



STATE OF DELAWARE
STATE COUNCIL FOR PERSONS WITH DISABILITIES
Margaret M. O'Neill Bldg., Suite 1, Room 311
410 Federal Street
Dover, Delaware 19901
302-739-3621

The Honorable John Carney
Governor

John McNeal
SCPD Director

June 12, 2020

Via E-mail

The Honorable Governor John Carney

Re: Nursing Home Immunity from COVID-19 Lawsuits

Dear Governor Carney:

The State Council for Persons with Disabilities (SCPD) has been actively following the disturbing trend relating to the disproportionate number of COVID-19 cases and deaths of people with disabilities and the elderly that have occurred in long-term care facilities throughout our state. Council's concerns were shared in a June 4th letter your office. To this end, we have not received a response. Council has reviewed the June 11, 2020 News Journal Article/Delaware Online article – *Delaware nursing homes, hospitals ask Carney for immunity from COVID-19 lawsuits*. In addition, SCPD has reviewed the letter from AARP opposing immunity for nursing homes: See <https://states.aarp.org/delaware/aarp-opposes-immunity-for-nursing-homes>

SCPD endorses the AARP letter and strongly opposes providing immunity to long-term care (LTC) facilities from COVID lawsuits. SCPD has the following relevant observations.

- **The tsunami of lawsuits is a myth.** While there have been over 30,000¹ deaths in long-term care facilities across the United States since the COVID-

¹ https://www.kff.org/health-costs/issue-brief/state-data-and-policy-actions-to-address-coronavirus/?utm_source=web&utm_medium=trending&utm_campaign=covid-19

19 pandemic began, during that same time only eleven lawsuits have been filed across the country alleging the negligence of a facility resulted in the death or injury of residents.²

- **Courts are the last remaining oversight protection for nursing home residents.** The usual oversight protections - family/friends, long-term care ombudsman, and adult protective services - are no longer present in facilities due to bans on visitation. As a result, the legal system is the only remaining avenue for protecting residents and holding nursing homes accountable for substandard care. Removing this last protection would eliminate essential oversight in nursing homes. Without the court system, residents have no remedy if they have experienced catastrophic personal injuries due to COVID-19 and families will have no remedy after losing a loved one due to inadequate care during this pandemic.
- **Liability for substandard care incentivizes facilities to provide high-quality care and comply with laws and regulations.** Judicial liability is a safety net to that helps ensure facilities are following both state and federal standards. When a facility knows it will be held liable for violating the law, it is more likely to provide high quality care.
- **Holding facilities liable during COVID-19 protects nursing home residents and staff and prevents spread of the virus.** Liability holds facilities accountability in meeting care standards to prevent the spread of COVID-19. Having adequate masks, gloves, and other protective gear, properly quarantining residents, and ample testing is essential. Liability pressures facilities to provide these necessary resources, which will protect residents, staff, and the general population.
- **Granting immunity waivers may result in years in which nursing homes are not held liable for substandard care.** Many experts³ have agreed that the pandemic will not halt for the next 18 to 24 months, which means that facilities may not be held liable for substandard care for up to two years from now. Facilities should not be granted widespread immunity for multiple years and it sets a dangerous precedent for expanding immunity to facilities in the future.
- **The COVID-19 crisis was foreseeable and is a direct result of years of cost cutting by nursing homes to maximize profits.** Over the past 20 years, more corporations and private equity firms have bought up nursing

² <https://www.huntonak.com/en/covid-19-tracker.html>

³ <https://www.weforum.org/agenda/2020/05/coronavirus-pandemic-last-2-years/>

homes, as they see them as large profit makers. 70% of nursing homes in the United States are for-profit.⁴ The financial success to investors from these homes is a result of cutting staffing and ignoring proper infection control. Many of the facilities hardest hit now by COVID-19 are homes that have a long history of infection control and other violations. It is perverse to grant them immunity now, after years of cost cutting and substandard care, while asking nursing home residents to pay with their lives.

- **The immunity exceptions for more egregious contact such as reckless behavior or gross negligence does not protect nursing home residents.** Currently, most cases brought against nursing homes are based on negligence theories. It is rare, even in the most egregious cases, for a jury to find gross negligence or reckless behavior. Those standards are too high. As a result, most cases would be precluded by immunity, even cases where the negligent behavior resulted in grave harm or even death. This is also confirmed in The News Journal/Delaware Online article which states: “John Culhane, a law professor at Widener University, said it is very difficult to prove gross negligence in lawsuits against health care providers.they are really always simple negligence cases.” He indicates it will also result in people not even filing lawsuits because they feel “the line is too difficult to draw”.
- **Questions of recklessness and gross negligence are for trials.** The American justice system has always relied on juries to decide the level of negligent behavior in personal injury and wrongful death trials. This determination comes AFTER a trial. In order to determine whether an action rises above just negligence factual findings must be made.
- **Immunity for nursing homes is not necessary to reopen the United States economy.** There has been much discussion both on the state and federal level that businesses will be reluctant to open because they fear liability for COVID lawsuits. Although this is very unlikely, as provenance will be prohibitively hard for plaintiffs, this is not the concern for nursing homes. Nursing homes are already open. The residents are already there. Whether a nursing home has immunity or not will have little or no bearing on the economy as a whole.

Family members are many times the “oversight” to ensure that their loved ones are being cared for in nursing homes. Given that families are prohibited, in most cases, to

⁴ <https://www.cdc.gov/nchs/fastats/nursing-home-care.htm>

visit LTC facilities, SCPD believes that providing immunity to such facilities for COVID lawsuits also constitutes negligence, and leaves residents and family members with little recourse.

The Dover Post reported on June 11th (citing June 10th statistics) that 263 of the 414 deaths in the State (64%) were people who resided in LTC facilities. This is well above an already troubling statistic of 40% nationally. SCPD implores you to please do the right thing and NOT grant immunity to nursing/LTC facilities for the aforementioned sound and ethical reasons. Now, more than ever, these facilities need to be held accountable for decent and humane care to the people and families they are required to serve and protect. Not holding these facilities accountable will only exacerbate an already appalling situation occurring in our State.

Sincerely,



J. Todd Webb, Chairperson
State Council for Persons with Disabilities

cc: Secretary Kara Walker, DHSS
Dr. Karyl Rattay, Division of Public Health
Ms. Sheila Grant, Chief of Staff
Mr. Albert Shields, Deputy Chief of Staff for Policy
Mr. Jonathan Starkey, Deputy Chief of Staff for Communications
Mr. Jordan Seemans, Director of Legislative Affairs
Ms. Yrene Waldron, Division of Health Care Quality
Ms. Lucretia Young, AARP
Ms. Elizabeth Furber, Nursing Home Residents Quality Assurance
Commission
Ms. Margaret Bailey, Nursing Home Residents Quality Assurance
Commission
Ms. Carolyn Donofrio, Delaware Trial Lawyers Association
Ms. Kathy Epler, ACLU
Ms. Laura Waterland, Disabilities Law Program
Developmental Disabilities Council
Governor's Advisory Council for Exceptional Citizens