jaclyn Sheltry The current ones expire tomorrow. If this committee approves the existing ones, it will be sixty days from tomorrow, so mid January or so. We will be back to this committee to represent them, whether on a permanent or an emergency basis, potentially with a new methodology.

Dr. Rugge Thank you.

Tom Holt In New York, Dr. Kalkut.

Dr. Kalkut My question was quite similar to John about when we would hear the results of a reassessment of the methodology and the recommendations. I think you said mid-January.

Jaclyn Sheltry The very latest before we present these regulations again. It would be the next meeting before these regulations expire.

Dr. Kalkut Thank you.

Tom Holt Thank you.

Tom Holt Are there any other questions in New York?

Tom Holt Other questions here in Albany?

Mr. Kraut I think there was a news item today that the state is starting to sell off its stockpile. I don't know if anybody is aware of that, but I think it was in the Albany Times Union today that the state GSA is selling its stockpile. It talks about if the state believes the time, you know, it needs a different stockpile requirement. It would be a good time for us to revisit, as Jackie said, you know, in the next quarter, the methodology. I think we'll look forward to that.

Tom Holt Dr. Berliner.

Dr. Berliner Thank you.

Dr. Berliner Two questions. One, how is the actual stockpile that hospitals and nursing homes have to have now being monitored? I mean, how do we know that they're in compliance?

Jaclyn Sheltry In general, both our nursing home and hospital surveillance divisions are incorporating it in their normal surveillance policies.

Dr. Berliner The second thing is, this is a little bit different because it's not about this regulation in particular. Wouldn't it be easier and logistically smoother for the state to set up warehouses than to have each individual facility have to maintain a stockpile of equipment?

Jaclyn Sheltry This is Jackie Sheltry again. I'll begin by answering your question that when we do relook at the methodology, we'll certainly take that into consideration, particularly in conversations with the industry. But for now, the current methodology and current regulations have really required the onus to be on the facilities to ensure that it's easier for them to retrieve the material and that they can determine, based on these regulations, the amount that they need to protect both their patients and staff. The onus should be on the regulated facilities to adequately protect their populations. Like I said, we can take that recommendation and any others that are recommended by the industry when we relook at the methodology for future regulations.

Dr. Berliner Thank you.

Mr. Kraut I think the most important point is, even though this is probably subject to revision, it's too important. We'd rather have it too much than too little right now. Until we find out what's just right, this is something that's important because it's expiring tomorrow that we need to renew it. That's why it's for emergency adoption and not permanent adoption.

Tom Holt Thank you, Mr. Kraut.

Mr. Kraut Tom, it's all yours.

Tom Holt Thank you.

Tom Holt Any more questions in New York, Jeff?

Mr. Kraut No.

Tom Holt I'm not seeing any here in Albany. We do have one individual who is signed up to speak. I'd ask them to come forward. Since you're our first speaker, I'll just remind you that you have three minutes. Introduce yourself as you seat, and then we'll start the clock and I'll give you a one minute warning.

Tom Holt Thank you.

Speaker 1 Good morning, members of the commission. Thanks for the opportunity. I always appreciate the fact that we have a public comment period at these meetings. I wanted to address the disturbance at the last meeting and apologize for that. We had nothing to do with that. We do not know who did that, and we regret that they acted inconsistent with the purposes of this meeting. As you've probably discovered by now, I am a member of the public who has grave misgivings about the way in which the emergency handling of the recent health crisis in the United States and around the world has proceeded. On the subject of personal protective equipment, although everybody is, of course, concerned with protecting the health of patients and staff in health care facilities, I did want to say a few things about the stories that I have been hearing from people who have the lived experience of being in the hospital under these circumstances. One of the things that we're hearing is that patients in nursing homes and hospitals are often

experiencing such an excessive imposition of personal protective equipment demands that the experience is not one of protection, but rather more one of harassment. In particular, in settings where people need to be able to breathe normally on a regular basis in order to be healthy. I think it's also really important for us to take into account many of the studies that suggest that mask wearing can actually be hazardous to people's health. It's also really important for us to consider the effect on child psychology.

Tom Holt One minute remaining.

Speaker 1 Meaning the psychological effects of having to wear masks can prevent people from understanding exactly how people are feeling and what they're trying to communicate. It can lessen our sense of intimacy and personal connection with each other, which is actually a really important component of health. That's basically what I wanted to say on this subject. I hope I get a chance to talk also about the surge and flex response later. Thank you all for your service to the state of New York and for your concern for the health of the people of the state of New York.

Speaker 1 Thank you very much.

Tom Holt Thank you.

Tom Holt I do note that you are signed up to speak on the next regulation as well.

Tom Holt If there are no other questions, then I am ready to call the vote. Just as a reminder, those voting are. Dr. Gutierrez, myself, Dr. Ruggie, Dr. Yang, Mr. Kraut and Dr. Lewin.

Tom Holt We have a motion and a second.

Tom Holt All in favor?

All Aye.

Tom Holt That motion carries and will now go to the full council for its emergency adoption.

Tom Holt The next regulation that we have for both emergency and final adoption is the surge and flex.

Tom Holt Can I have a motion for a recommendation of adoption of this emergency regulation?

Tom Holt Dr. Gutierrez.

Tom Holt Thank you.

Tom Holt Jaclyn Sheltry and Jonathan Karmel of the department are available and will provide us with information on this proposal.

Jaclyn Sheltry Good morning again. This is Jackie Sheltry. YThis regulation, as mentioned, is coming before the committee both for permanent adoption as well as emergency adoption. It has remained unchanged since prior presentations to this

committee, both on the emergency basis and final basis. The regulation amends Title 10 and Title 18, principally to add a new Part 360 to Title 10. The regulation would authorize the Commissioner of Health in the event of a declared state disaster emergency to direct regulated health care facilities to increase their acute bed capacity by up to 50%, postpone elective procedures, allow temporary physical plans changes and designate health care facilities as trauma centers. The regulation also principally directs hospitals to develop surge and flex response plans, including plans for PPE, stockpile maintenance, staffing, maintenance and increasing bed capacity.

Jaclyn Sheltry Thank you.

Tom Holt Thank you.

Tom Holt Are there questions for the members of the committee or counsel?

Tom Holt Not seeing any here in Albany.

Tom Holt Any in New York, Mr. Kraut?

Mr. Kraut The only question is we have these plans. We also know I think facilities have been surging, particularly pediatric facilities. Do we have an expedited process to implement these plans when it's necessary?

Jaclyn Sheltry I apologize. The regulation doesn't specifically direct facilities to expedite implementation, but because the plans are developed by the facilities themselves, if there is a state disaster, emergency declared facilities would be expected to implement their surge and flex response plans diligently and expeditiously whenever called upon. It's partly a facilities determination as well as the state disaster emergency.

Mr. Kraut It's only dictated when a public health disaster or public health emergency is declared.

Jaclyn Sheltry That's correct.

Mr. Kraut Thanks.

Jaclyn Sheltry Just to clarify, the implementation of the plan is only dictated when there's a state declaration of a disaster.

Jaclyn Sheltry Thank you.

Mr. Kraut Thank you.

Tom Holt Thank you.

Tom Holt Seeing no other questions, we do have one person who signed to sign up to speak. If you come forward, I think you know the process. Introduce yourself and you have three minutes and we'll notify you at two.

Speaker 1 Thanks again for the opportunity to speak on the subject, Mr. Chairman, members of the Committee. When I looked through the material on the surge and flex plan, the one thing that really stood out for me as a cause for concern was the

centralization of power under the Health Commissioner. We all hope that our public servants are going to do the right thing under these circumstances, but the last I checked, during the last crisis, there was a huge disagreement between the Attorney General and the Health Commissioner, who I think had to resign as a result of the fact that the plans and the implementation of those plans resulted in a serious crisis. I'm not sure if centralization of the surge and flex or any other health care response to any kind of emergency situation is the right way to go. I think it might make more sense for people to learn from each other or for individual best case scenarios to get shared such that a bad decision at the top doesn't affect absolutely everybody. I did also forget to mention in my comments on the other subject that positivity rates using PCR tests are known for being inaccurate. In other words, if you test with a PCR test using twenty-five or twenty-eight cycles, you're likely to get a positive rate. If you test using forty cycles, you're likely to get a negative rate. A determination on COVID positivity is really not possible. The gentleman who invented the PCR test was clear that it can't be used for diagnostic purposes. How you're going to get a good reading on COVID positivity is not clear to me. That was my main comment on the surge and flex response.

Tom Holt One minute remaining.

Speaker 1 The language regarding the centralization of the response to any health care emergency under the Health commissioner I think is ill advised. Of course, we hope that this Commissioner will do a good job in the event that there is a problem, but since many of the principles and the practices that she's suggesting that we keep in place are very similar to the ones that were put in place by the previous Health Commissioner, the members of the public with whom I'm associated and who have suffered greatly under a lot of these plans are concerned that any further centralization of power under the Health Commissioner's unwise.

Speaker 1 Thank you for your time.

Tom Holt Thank you very much.

Dr. Gutierrez I just want to go on record disagreeing with the speaker's assessment of the quality of the testing being done for COVID. I think that the tests, as they are being applied now, are excellent in terms of their sensitivity and specificity.

Tom Holt Thank you, Dr. Gutierrez.

Tom Holt There are no further questions, I will call for the vote.

Tom Holt All in favor?

All Aye.

Tom Holt Thank you.

Tom Holt That motion carries and will now go to the full council for its adoption.

Tom Holt Next up, we have for final adoption, the nursing home minimum direct care spending.

Tom Holt Can I have a motion for a recommendation of adoption of this regulation to the full Public Health and Health Planning Council?

Tom Holt Dr. Gutierrez.

Tom Holt Dr. Lewin.

Tom Holt Thank you.

Tom Holt Mr. Kraut, would you like to make a comment?

Mr. Kraut I think let the department present the reg and then I'd like to make a comment.

Mr. Kraut Thank you.

Tom Holt Great.

Tom Holt Thank you.

Tom Holt We have Adam Herbst and Mark Furnish and Jonathan Karmel from the department who will give us information on this proposal.

Adam Herbst Thank you.

Adam Herbst Good morning. My name's Adam Herbst, Deputy Commissioner for the Office of Aging and Long Term Care. This regulation on the minimum direct resident care spending is coming today for adoption. On October 7th, 2021, the department presented a previous version for information and discussion purposes. I want to first highlight some procedural history for the group today of how this regulation ended up before you. There are two regulations before you today. This one, which is the direct care nursing home spending reg. The other regulation to be presented later today is the minimum nursing staffing requirements for nursing homes. They're both the direct result of legislation creating statutes mandating these actions. This regulation is required by legislation enacted by the legislature, which became part GG of Chapter 57 of the laws of 2021. After October 7th, discussion of the original regulation to codes. This regulation was published in the New York State Register on November 17th with a sixty day public comment period that ended on January 18th, 2022. In the interim, the Governor declared a state of emergency, suspending the implementation date of the governing statute from December 31st, 2021 until April 1st, 2022 based on the workforce shortage facing the state and the nation. The Governor also suspended the implementation date to the governing statute of the minimum nursing staffing requirements for nursing homes over the same time period. On April 1st, 2022, the Governor rescinded the Executive Order that suspended these two statutes. The 2022 enacted budget included an amendment of the definition of revenue for purposes of the 7040 direct care spending legislation. As a result of the statutory change, the regulation was amended and republished in the State Register on August 10th, 2022, with a forty-five day public comment period that ended on September 26th. No changes other than the updated definition of revenue were made to the regulation. Pursuant to the State Administrative Procedure Act, a notice of proposed rulemaking expires 365 days after it is published in the State Register. Since the regulation was originally published on November 17th of last year, the department must file either a notice of adoption by the end of the day today or start the whole process over again and file a new proposed rule with another sixty day comment period. This is the last possible day that the regulation can be

adopted and filed with the Secretary of State, so that it can be placed in the state register or issue a new notice of proposed rulemaking. Amending the regulations further or delaying the vote will require a new sixty day public comment period, as I mentioned. Department is in a unique position. The two regulations presented today are legislative mandates placed on a department. To properly enforce the legislative mandate and to ensure uniformity and consistency across the industry, regulations must be in place. With that procedural history presented, I would now like to focus on some specifics of the regulation. 40% of the revenue will be spent on resident facing staffing. 70% of the revenue shall be spent on direct resident care. 15% of costs associated with resident facing staffing contracted out by the facility of nursing services shall be deducted from both of these calculations. Revenue is defined as the total operating revenue from or on behalf of residents of the residential health care facility, government payers or third party payers to pay for residents occupancy of the residential health care facility, resident care and the operation of the residential health care facility as reported in the Residential Health Care Facility Cost report submitted to the department. As mentioned previously in the 2022 executive budget, the definition of revenue was amended to exclude reimbursement for some non-operating expenses, including pandemic related emergency relief funds received from the federal government and capital costs reimbursement for high quality nursing homes. This new version of the regulation to be adopted today reflects these exclusions. Direct resident care means specific cost centers in the residential health care costs report. Resident facing staffing is defined as all staffing expenses and ancillary and program services categories found in exhibit H of the residential health care facility cost reports. This statute and regulation do not apply if 51% or more of the certified beds of the residential care facility are for specialty services or one, the primary care of the medically fragile children, two, HIV aid residents, AIDS residents, three, behavioral interventions or four, neurodegenerative diseases. Further continuing care retirement community CCRC's are not included in the statute or regulation. A residential care facility can apply to the Commissioner to have certain revenues excluded if there is a national disaster, whether federal, state or local or extraordinary non-recurring revenue such as legal settlements, for example. A facility can apply for a waiver based on providing specialty care services, primarily focused on a specialty population that exceeds 51% of certified beds. An application for a waiver must detail the percentage of the resident population needing such specialty services. If specialty services are no longer provided, the residential care facility must notify the department by January 1st of the year following the date termination of those specialty services. Additionally, a facility can apply for a waiver based on unexpected or exceptional circumstances. Facility must put in its waiver application why they cannot have anticipated this special circumstance, the steps taken to address it and when they expect it to be resolved and preventative steps taken to prevent this from occurring in the future. The Commissioner has the discretion to approve or reject a request for a waiver upon a reasonable timeframe. Factors the Commissioner must look at when considering granting a waiver or whether the facility can anticipate the event occurring, if other facilities have faced similar circumstances, but have not applied for the waiver, and whether the facility has implemented policies and procedures to ensure that such events do not reoccur. A facility shall be subject to a recruitment for the excessive total operating revenue if the facility fails to spend the minimum amount necessary to comply the minimum staffing standards for residents facing staffing 40% or direct resident care 70%, or the facility's total operating revenue exceeds total operating and non operating expenses by more than 5% of total operating revenue. Department shall annually audit the residential health care facilities cost reports for compliance. The department shall issue a notice of non-compliance to a facility subject to recoupment via acceptable forms of payment. The notice will indicate the amount to be remitted based on the amounts of excess revenue or the difference between the minimum spending requirement and the

actual amount spending for direct care staffing as applicable. If the facility did not report data in the 2019 residential health care facility cost report, they must promptly provide the department data on direct care spending and resident facing staffing expenses. Data must be submitted with a written certification by the Operator, Officer, public official responsible for the operation of the facility. Finally, if not submitted in a reasonable timeframe, the department shall use previous cost report data applicable to such facility.

Adam Herbst Thank you very much.

Adam Herbst Happy to take questions with my colleagues.

Tom Holt Thank you very much.

Tom Holt Mr. Kraut.

Mr. Kraut I know just based on, you know, information that we're going to have a lot of discussion about these regs. I just want to have both the committee and subsequently the council members to be aware of this. It's obviously a very complex bill with a lot of moving parts. There's issues about definitions, what's in, what's out. There is a context of the current environment, whether or not actually how this would be applied. I'm sure all of those will come out during the questioning. One thing I need you to bear in mind is that if we do not approve this, these regulations have been revised since they were initially done giving the department discretionary powers. There's these issue about the Commissioner can take into account mitigating factors and there was removal of some more onerous provisions of the statute or in the previous regulation, not the statute about penalties. If we fail to approve it or we do not have enough votes to advance it to the council for a full vote, the statute becomes the law of the land and it does not give the department discretionary powers that would take a lot of these factors into account. If you believe it's a flawed regulation and needs to be revised, then we should make those statements as you question. The department will keep a list of those issues. We could pass it with having it returned to the council after some subsequent time. I just want you to be aware of not approving or passing this, even though you may believe it may be flawed, may actually tie the hands of the Commissioner and the department. That may not in fact, that could be worse than some of the other circumstances. I just would like you to just keep that in mind as we have this discussion.

Mr. Kraut Tom, I turn it back to you to run the meeting.

Tom Holt Thank you for those comments, Mr. Kraut.

Mr. Kraut Not surprisingly, there are people in New York who want to speak. Scott La Rue just jumped over the table to grab the mic. I just want to let you know, he's at least teed up.

Tom Holt We certainly wouldn't want Mr. La Rue to get hurt having to go through that again. Why don't we jump over to Scott first, and Jeff, I think we'll we'll cover the questions, at least initially from the city site, and then we'll go to questions that may be here in Albany.

Tom Holt Go ahead, Mr. La Rue.

Mr. La Rue I'm gonna reserve my other questions. This was a procedural question based on Jeffrey's comment. Is it still within the ability to pass this as a emergency legislation

today and then provide the opportunity for further comment modification for a permanent regulation after the fact?

Mr. Kraut Could somebody in Albany answer to that question, please?

Mr. Kraut I believe the answer is no. One, we haven't posted it in that way. If there's emergency adoption, we would have had to have given notice.

Mark Furnish That is correct. This is Mark Furnish from the department.

Mr. Kraut We didn't hear you, Mark.

Mark Furnish That's correct.

Tom Holt It cannot be submitted at this point for emergency adoption given the posting.

Mr. Kraut If we adopted it on an emergency basis, it was posted that it would return to us in thirty days or some period of sixty days, I think it might be.

Tom Holt Thank you.

Tom Holt Are there other questions in New York?

Mr. Kraut Scott LaRue, then Dr. Torres, then Mr. Thomas, and we'll see where that leads us down here.

Mr. La Rue Good morning. My question is going to be specific about the 15% as it relates to the use of agency staff. Since the beginning of the pandemic, there's obviously been an increase in use of agency staff across the board in all facilities. This extraordinary staffing crisis has also resulted in kind of this self-destructive model where the staffing agencies are paying exorbitant fees or charging exorbitant fees, recruiting our own staff from our facilities to go work for the staffing agencies, quit our homes, go work for the agency. The ratio of the number of staff within a facility that is agency staffed now versus what it was even when we made the comments on this regulation previously has changed significantly. That's really concerning to me that there'd be a 15% discount to the use of agency staff.

Tom Holt Thank you, Mr. La Rue.

Tom Holt I'll give some personal context to that comment. We've been an organization that had historically never relied on agency staff for staffing our facilities. A nurse who we were paying $40.00 an hour to prior to the pandemic, who's now been hired by the agency, is costing us $140.00 an hour, of which that nurse is receiving $80.00. I mean, that's the real world example of what we're seeing out in the field. I'm sure others have a very similar experience to that.

Mark Furnish This is Mark Furnish from the department. If I can elaborate a little bit more on that. As has been stated several times already, this is a result of legislation that passed. In terms of the contracted staff, the regulation implements Section 28, 28 of the public health law, which mandates that 15% of costs associated with resident facing staff contracted out be discounted. The deduction reflects the fact that a portion of what is paid to the agency is not used for staffing of the nursing home. That is the reason why we have

that is because of the fees associated with the contracting out. That's why that deduction is there. I understand your point.

Tom Holt Thank you.

Tom Holt We have Dr. Torres next, did you say?

Mr. Kraut Actually, Mr. La Rue had a follow up question.

Tom Holt Go ahead.

Mr. La Rue Is the 15% in the statute from the legislature or is the 15% have flexibility within the development of the regulation?

Mark Furnish It does have ability in the regulation. However, what we wanted to do is we use that 15%, one, because it does the fees associated with that wouldn't go towards patient spending and patient care, which is what the whole purpose of the legislative intent of the statute is. We wanted to deduct that 15% out for those fees associated with contracting out, which is the intent of the legislation. That's why that thinking is there.

Mr. Kraut Dr. Torres.

Tom Holt Dr. Torres.

Dr. Torres Good morning. I echo Mr. La Rue's comments. It's distressing, but I have a question. If we cannot adopt an emergency status today and it goes before a full council, would we be able to prepare at the full council for or transition into an emergency?

Mr. Kraut We're going to take it up with the full council immediately following this. There's a process for emergency adoption. It requires a specialized packet of information to be put together and to post it in the register. There wasn't that thinking prior to today. We're confronted with the reality of the calendar, because this if we don't act, it's problematic. There's not enough time to have this done in the current calendar year.

Marthe Ngwashi Good morning. This is Marthe Ngwashi . I'm an attorney for the Department of Health. The other thing I just want to reiterate what Chair Kraut said about this regulation. And also, I believe Deputy Commissioner Herbst also mentioned that the department will take into consideration any feedback that they received today and moving forward. We'll obviously bring the regulation back if it's necessary to make any additional amendments.

Dr. Torres Can anything be done at our level to address the inconsistencies of these private entities really taking staff making twice or three times level profit? It's ludicrous, right, for an organization to be staffed again with the staff that had been theirs and now they're paying this exorbitant rate for reimbursement of services.

Mark Furnish This is Mark Furnish. In a way, these regulations will help with that because it gives the Commissioner the ability to take that into consideration when factoring all of this in. If these regulations are not passed, that ties the hands of the department to look at factors such as that.

Mr. Kraut If these regs were... If the statute was drafted in today, I suspect the legislature would take other factors into consideration, given the reality of the environment we are in. This legislation was enacted as part of the 2122 executive budget. There's a timing issue here. The environment, I mean, that's why I think it's important for the department to apply those mitigating factors. I you know, Mark, you can comment, since this is retroactive to the beginning of the year, I'll ask the question, I won't presume. There is no expectation of enforcement actions given what you know now in the environment. Is there?

Mark Furnish First of all, I wanted to clarify that it's not enacted to the first of the year, but April 1st. that. It's retroactive to April 1st. There's a snapshot in time that we have to take looking at this now. We're looking at that snapshot and we need these regulations to develop the factors that we'll take a look at for mitigation.

Mr. Kraut The department hasn't made a determination yet if we're having a staffing shortage in the nursing home industry?

Mark Furnish That's correct. We're going to make the determination. We need these regulations first as a guidepost to determine.

Tom Holt Thank you.

Tom Holt Mr. Thomas, did you have a question?

Mr. Thomas Hugh Thomas, member of council. I will hold on for the next regulation. I have more comments on that. I echo Mr. La Rue's comments this morning completely.

Tom Holt Hugh, if you could just pull it close. We're not we're not hearing you well here.

Mr. Thomas I'm sorry.

Mr. Thomas Tom, can you hear me now?

Tom Holt Yeah.

Mr. Thomas Just echo Scott La Rue's comments and Chairman Kraut's comments that the reality has changed so much in the last seven months. Mark, you're correct. I suppose if once you have the regulation effective tomorrow, you can start to evaluate staffing shortages in all nursing homes in the state because reality is a little bit disconnected from what we're talking about this morning. I'll reserve more comments for the next regulation.

Tom Holt Thank you, Mr. Thomas.

Tom Holt Dr. Rugge.

Dr. Rugge Just a couple of questions. Is it possible for us to have a time limit in terms of the approval of this regulation?

Mark Furnish Any change to the regulation, I believe would add an extra public comment period, extra sixty days. Any change today other than what we're proposing today would affect that. The question is, you know, it would delay the regulation even further out for another sixty days or so, I believe.

Dr. Rugge Would that be the equivalent of failing to pass through the regulation?

Mark Furnish Correct.

Dr. Rugge Is there any precedent or any process for us to alert the legislature about our concerns and ask for relief, help, amendment recognition of changing reality?

Mark Furnish This is Mark Furnish again. You asked that question at the last time we did this on October 7th, and on October 20th, 2021, we received a letter from the Assembly and the Senate Health Chairs implementing that we move forward with these. I have a copy of the letter if you want to see it. They said we strongly urge you to promptly make the appropriate regulations. That was in response to the question you asked on October 7th, 2021.

Tom Holt Given the questions that have already been raised on this particular regulation and the ones that I suspect will be raised next, the question then becomes, what's the department's plan? What can the council expect from the department in terms of perhaps revision to these regulations from a time frame standpoint? I think that's what has most folks concerned at this point.

Mark Furnish This is a part of the statute that it requires the regulations. We have the regulations. This will allow us to move forward because of the mitigation factors and other things and looking at the workforce. We have guidance, which we'll be issuing as well. It's a combination of all three things that will guide us going forward. This isn't the end of the story, but we'll have guidance for the regulations, but we need this framework to move forward.

Mr. Kraut Could I make a suggestion to that point? Maybe after the department has had an opportunity to issue guidance, let's just say that you have draft guidance that we might get a briefing on how those regs are going to be applied. That might determine if, you know, once you've had some experience to come back to us, whether modifications would need to be made. I mean, it's hard. It's kind of a chicken and an egg issue right now is if we pass the regs, then you're going to write the apply the methodology based on the data you'll be collecting and receiving. You may see issues there. Look, I think the bottom line is the individuals who drafted this to follow the statute and the individuals who may have drafted the statute, it's a different context. It's a different environment. Frankly, there are operating implications of unintended consequences. It's hard to pin the department down today because there's a lot of moving parts here. I think what you're hearing, Mark, is nobody wants to knowingly pass a regulation they believe has shortcomings. Neither does department. Neither do us. It's important that we do at this juncture so we can move forward. We're looking for a kind of a return back to the council to have a discussion about the process by which these regs would be implemented. I would not ask you to answer the question, but I would ask you to go back to the department and the staff and report back to us a process you can come back and talk and have a conversation.

Mark Furnish We can do that.

Tom Holt Thank you.

Tom Holt Dr. Gutierrez.

Tom Holt We had Dr. Gutierrez here and we'll come back to Scott.

Mr. Kraut Thank you.

Dr. Gutierrez I feel compelled to say this as a member of this committee, a member of the council. I feel I'm in a situation where I'm damned if I do, damned if I don't. I'm willing to go forward approving this if I can have the best assurance that the department can give us. That they will review this and bring it back or find the method that follows what Mr. Kraut presented, where we are going to have another shot at this. I fear the consequences of this going unchecked, going forward unchecked, because I'm concerned about the patients that will be affected by this. I'm concerned about the institutions that will be affected by this. I believe that we cannot afford to create more turmoil than what already exists.

Dr. Gutierrez Thank you.

Tom Holt Thank you, Dr. Gutierrez.

Tom Holt Mr. La Rue.

Mr. La Rue Good morning. Dr. Gutierrez said exactly what I was going to say, which is I think what I heard Mark say and Jeffrey propose. I know the Health Department is in a box on this because the legislature passed it and they're forced into this, but if we could have some assurance that we're going to have the opportunity that after we approve these regulation and you've had a chance to write the guidance and we all understand the implications that this will come back to the council for comment and review and suggestions of how that could be further improved. It would go a long way towards, I think, making a lot of individuals more comfortable in the box that we're caught in right now.

Tom Holt Thank you, Mr. LaRue.

Tom Holt Are there other questions from the council or the committee in New York?

Tom Holt We do have one speaker who is signed up. We just remind you to please introduce yourself and be mindful of the fact that you have three minutes to speak.

Speaker 2 Thank you, Mr. Chairman, members of the committee and any other council members. I am Neil Murray. I am the general counsel for the New York State Health Facilities Association, which is one of the two largest trade associations in the state, representing nursing homes, both from the public, the not for profit and the proprietary sector. We have over 350 facilities serving over 70,000 patients. I want to make my remarks. I want to make clear at the outset that we want to voice on behalf of the association, respectfully. I underline the word respectfully, but very vigorously oppose these regulations for all the reasons that you have already heard. I think they are specifically ill timed as well as ill conceived. I had intended here to use my three minutes to speak about both, but I'll try to confine my remarks right now to the spending regulation and I will address the staffing regulation when that comes up formally for discussion. The thing that is most baffling about both of these regulations is the fact that two years ago, just two years ago, there was a major study conducted by the Department of Health with respect specifically to staffing, but also with the spending implications. The department rejected that first because, wow, there was a huge amount of cost associated with adopting any kind of specific mandated regulations. Second, the department spoke and said in its conclusion very forcefully that what we need here is flexibility. The antithesis of

flexibility is rigidity. What do these regulations do specifically? They impose a straitjacket. They do just the opposite.

Tom Holt One minute remaining.

Speaker 2 Thank you.

Speaker 2 First of all, you're adopting these regulations across the board, one size fits all, notwithstanding the fact that a lot of the facilities here are four or five star facilities. They are also facility regardless of case mix, regardless of four or five star. You're imposing these mandates. Why are you doing that? That's a misallocation of resources. Secondly, you don't have a state plan amendment yet in effect. The law requires you to go to CMS to adopt a state plan amendment. That hasn't happened. Again, because of the time constraints here, I could speak forever on this. Let me get to the other critical issue right now facing the industry. It's been brought up. That is retroactivity. Here we are with a gun to our head here because we've got to adopt these regulations today because if we don't adopt them.

Tom Holt Please wrap up.

Speaker 2 That's a shame. You've had a year and a half to do this and you didn't do it.

Tom Holt Thank you, Mr. Murray.

Speaker 2 Thank you.

Tom Holt Dr. Rugge has a question.

Speaker 2 Yes, Doctor.

Dr. Rugge Mr. Murray, how would you advise us to proceed with our vote today?

Speaker 2 Well, I think you've already covered it. And by the way, let me just preface my remarks with one other thing. I understand Mark Furnish's referred to it. Unfortunately, the legislation is unnecessarily prescriptive, but they're asking you to adopt a regulation that I think everybody understands is a not a good one. It's a bad one. Go back to the legislature.

Tom Holt Mr. Murray, your initial response to Dr. Rugge was responsive.

Tom Holt Thank you.

Speaker 2 Thank you.

Tom Holt Do we have any other questions from the members of the committee or council?

Mr. Kraut Yes. Mr. Lawrence would like to make a comment, please.

Mr. Lawrence It appears that the legislative intent may have been well intended, but the consequences are sort of lagging behind reality of the current environment. From just a policy perspective, is there a position that the council can take addressing a letter to the legislature outlining the consequences of its action? Because it appears that we are in a

straitjacket with regard to the regulations that are being promulgated as a result of potentially faulty legislation.

Mark Furnish This is Mark Furnish. I'll defer to counsel if they disagree. As a public body, you can pass a resolution or do something of that nature to the legislature asking them to consider what you want them to consider.

Mr. Kraut I mean, last time we did communicate with them about our concerns. I received that letter on October 21st, 2021. I don't think there's a downside in doing so.

Mr. Lawrence Should it be a formal resolution from the council that is proposed and delivered?

Mr. Kraut Let's do this. Let's see if we actually adopt it or, you know, but I would come back and do that right after this. I would just make it... To make it a formal resolution, let's talk about it when we go into full council instead of just the Codes Committee and then direct me to do whatever you want me to do.

Tom Holt I'm not seeing other questions here in Albany.

Mr. Kraut Dr. Berliner wants to make a statement and hopefully we'll be able to vote.

Dr. Berliner A quick question. If we don't approve this, at what point in time does the state law go into effect? Is it immediate?

Mark Furnish The state law is in effect right now as we speak with no flexibility for the department to grant waivers or look at case by case situations or any of that. If we don't pass these regulations, we're forced to enforce the law with no ability to temper it with facts or figures or things of that nature. It's already the law of the land.

Tom Holt Thank you.

Mr. Kraut There's no other questions down here.

Tom Holt Great.

Tom Holt Thank you.

Tom Holt Colleen, I think it may make to do a voice vote.

Tom Holt We have a motion and a second and would ask for a voice vote on this proposal.

Colleen Dr. Gutierrez?

Dr. Gutierrez Reluctantly, yes.

Colleen Mr. Holt?

Tom Holt Yes.

Colleen Dr. Lewin?

Dr. Lewin Yes.

Colleen Dr. Rugge?

Dr. Rugge Yes, reluctantly.

Colleen Dr. Yang?

Dr. Yang Yes.

Colleen Mr. Kraut?

Mr. Kraut Yes.

Colleen Passes.

Tom Holt Thank you.

Tom Holt This regulation now goes to the full council for its adoption.

Tom Holt The next regulation you have before us today is minimum staffing requirements for nursing homes.

Tom Holt Can I have a motion for a recommendation of adoption of this regulation to the full Public Health and Health Planning Council?

Tom Holt Thank you.

Tom Holt Adam Herbst and Mark Furnish and Mr. Karmel from the Department are available to provide us with information on this proposal.

Adam Herbst For the record, this is Adam Herbst, Deputy Commissioner for Office of the Aging once again. This regulation on minimum nursing staff requirements is coming to you today for adoption. On October 7th, 2021, the department presented a previous version for information information and discussion purposes. This regulation is required by legislation enacted by the Legislature, which became Chapter 156 of the law 2021. The minimum staffing requirements in the statute are very prescriptive and mandate the minimum staffing hours laid out in this regulation. When this regulation was first brought to your attention on October 7th, 2021, members asked if there was a way to officially request that the Legislature amend the statute based on workforce shortages. As a result of this request, the Assembly and Senate Health Chair sent a letter to members indicating that they did not see a need to amend the legislation and that minimum staffing levels are achievable. I want to highlight the procedural history of how this regulation ended up before you today. This one, the minimum nursing staffing requirements in nursing homes, as we just discussed, the other regulation presented today was the minimum direct resident care spending. After the October 7th, 2021 discussion and the original regulation that the Codes Committee. This regulation was published in the New York State Register on November 17th, 2021, with a sixty day public comment period that ended on January 18th, 2022. In the interim, the Governor declared a state of emergency, suspending the implementation date of the governing statute from December 31st, 2021 until April 1st, 2022. Based on the workforce shortage facing the state in the nation, the Governor also

suspended the implementation date for the governing statute of the minimum direct care spending requirements for nursing homes over that same period. On April 1st, 2022, the Governor rescinded the Executive Order that suspended these two statutes. Further as a result of the public comments which advocated the removal of the $300.00 a day minimum penalty for noncompliance, it was decided to remove this provision to afford the Commissioner the maximum discretion allowed in the statute in assessing a range of penalties to account for mitigating factors. As a result of the substantive change to the original regulation, the regulation was amended and republished in the State Register on August 10th, 2022, with a forty-five day public comment period that ended on September 26th, 2022. No changes other than removing the $300.00 a day minimum penalty were made to the regulations. Pursuant to the State Administrative Procedure Act, a notice of proposed rulemaking inspires 365 days after is published in the State Register. Since the regulation was originally published on November 17th of last year, the department must file either a notice of adoption by the end of the day today, or the department will have to start the whole regulatory process over again by publishing the new proposed rule with another sixty day comment period. This is the last possible day that the regulation proposed on November 17th, 2021 can be adopted and filed with the Secretary of State, so that it can be placed in the State Register. Amending the regulation further or delaying the vote will require a new sixty day public comment period. Department once again is in a unique position. The two regulations presented today are legislative mandates placed on the department. To properly enforce this legislative mandate and to ensure uniformity and consistency across the industry, regulations must be in place. With that procedural history presented, I'd like to focus on some specifics of the regulation. At a minimum, nursing home facility shall employ certified nurse aides, CNA's, registered professional nurses, RN's and licensed practical nurses, LPN's to maintain the following staff hours per resident. 3.5 hours per resident a day must be provided by CNA'S, RN's, or LPN's. Out of those 3.5 hours, no less than 2.2 hours of care per resident per day shall be provided by CNA and no less than 1.1 hour of care per resident per day shall be provided by an RN or LPN. Compliance with minimum nursing staff requirement shall be determined on a quarterly basis by comparing the daily average of the number of hours provided for resident day using daily data available from CMS payroll based journal PBJ, which includes both the daily census and daily hours of care provided by nursing staff. The department will determine compliance based on three assessments. One, assessing whether the total daily staffing hours provided for residents by CNA's, LPN's or RN's fall below 3.5 hours of care for resident on average over the course of that quarter. Two, assessing whether at least 2.2 hours of care per resident per day was provided by a CNA or nursing training aid for the remainder of 2022 on average over the course of that quarter. Three, assessing whether at least 1.1 hours of care per resident per day was provided by an RN or LPN on average over the course of that quarter. If the facility does not satisfy the quarterly test, the department will impose a penalty of up to $2,000 per day for each day in the quarter that the facility failed to comply with the minimum staffing requirements unless mitigating factors exist. Mitigating factors include the following extraordinary circumstances. One, a facility experienced a natural disaster. Two, a national emergency affecting the facility has been declared. Three, a state or municipal emergency affecting the facility has been declared. Four, the facility experiencing catastrophic event that caused physical damage to the facility or impair the ability of facility personnel to access the facility. These extraordinary circumstances can only be applied to the satisfaction of the department if such extraordinary circumstances could not have been prevented or mitigated through effective implementation of the facility's pandemic emergency plan and that the facility complies with all disaster and emergency preparedness requirements legally required. A further mitigating factor is the existence of an acute labor shortage of CNA's, LPN's or RN's in the geographic area in which the

facility is located. To make such a labor shortage termination, the Commissioner shall issue a determination on a quarterly basis as to whether an acute labor supply shortage exists. Such determination shall be made in conjunction with the New York State Department of Labor and should consider job availability metrics developed by the DOL, including the list of job openings in New York State. The fact that a facility is in an area experiencing an acute labor supply shortage will not serve as a mitigating factor unless the facility has demonstrated to the satisfaction of the department reasonable attempts to procure sufficient staffing during the period of noncompliance. Reasonable attempts to include incentivizing new personnel through increased wage and benefit offers, and searching for personnel outside the geographic area in which the facility is located. The fact that a facility is in an area experiencing an acute supply shortage shall not serve as a mitigating factor unless the facility has demonstrated to the satisfaction of the department that has taken steps over the course of the quarter to ensure resident health and safety notwithstanding any labor supply shortage. Another mitigating factor to be considered is in the regulation is a verifiable union dispute existing between the facility and CNA's, LPN's or RN's employed or contracted by such facility that result in a labor shortage at that facility.

Adam Herbst Questions and comments.

Tom Holt Thank you, Mr. Herbst.

Tom Holt Just a question, and then I'll turn it over to the other members of the council and the committee. When we're talking about the regional determinations, how finite will that be? I ask that from the perspective from a regional perspective, where I reside, for example, is part of Erie County, which might have an entirely different set of circumstances than what we have in Southern Chautauqua County. How far down or how finite will those determinations get?

Mark Furnish We are working on getting the granularity down. We're working with the Department of Labor right now as we speak and doing and defining that because the statute doesn't articulate that, but we are working on those metrics as we speak.

Tom Holt Thank you.

Tom Holt I'll turn over to questions for the members of the committee or counsel again. Why don't we start in New York? I know Mr. Thomas deferred comments to this particular code, so why don't we start with Mr. Thomas?

Mr. Kraut Just before we do that, I'm not going to repeat the same thing I said about the importance of passing this because of the box we're in. Number two, just I want to make people aware and Tom, if you can, because of the weather conditions in Western New York, we may lose some of our members. It would be really beneficial if everybody can be pretty concise and not repetitive, so we can conclude the Codes Committee and move into the committee and just proceed with the day. Let's see what we end up. I don't want to stop anybody from talking.

Tom Holt Thank you.

Tom Holt Thank you.

Mr. Thomas My comments on this regulation really are practical, more than technical and legal. I think that, as Mr. Kraut has suggested, we are where we are as to the regulation. The reality is that and I'm not going to cast aspersions on any homes that have not been able to maintain this minimum separation since April 1. We have five and we have and it cost tens of millions of dollars. At some point, it is going to no longer be feasible for us to afford to hire agency workers to meet these standards. From our perspective, I guess the first question I would have is under this regulation, would the Commissioner have the authority? I think I know the answer, but have the authority to delay implementation of the penalty provisions for a period of a year or say, the entire calendar year of 2023, so that we can see where this acute staffing issue goes. I would say, secondly, in terms of the department and from our perspective on the ground, at least that I'm in, as you know, in the Finger Lakes region, we are waiting patiently for transformation funding that is yet to come. It's a combination of the lack of funding coming out relating to reimbursement in our homes and our complete inability to find CNA's, LPN's and RN's. Last, I'd suggest that at some point the legislature, I don't know how to do this, we'll get to the council meeting, we'll decide whether we can pass a resolution to that effect. The realities are that we simply can't continue to maintain, provide care under these circumstances with this kind of onerous penalty. What we've experienced is that homes continue to shut down beds. The acute facilities in our region can no longer discharge patients into those beds because there simply is no staff. Combination of all of those factors would warrant stepping back and at minimum evaluating whether or not the penalty can be put in abeyance, put on hold. I understand the legislation put on hold until this acute staffing problem hopefully leaves us, but that's my comment.

Mr. Thomas Thank you.

Tom Holt Thank you, Mr. Thomas.

Tom Holt Other comments in New York.

Mr. La Rue I'm going to reserve my comments till after the public has spoken.

Tom Holt Thank you.

Mr. Kraut There was a question posed by Mr. Thomas. Mark, if you could respond to that.

Mark Furnish The question was, can the department delay enforcement or penalties for up to a year while we develop the data or the situation? The answer to that is no based on the statute. The statute says that we have to follow these minimum staffing for CNA's, LPN's and RN's. What the regulations do allow for us is to set up waivers and to look at labour shortages and make determinations on it on those basis, on a quarterly basis. What would have to happen, I think, under the law and based on the regulations is you would submit your quarterly, you know, we would make a quarterly determination on the factors involved. We would proceed on that quarterly determination based on our work with the Department of Labor.

Mr. Kraut When the data supports the mitigating factors as you define them, then their penalties wouldn't be incurred if there were mitigating factors?

Mark Furnish Correct.

Mr. Kraut You have to have to establish that there are mitigating factors. You can't do it absent the work that the statute requires you to do.

Mark Furnish That's correct.

Mr. Thomas Mark, just one further comment for you and the department. Notwithstanding the ability to review the mitigating factors and not impose penalties, the existence of a possible penalty has a huge chilling effect on homes, even in the instance of where there may be discretion granted under facts to be determined in the future. You know that. I understand that you have some flexibility when the data is developed, but the fact is that that folks who are trying to manage their business probably plan for the worst, which means they will not get that kind of discretion. I offer that as a point of comment.

Mr. Kraut It'll be interesting when you see how the accountants are going to reserve. Your balance sheets and your debt capacity is going to be impacted by this as well because you're going to have to make reserves for this.

Tom Holt Jeff, are there more comments?

Dr. Soffel I have one question. I was reading the very last part of this proposed regulation where it indicates that should nursing homes find that they need more money to meet these regulations, that there may be funds available from the department that nursing homes can apply for. Is there money available for that? Is that in the budget? Is it likely to be in the budget moving forward?

Dr. Soffel I mean, it says there's money available.

Mr. Kraut Well, you know, Denise, I would say that that would be an issue that we would point to in this resolution or letter we would send the legislature that that would be an important priority. I don't know who else could speak to that, but I would certainly that would be one of the items I would suggest.

Mark Furnish I can only speak to what the regulation states that, you know, if there's funding available to that point. That's all I can say on that.

Tom Holt Was there any other follow up for the department on that?

Tom Holt Adam, did you have something else to offer the department?

Adam Herbst We hear the question and there's money being allocated has been heard. We are working on that expeditiously to see how we can implement that, whether through the state or state federal match. We will get back to the committee on this very soon.

Tom Holt Thank you.

Mr. Kraut Tom, there are no other questions other than after the public speaks Mr. La Rue would like to make a statement.

Tom Holt We have one question here in Albany with Dr. Rugge.

Dr. Rugge Will the labor shortage areas be designated proactively or retroactively? Will the facilities know whether they are candidate shortage in advance or not?

Mark Furnish The way it works is that there's a quarterly determination by the Commissioner independent of what individual homes do.

Dr. Rugge Does that apply to the next quarter or the previous quarter?

Mark Furnish It would apply to the quarter that's in question at the time. It'd be the current quarter.

Dr. Rugge Okay.

Dr. Rugge The quarter is coming right up. How far along are you in determining which areas of state are truly labour shortage areas?

Mark Furnish We're in the process of developing that now with the Department of Labor. We do need the regulations to be adopted to move forward with that process. It's an ongoing discussion. We will have more in the form of guidance very shortly on that.

Dr. Rugge Do you have an anticipated time frame for making those determinations?

Adam Herbst It's not on the DOH exclusively. We are working with the Department of Labor on this to get the metrics. Once we're able to conclude those conversations, which hopefully will be done soon and you know, the metrics will be developed, but it's not something that we can say without our colleagues in the DOL.

Tom Holt Thank you.

Tom Holt We do have four speakers that have signed up, three of which I think are here in Albany and perhaps one in the city.

Mr. Kraut There's no one in New York signed up to speak.

Speaker 1 I'm Jim Klein. I represent Leading Age, New York. We represent the full continuum of care of long term care providers, including over 180 nursing homes. I fully understand the limits that the council faces in implementing the statute and also the department, but the reality is it's impossible for members to comply with these levels. Based on the latest data that came out from the federal government, 75% of the nursing homes in the state don't meet one of the three standards. Members are trying at an extraordinary cost through staffing agencies, through bonuses, through incentives. Many of them are also dealing with it by lowering their census. That's creating this health care crisis in New York. It's happening right now. If you read the Times Union today, you'll hear about the EMS people waiting hours before they can get into the ER's, which are backed up because they can't get people up on the floors because they can't discharge them to nursing homes. Right now, there are 6,700 more empty nursing home beds. These are certified beds that are empty because you can't get the staff. If you could get the staff and feel like you could run it safely, if you don't hit these arbitrary numbers that are not case suggested, don't take in the rec and activity staff, you'll be penalized and then you'll have even less money in order to try and meet the requirements. Mr. Thomas hit the nail right on the head when he said, we are not going to be able to change the business model overnight. We really need the department in regard to this regulation to work with DOL and declare that there is an acute labor shortage and say something publicly that it is not going to change anytime soon. That's the only way you're going to get facilities to begin to open

up and start taking more admissions. The ultimate solution to this is more money. It's the only solution. New York has the worst Medicaid rate when you compare cost of providing care to the revenue provided. 70% of the days covered are from Medicaid. There is no place to shift the cost. Because of the lack of increases over the last fourteen years, we are way behind. We've had good discussions with the department about the allocation of 187 Million that's available, but just to give you some context, that's only 2.5% if it was spread across the board. Just to give you some context, Wisconsin just put up 500 Million for staffing in nursing homes. Pennsylvania did 17.5% across the board. New York State stands out as an outlier in completely neglecting the funding of care. I'd be happy to answer any questions.

Tom Holt Thank you, Mr. Klein.

Tom Holt Next, we have Mr. Murray.

Speaker 2 Thank you.

Speaker 2 Very quickly. The staffing regulations are counterintuitive based upon what the reality of the situation is, as Mr. Klein has referred to, and I think a lot of members of the council are well aware of as well. Why in the world are we penalizing facilities 15% if they have no choice other than to get agency staffing? You mentioned that there may be some facilities that create an agency staff. There are a lot of facilities that do not and they have no choice whatsoever. We turn around in the face of a Governor's Executive Order declaring a statewide emergency disaster. We are only going to exacerbate the situation. You're not going to ameliorate it if you start penalizing facilities $2,000 a day on top of that for regulations they cannot abide to even if they wanted to. With that, affordability. There's been questions here. How are you going to fund this? My understanding that there is money in the budget, 187 Million, to be exact, to be expended over four quarters, but it is contingent upon a state plan amendment approval from the federal government, which hasn't been forthcoming, notwithstanding the fact that the legislature mandated that you go and get this state planning amendment. They did that a year and a half ago. Now, we're faced with a gun to our head. I can't imagine anything that is more dysfunctional than a government and a council that's presented with you've got to do this today, when we could have had debate about this and proposed regulations back several months ago, we could have provided you with the input at that time. You could have made the changes so that we could adopt this today. This is a poster child for dysfunctionality. I don't buy the fact that the regulations suddenly all of a sudden had to be at this meeting today. We had plenty of time. With that, let me give you one other constructive proposal. The staffing mandate is too narrow. It only talks about resident facing staff in terms of nurses and nurses aides. There are a lot of other people, other disciplines, therapy, social workers. Those are resident facing staff. If you included them in the definition of resident facing staff, I think that would help to mitigate. I don't think it would resolve the problem, but I think it would help to mitigate that. The last thing I would like to know, in order for our clients to manage their business and our members to manage their businesses. Is the department or is that department not going to apply these regulations retroactively? Here it is. It's almost the end of 2022. We're going to have regulations in place that now we have to apply to retroactively, which obviously in this world we're not in a metaphysical club. We're in the real world. We can't turn back the clock and comply with regulations that have yet to be adopted.

Speaker 2 Thank you.

Tom Holt Thank you, Mr. Murray.

Speaker 3 Thank you, Chairman Holt.

Speaker 3 My name's Andrew Cruikshank. I'm CEO of Fort Hudson Health System. You've heard some comments from providers, provider associations. I want to give you a firsthand view. I've been a provider for thirty-five years. I want to speak directly to the staffing, minimum staffing ratios. In our facility for over five decades, we've been very confident in our ability to hire and retain staff. That was under normal conditions. We're not under normal conditions anymore. My message is simple. The current minimum staffing ratios, despite our monumental and unreimbursed efforts, are simply unattainable. Not for lack of trying, not by a long shot. I'd like to comment briefly on two things. One is what we are doing as a provider and what the impact is on our local health care community. The first area is, what are we doing? I think the more apt question is what aren't we doing? We have every conceivable strategy in place and have been in place for months, going on over a year. Social media, print, radio, you name it. Hundreds of thousands of dollars unreimbursed that we're investing to try to attract and retain staff to the field and to Fort Hudson. Sign on bonuses, tuition reimbursement, you name it. It's all in the arsenal. Despite all of our investments and strategies, we are unable to come close to filling our positions. Overall, we have a 30% deficit in our FTE's. For hard to fill shift, 50% deficit. Put the staffing crisis aside, we're competing with other providers with greater means and greater appeal. We can't compete with acute care salaries. We can't compete with primary care. Quite frankly, we can't compete with Walmart. That is a shame. It's no secret why this condition exists. Look no further than the last fourteen years of the actions of the governors and the state legislature. We're still living on rates from 2007 without a single inflationary adjustment.

Tom Holt One minute.

Speaker 3 Thank you.

Speaker 3 The second is the impact in the health care delivery system. To be brief, in our local community our hospital is backed up like never before with patients that need to get to a nursing home. Meanwhile, I have twenty empty beds. I'm one of the fortunate ones. Twenty empty beds where there's twenty people in the hospital that could use those beds making room for people who are in emergency department are getting backed up. That's our reality. We're not the only community. I think you know that. I know there's many good intention to advocates who will argue that staffing ratios create accountability. I will tell you, those are two mutually exclusive areas. What this will do, this mandate, it will create another insurmountable barrier for the quality long term care providers. We've already been battered by COVID, by staffing and everything else. It's going to keep the hospital beds filled with people who simply don't belong there.

Speaker 3 Thank you very much.

Speaker 4 Good morning. I'm a CNA at Yorktown Rehab and Nursing Center.

Tom Holt Ms. Brown, if you would just pull the microphone right up close, please.

Speaker 4 Can you hear me now?

Tom Holt Closer is always going to be better. We want to make sure we hear your comments.

Speaker 4 Okay.

Speaker 4 I'm a CNA Yorktown Rehab and Nursing Center and an 1199 member. It's important to strengthen and enforce new law. Would improve nursing home staffing, ensure quality care for the residents. There must be law because I've already seen too many nursing home owners will not do what is necessary on their own even when they make a lot of money. They always say they don't have enough money for staff. They cannot afford. Now, the law will require. That should have been done a long time ago. Short staffing has been going on for a long time, but only become known in the pandemic, during the COVID pandemic. One wondered if we had not been taught that tragedy if the staffing issue would have been even at you. Thank goodness it have been. To regulation need to be in permanent. Residents Family leave their loved ones in our care, nursing, dietary workers, housekeeping. it's our job to meet the resident needs where they are and provide best quality care we can.

Tom Holt One minute remaining.

Speaker 4 We cannot do that. Employee nursing home owners give us tools we need to do the job. Number of member and been enough staff. Important CNA do not have job given. Thirteen to twenty resident to care for at once. I feel terribly that I cannot do my job. I have not been able to give my residents the care they deserve. I have friends and family who work at nursing homes where things are not as bad. I know that if an employee would invest money.

Tom Holt Thank you, Ms. Brown.

Tom Holt Your time has expired.

Speaker 4 Okay.

Tom Holt Thank you for your comments.

Tom Holt That concludes the speakers and is signed up here in Albany. Again, there's no one in New York.

Tom Holt We'll go back to the council and the committee.

Tom Holt Mr. La Rue, you had a question or comment?

Mr. La Rue I have a couple of comments to make. I won't make any additional comments at the Public Health Council. Some of this is going to be a repeat, but I think it's important that it be said. First, I want to explain the process as I understand it and has been presented to me by legal counsel for the Public Health Council. Today, we're being asked to vote on regulations that the Department of Health developed to fulfill their legal requirement to enact the legislation passed by the New York State legislative bodies in April of 2020. As a member, I'm being asked to vote on regulations to enact the minimum staffing that I believe in the absence of being fully funded by the state legislature has the potential to jeopardize the future of the ministry I'm responsible for leading. As of this date, my organization's nursing home portfolio previously on a solid financial footing has lost

over 13 Million in nine months. This deficit is a direct result of our best efforts to meet the minimum staffing legislation requirement through agency staff, traveling nurses, bonuses, increased salaries, payment of nursing student loans, premium paid for extra shifts, overtime, and a variety of other efforts. The legislation was supposed to be fully funded. Under the proposed methodology, the funding fails to cover even 50% of the cost. As a result, two of our homes who don't even qualify for the funding because in the fourth quarter of 2020, the measurement period they already were at 3.5, primarily because of special accommodations made for COVID, special units for COVID. This is now being used as the measurement period to determine in 2023 who's eligible for the funding. Before the legislation, Medicaid only covered approximately 74% of the actual cost of serving a Medicaid recipient. After implementing the staffing legislation, it now only covers 68%. There is a justifiable focus on quality in nursing homes. There has been significant public pontification by elected officials and others about the cause. This justifiable concern, however, has only been addressed to date by adding regulations and oversight. No one seems willing to pay for what they publicly say they want. I'm not against adding staffing. I'm against asking us to do it without providing the resources to do so. In the course of the worst staffing crisis to face the entire nation in nearly every industry, New York State passed new requirements for staffing that all the data at the time reflected could not be met. Back to my obligations as a member of the Public Health and Health Planning Council. The legislation was passed. It is the law. The DOH wrote regulations to enact them as they are required to do. To their credit, have attempted where the legislation allows providing mitigation under certain circumstances. However, as I understand it, if I vote no to the proposed regulations, the law will remain in effect and we will lose the benefit of their work. Given that I will vote in favor of the regulations, in many respects I feel I am voting for regulations to enact legislation that will jeopardize the future of what I care most about. Unfortunately, in this case, the best of intentions by all parties could result in the worst of outcomes for those we're all trying to serve.

Mr. La Rue Thank you.

Tom Holt Thank you, Mr. La Rue.

Tom Holt Are there other comments or questions from the members of the committee?

Dr. Rugge I can't help myself.

Tom Holt Dr. Rugge.

Dr. Rugge Just based on all this, I think to a degree we can anticipate where we're facing the possibility of real system collapse. As the long term care system is eviscerated, there's back up in the hospital, such as we've already heard. This translates into ambulances in the waiting area in the parking lots with patients that can't be accommodated in the acute care setting. Again, as I take it, our responsibility as a council is to once again to alert the legislature, to alert the Governor that we are out of step and new steps need to be taken or put the health care system at profound risk. This is very unfortunate.

Tom Holt Thank you, Dr. Rugge.

Tom Holt I want to thank all the members of the committee and council and the public who have spoken to this and the others that we've had here this morning. I think there's a real awareness and appreciation for the challenges that the industry is facing right now. It's important that we continue to be working in a very collaborative way to make the best out

of these regulations that can possibly be made. I think it's been made pretty clear that there's an expectation on the part of the council that these regulations will be back in front of us quickly so that we can address the concerns that you've heard about this morning.

Tom Holt Are there other comments or questions from the members of the committee or council?

Tom Holt Jeff.

Mr. Kraut I think Dr. Torres.

Dr. Torres Yeah, I just want to make it now. I was so moved by Mr. La Rue's and my colleague's comments that it's just a very sad day. A moment for me at least serving on the Public Health Council to hear this and the direction that we have to move into.

Dr. Torres Thank you, Mr. La Rue.

Tom Holt Thank you, Dr. Torres.

Tom Holt Colleen, I think we should do this again as a voice vote.

Tom Holt If you would call the roll, please.

Colleen Dr. Lewin?

Dr. Lewin Yes.

Colleen Dr. Rugge?

Dr. Rugge Yes.

Colleen Dr. Yang?

Dr. Yang Yes.

Colleen Mr. Kraut?

Mr. Kraut Yes.

Colleen Mr. Holt?

Tom Holt Yes.

Colleen Motion carries.

Tom Holt Thank you.

Tom Holt This regulation now goes to the full council for its adoption.

Tom Holt That concludes this morning's meeting of Codes, Regulations and Legislation.

Tom Holt Thank you.