

Personal Caregiving and Compassionate Caregiving Visitors in Nursing Homes and Adult Care Facilities

Effective date: 6/1/21

SUMMARY OF EXPRESS TERMS

These regulations are intended to implement section 2801-h of the Public Health Law (PHL) and section 461-u of the Social Services Law (SSL), as enacted by Chapter 108 of the Laws of 2021. These statutory amendments required the Commissioner of Health to promulgate regulations governing personal caregiving visitors in all licensed nursing homes and adult care facilities. According to the statute, a “personal caregiving visitor” means a family member, close friend, or legal guardian of a resident designated by such resident, or such resident’s lawful representative, to assist with personal caregiving or compassionate caregiving for the resident. Personal caregiving is defined as care and support of a resident to benefit such resident’s mental, physical, or social well-being, and compassionate caregiving is defined as personal caregiving provided in anticipation of the end of the resident’s life or in the instance of significant mental, physical or social decline or crisis (*see* PHL § 2801-h[1][a-c], SSL § 461-u[1][a-c]).

In accordance with the statutory directive, the new regulatory sections amend 10 NYCRR 415.3(d) to add new paragraphs (3), (4), and (5) concerning, respectively, personal caregiving visitation, additional provisions relating to compassionate caregiving, and authority for the Department of Health to review a nursing home’s personal caregiving visitation policies and procedures. Likewise, for adult care facilities, the regulation adds a new section 485.18 of 18 NYCRR to address general visitation rights in an adult care facility (section 485.18[b]), personal caregiving visitation (section 485.18[c]), additional provisions relating to compassionate caregiving (section 485.18[d]), and authority for the Department of Health to review an adult care facility’s personal caregiving visitation policies and procedures (section 485.18[e]).

More specifically, the regulatory amendments relating to personal caregiving visitation, as contained in the new 10 NYCRR 415.3(d)(3) and 18 NYCRR 485.18(c), provide that such visitation shall be permitted in a nursing home and adult care facility during a public health emergency declared under section twenty-four or section twenty-eight of the Executive Law, notwithstanding general visitation restrictions in the facility, and subject to certain limitations, including the need to limit or temporarily suspend personal caregiving visitation due to an increase in local infection rates, temporary inadequate staff capacity, an acute emergency situation such as loss of an essential service, or because the personal caregiving visitor poses a threat to the safety and well-being of the resident or any resident or personnel in the facility. The regulations governing personal caregiving visitation further: (i) set forth procedures for residents or their lawful representatives to designate and change their designation of personal caregiving visitors; (ii) provide that a resident shall be entitled to designate at least two personal caregiving visitors; (iii) require that all personal caregiving visitors follow infection prevention safety protocols required for nursing home and adult care facility staff, such as communicable disease testing, health screenings, and donning appropriate personal protective equipment; and (iv) set forth standards for a facility to determine the maximum frequency and duration of personal caregiving visits and the total number of personal caregiving visitors allowed to visit the facility at any one time.

The new 10 NYCRR 415.3(d)(4) and 18 NYCRR 485.18(d) establish additional provisions for compassionate caregiving provided by personal caregiving visitors. These sections set forth the situations in which a resident is eligible for a compassionate caregiving visitor and the requirements for screening compassionate caregiving visitors prior to their entry into the facility.

Pursuant to the authority vested in the Commissioner of Health by sections 2801-h and 2803 of the Public Health Law, sections 461, 461-e, and 461-u of the Social Services Law, and Executive Order 202, Section 415.3 of Title 10 of the Official Compilation of Codes, Rules and Regulations of the State of New York (NYCRR) is hereby amended and a new Section 485.18 of Title 18 of the NYCRR is hereby added, to be effective upon filing with the Secretary of State, to read as follows:

Subparagraph (iv) of paragraph (2) of subdivision (d) of Section 415.3 of 10 NYCRR is amended to read as follows:

(iv) provide immediate access to any resident by the following:

* * *

(f) immediate family or other relatives of the resident, subject to the resident's right to deny or withdraw consent at any time; [and]

(g) personal caregiving visitors, as defined in subdivision (1) of section 2801-h of the Public Health Law and pursuant to criteria specified in paragraph (3) of this subdivision, including those providing compassionate caregiving, as defined in subdivision (1) of section 2801-h of the Public Health Law and pursuant to criteria specified in paragraph (4) of this subdivision; and

[(g)] (h) others who are visiting with the consent of the resident, subject to reasonable restrictions and the resident's right to deny or withdraw consent at any time;

Subdivision (d) of Section 415.3 of 10 NYCRR is amended to add new paragraphs (3), (4), and (5) to read as follows:

(3) Personal caregiving visitors.

(i) During a public health emergency declared under section twenty-four or section twenty-eight of the executive law, the facility must continue to allow residents to access their designated personal caregiving visitors, notwithstanding any restrictions or prohibitions relating to residential health care visitation resulting from the declared public health emergency, subject to the following restrictions:

(a) If a facility has reasonable cause to believe that a resident will not benefit from accessing their designated personal caregiving visitors, and such reasoning has been documented in the resident's individualized comprehensive plan of care, a facility may require a health or mental health professional duly licensed or certified in New York State under the Education Law, and who need not be associated with the nursing home, including but not limited to a physician, registered nurse, licensed clinical social worker, psychologist, or psychiatrist, to provide a written statement that the personal caregiving will substantially benefit the resident's quality of life, including a statement from such medical provider that the personal caregiving visitation will enhance the resident's mental, physical, or psychosocial well-being, or any additional criteria evidencing a benefit to quality of life as determined by the Department. Such written statements from the medical provider shall be maintained in the resident's individualized comprehensive plan of care.

(b) Notwithstanding any provision of this subparagraph (i), a facility may temporarily suspend or limit personal caregiving visitors to protect the health, safety and welfare of residents if: the declared public health emergency is related to a communicable disease and the Department determines that local infection rates are at a level that presents a serious risk of transmission of such communicable disease within local facilities; the

facility is experiencing temporary inadequate staffing and has reported such staffing shortage to the Department of Health and any other State or federal agencies as required by law, regulation, or other directive; or an acute emergency situation exists at the facility, including loss of heat, loss of elevator service, or other temporary loss of an essential service. Provided, however, that in the event a facility suspends or limits personal caregiving visitation pursuant to this clause, the facility shall notify residents, all designated personal caregiving visitors, and the applicable Department regional office of such suspension or limitation and the duration thereof within twenty-four hours of implementing the visitation suspension or limitation. Additionally, for each day of the suspension or limitation, the facility shall document the specific reason for the suspension or limitation in their administrative records. The facility shall further provide a means for all residents to engage in remote visitation with their designated personal caregiving visitor(s), including but not limited to phone or video calls, until such time that the suspension or limitation on personal caregiving visitation has ended.

(c) Notwithstanding any provision of this subparagraph (i), a facility may prohibit a personal caregiving visitor from entering if the facility has reasonable cause to believe that permitting the personal caregiving visitor to meet with the resident is likely to pose a threat of serious physical, mental, or psychological harm to such resident. In the event the facility determines that denying such personal caregiving visitor access to the resident is in the resident's best interests pursuant to this subparagraph, the facility must document the date of and reason for visitation refusal in the resident's individualized comprehensive plan of care, and on the same date of the refusal the facility shall communicate its decision to the resident and their designated representative. Further, a

facility may refuse access to or remove from the premises any personal caregiving visitor who is causing or reasonably likely to cause physical injury to any facility resident or personnel.

(ii) The facility shall develop written policies and procedures to ask residents, or their designated representatives in the event the resident lacks capacity, at time of admission or readmission, or for existing residents within fourteen days of the effective date of this paragraph, which individuals the resident elects to serve as their personal caregiving visitor during declared public health emergencies. A resident shall be entitled to designate at least two personal caregiving visitors at one time.

(iii) The facility shall maintain a written record of the resident's designated personal caregiving visitors in the resident's individualized comprehensive plan of care, and shall document when personal caregiving and compassionate caregiving is provided in the resident's individualized comprehensive plan of care.

(iv) As part of its ongoing review of a resident's comprehensive plan of care, the facility shall regularly inquire of all current residents, or their designated representative if the resident lacks capacity, whether the facility's current record of designated personal caregiving visitors remains accurate, or whether the resident, or their designated representative if the resident lacks capacity, wishes to make any changes to their personal caregiving visitor designations. The facility shall update the resident's individualized comprehensive plan of care with the date the facility sought updates from the resident and indicate any changes to the resident's personal caregiving visitor designations therein. Such inquiries shall be made no less frequently than quarterly and upon a change in the resident's condition; upon review of a facility's visitation policies and procedures,

the Department may also require the facility inquire of any resident whether the facility's current record of designated personal caregiving visitors remains accurate.

(v) The facility shall require all personal caregiving visitors to adhere to infection control measures established by the facility and consistent with any guidelines from the Department, or in the absence of applicable Department guidance, consistent with long term care facility infection control guidelines from the U.S. Centers for Disease Control and Prevention and the Centers for Medicare and Medicaid Services. Such infection control measures may include, but need not be limited to:

(a) testing all personal caregiving visitors for any communicable disease that is the subject of the declared public health emergency, which may include rapid on-site testing or requiring the visitor to present a negative test result dated no more than seven days prior to the visit;

(b) checking the personal caregiving visitor's body temperature upon entry to the facility, and denying access to any visitor with a temperature above 100 degrees Fahrenheit;

(c) conducting health screenings of all personal caregiving visitors upon entry to the facility, including screenings for signs and symptoms of any communicable disease that is the subject of the declared public health emergency or any other communicable disease which is prevalent in the facility's geographic area, and recording the results of such screenings;

(d) requiring all personal caregiving visitors to don all necessary personal protective equipment appropriately, and providing such personal protective equipment to all personal caregiving visitors; and

(e) enforcing social distancing between persons during visitation, including personal caregiving visitation, except as necessary to provide personal caregiving by the personal caregiving visitor for the resident.

(vi) The facility shall establish policies and procedures regarding the frequency and duration of personal caregiving visits and limitations on the total number of personal caregiving visitors allowed to visit the resident and the facility at any one time. Such policies shall not be construed to limit access by other visitors that would otherwise be permitted under state or federal law or regulation. The facility shall ensure its policies and procedures respect resident privacy and take into account visitation protocols in the event a resident occupies a shared room. In establishing frequency and duration limits, the facility policy shall ensure that residents are able to receive their designated personal caregiving visitors for the resident's desired frequency and length of time, and any restrictions on that desired frequency and duration must be:

(a) attributable to the resident's clinical or personal care needs;

(b) necessary to ensure the resident's roommate has adequate privacy and space to receive their own designated personal caregiving visitors; or

(c) because the desired visitation frequency or duration would impair the effective implementation of applicable infection control measures, including social distancing of at least six feet between the visitors and others in the facility, having sufficient staff to effectively screen all personal caregiving visitors and monitor visits to ensure infection control protocols are being followed throughout, and having a sufficient supply of necessary personal protective equipment for all personal caregiving visitors.

(4) Compassionate caregiving.

(i) In the event a resident experiences a long-term or acute physical, mental, or psychosocial health condition for which, in the opinion of the resident, their representative, or a health care professional (including but not limited to a physician, registered nurse, licensed clinical social worker, psychologist, or psychiatrist), a compassionate caregiving visitor would improve the resident's quality of life, the resident or their representative shall designate at least two compassionate caregiving visitors at one time, and the facility shall record such designation in the resident's individualized comprehensive plan of care. A resident's designated personal caregiving visitors may also provide compassionate caregiving.

(ii) Situations in which a resident is eligible for a compassionate caregiving visitor include but are not limited to the following:

(a) end of life;

(b) the resident, who was living with their family before recently being admitted to an adult care facility, is struggling with the change in environment and lack of physical family support;

(c) the resident is grieving after a friend or family member recently passed away;

(d) the resident needs cueing and encouragement with eating or drinking, and such cueing was previously provided by family and/or caregiver(s), and the resident is now experiencing weight loss or dehydration; and

(e) the resident, who used to talk and interact with others, is experiencing emotional distress, seldom speaking, or crying more frequently (when the resident had rarely cried in the past).

(iii) Compassionate caregiving visitation shall be permitted at all times, regardless of any general visitation restrictions or personal caregiving visitation restrictions in effect in the facility.

Provided, however, that the facility shall require compassionate caregiving visitors to be screened for communicable diseases prior to entering the facility and visits must be conducted using appropriate social distancing between the resident and visitor if applicable based on guidance from the Department or the U.S. Centers for Disease Control and Prevention; if, however, personal contact would be beneficial for the resident's mental or psychosocial well-being, the facility shall establish policies and procedures to ensure that such necessary physical contact follows appropriate infection prevention guidelines, including the visitor's use of personal protective equipment and adhering to hand hygiene protocols before and after resident contact, and that the physical contact is limited in duration.

(5) The Department shall have discretion to review and require modifications to a facility's personal caregiving visitation and compassionate caregiving visitation policies and procedures to ensure conformity with paragraphs (3) and (4) of this subdivision and any applicable visitation guidelines issued by the Department or the Centers for Medicare and Medicaid Services.

A new Section 485.18 of 18 NYCRR, titled Personal and Compassionate Caregiving Visitation, is added to read as follows:

(a) This section shall apply to all adult care facilities, including every adult care facility regulated pursuant to Parts 487, 488 and 490 of this Title and Part 1001 of Title 10 of the NYCRR.

(b) Subject to the resident's right to deny or withdraw consent at any time, all adult care facilities must provide immediate access to any resident of visitors of their choice, including but not limited to immediate family or other relatives of the resident and any others who are visiting with the consent of the resident. Provided, however, that the facility may establish policies and

procedures to establish reasonable restrictions on such visitation, including but not limited to: setting forth visitation hours; denying access to any visitor suffering from a communicable disease; terminating visitation with any visitor causing a threat to the health or safety of any resident; and setting a cap on the number of visitors allowed in the facility at any one time. Any such restrictions or limitations on visitation shall be communicated in writing to residents.

(c) Personal caregiving visitors.

(1) During a public health emergency declared under section twenty-four or section twenty-eight of the executive law, the facility must continue to allow residents to access their designated personal caregiving visitors, as defined in subdivision (1) of section 2801-h of the Public Health Law, notwithstanding any restrictions or prohibitions relating to residential health care facility visitation resulting from the declared public health emergency, subject to the following restrictions:

(i) If a facility has reasonable cause to believe that a resident will not benefit from accessing their designated personal caregiving visitors, and such reasoning has been documented in the resident's case management record, a facility may require a health or mental health professional duly licensed or certified in New York State under the Education Law, and who is not associated with the facility, including but not limited to a physician, registered nurse, licensed clinical social worker, psychologist, or psychiatrist, to provide a written statement that the personal caregiving will substantially benefit the resident's quality of life, including a statement from such medical provider that the personal caregiving visitation will enhance the resident's mental, physical, or psychosocial well-being, or any additional criteria evidencing a benefit to quality of life

as determined by the Department. Such written statements shall be maintained in the resident's case management record.

(ii) Notwithstanding any provision of this paragraph, a facility may temporarily suspend or limit personal caregiving visitors to protect the health, safety and welfare of residents, if: the declared public health emergency is related to a communicable disease and the Department determines that local infection rates are at a level that presents a serious risk of transmission of such communicable disease within local facilities; the facility is experiencing temporary inadequate staffing and has reported such staffing shortage to the Department of Health any other State or federal agencies as required by law, regulation, or other directive; or an acute emergency situation exists at the facility, including loss of heat, loss of elevator service, or other temporary loss of an essential service. Provided, however, that in the event a facility suspends or limits personal caregiving visitation pursuant to this subparagraph, the facility shall notify residents, all designated personal caregiving visitors, and the applicable Department regional office of such suspension or limitation and the duration thereof within twenty-four hours of implementing the visitation suspension or limitation. Additionally, for each day of the suspension or limitation, the facility shall document the specific reason for the suspension or limitation in their administrative records. The facility shall further provide a means for all residents to engage in remote visitation with their designated personal caregiving visitor(s), including but not limited to phone or video calls, until such time that the suspension or limitation on personal caregiving visitation has ended.

(iii) Notwithstanding any provision of this paragraph, a facility may also prohibit a personal caregiving visitor from entering if the facility has reasonable cause to believe

that permitting the personal caregiving visitor to meet with the resident is likely to pose a threat of serious physical, mental, or psychological harm to such resident. In the event the facility determines that denying such personal caregiving visitor access to the resident is in the resident's best interests pursuant to this subparagraph, the facility must document the date of and reason for visitation refusal in the resident's case management record, and on the same date of the refusal the facility shall communicate its decision to the resident and their designated representative. Further, a facility may refuse access to or remove from the premises any personal caregiving visitor who is causing or reasonably likely to cause physical injury to any facility resident or personnel.

(2) The facility shall develop written policies and procedures to ask residents, or their designated representatives in the event the resident lacks capacity, at time of admission or readmission, or for existing residents within fourteen days of the effective date of this paragraph, which individuals the resident elects to serve as their personal caregiving visitor during declared local or state health emergencies. A resident shall be entitled to designate at least two personal caregiving visitors at one time.

(3) The facility shall maintain a written record of the resident's designated personal caregiving visitors in the resident's case management record, and shall document when personal caregiving and compassionate caregiving is provided in the case management record.

(4) As part of its ongoing review of a resident's case management needs, the facility shall regularly inquire of all current residents, or their designated representative if the resident lacks capacity, whether the facility's current record of designated personal caregiving visitors remains accurate, or whether the resident, or their designated representative if the resident lacks capacity, wishes to make any changes to their personal caregiving visitor designations. The facility shall

update the resident's case management record with the date the facility sought updates from the resident and indicate any changes to the resident's personal caregiving visitor designations therein. Such inquiries shall be made no less frequently than every six months and upon a change in the resident's condition; upon review of a facility's visitation policies and procedures, the Department may also require the facility inquire of any resident whether the facility's current record of designated personal caregiving visitors remains accurate.

(5) The facility shall require all personal caregiving visitors to adhere to infection control measures established by the facility and consistent with any guidelines from the Department, or in the absence of applicable Department guidance, consistent with long term care facility infection control guidelines from the U.S. Centers for Disease Control and Prevention. Such infection control measures may include, but need not be limited to:

- (i) testing all personal caregiving visitors for any communicable disease that is the subject of the declared public health emergency, which may include rapid on-site testing or requiring the visitor to present a negative test result from no more than seven days prior to the visit;
- (ii) checking the personal caregiving visitor's body temperature upon entry to the facility, and denying access to any visitor with a temperature above 100 degrees Fahrenheit;
- (iii) conducting health screenings of all personal caregiving visitors upon entry to the facility, including screenings for signs and symptoms of any communicable disease that is the subject of the declared public health emergency or any other communicable disease which is prevalent in the facility's geographic area, and recording the results of such screenings;

(iv) requiring all personal caregiving visitors to don all necessary personal protective equipment appropriately, and providing such personal protective equipment to all personal caregiving visitors; and

(v) enforcing social distancing between persons during visitation, including personal caregiving visitation, except as necessary to provide personal caregiving by the personal caregiving visitor for the resident.

(6) The facility shall establish policies and procedures regarding the frequency and duration of personal caregiving visits and limitations on the total number of personal caregiving visitors allowed to visit the resident and the facility at any one time. Such policies shall not be construed to limit access by other visitors that would otherwise be permitted under state or federal law or regulation. The facility shall ensure its policies and procedures respect resident privacy and take into account visitation protocols in the event a resident occupies a shared room. In establishing frequency and duration limits, the facility policy shall ensure that residents are able to receive their designated personal caregiving visitors for the resident's desired frequency and length of time, and any restrictions on that desired frequency and duration must be:

(i) attributable to the resident's clinical or personal care needs;

(ii) necessary to ensure the resident's roommate has adequate privacy and space to receive their own designated personal caregiving visitors; or

(iii) because the desired visitation frequency or duration would impair the effective implementation of applicable infection control measures, including social distancing of at least six feet between the visitors and others in the facility, having sufficient staff to effectively screen all personal caregiving visitors and monitor visits to ensure infection

control protocols are being followed throughout, and having a sufficient supply of necessary personal protective equipment for all personal caregiving visitors.

(d) Compassionate caregiving.

(1) In the event a resident experiences a long-term or acute physical, mental, or psychosocial health condition for which, in the opinion of the resident, their representative, or a health care professional (including but not limited to a physician, registered nurse, licensed clinical social worker, psychologist, or psychiatrist), a compassionate caregiving visitor would improve the resident's quality of life, the resident or their representative shall designate at least two compassionate caregiving visitors at one time, and the facility shall record such designation in the resident's case management record. A resident's designated personal caregiving visitors may also provide compassionate caregiving.

(2) Situations in which a resident is eligible for a compassionate caregiving visitor include but are not limited to the following:

(i) end of life;

(ii) the resident, who was living with their family before recently being admitted to an adult care facility, is struggling with the change in environment and lack of physical family support;

(iii) the resident is grieving after a friend or family member recently passed away;

(iv) the resident needs cueing and encouragement with eating or drinking, and such cueing was previously provided by family and/or caregiver(s), and the resident is now experiencing weight loss or dehydration; and

(v) the resident, who used to talk and interact with others, is experiencing emotional distress, seldom speaking, or crying more frequently (when the resident had rarely cried in the past).

(3) Compassionate caregiving visitation shall be permitted at all times, regardless of any general visitation restrictions or personal caregiving visitation restrictions in effect in the facility.

Provided, however, that the facility shall require compassionate caregiving visitors to be screened for communicable diseases prior to entering the facility and visits must be conducted using appropriate social distancing between the resident and visitor if applicable based on guidance from the Department or the U.S. Centers for Disease Control and Prevention; if, however, personal contact would be beneficial for the resident's well-being, the facility shall establish policies and procedures to ensure such physical contact follows appropriate infection prevention guidelines, including the visitor's use of personal protective equipment and adhering to hand hygiene protocols before and after resident contact, and that physical contact is limited in duration.

(e) The Department shall have discretion to review and require modifications to a facility's personal caregiving visitation and compassionate caregiving visitation policies and procedures to ensure conformity with subdivisions (c) and (d) of this section and any applicable visitation guidelines issued by the Department or the Centers for Medicare and Medicaid Services.

REGULATORY IMPACT STATEMENT

Statutory Authority:

The statutory authority is provided under section 2801-h of the Public Health Law (PHL) and sections 461, 461-e, and 461-u of the Social Services Law (SSL).

PHL § 2801-h and SSL § 461-u specifically authorize the New York State Department of Health (Department) to promulgate regulations relating to personal caregiving visitors and compassionate caregiving visitors in nursing homes and adult care facilities (ACFs).

SSL § 461 requires the Department to promulgate regulations establishing general standards applicable to ACFs. SSL § 461-e authorizes the Department to promulgate regulations to require ACFs to maintain certain records with respect to the facilities' residents and the operation of the facility.

Legislative Objectives:

The legislative objective of PHL § 2801-h and SSL § 461-u is to ensure residents' rights to visitation are respected by allowing residents of nursing homes and ACFs to have access to their designated personal caregiving visitors and compassionate caregiving visitors during a declared State or local public health emergency, including the COVID-19 public health emergency declared under New York State Executive Order 202. Further, the legislative objective of SSL § 461 is to promote the health and well-being of residents of ACFs.

Needs and Benefits:

These regulations are necessary pursuant to the statutory directives in PHL § 2801-h and SSL § 461-u, which direct the Commissioner of Health to promulgate regulations governing personal caregiving visitation and compassionate caregiving visitation in nursing homes and ACFs during a declared State or local public health emergency.

These regulations are beneficial insofar as they will provide clarity to facility operators and administrators, residents, and their family members regarding whether certain visitors are permitted to access a nursing home or ACF during a declared local or State health emergency, notwithstanding any visitation restrictions currently in effect within the facility.

COSTS:

Costs to Regulated Parties:

There are no anticipated costs to regulated parties. The regulations require facilities to establish policies and procedures regarding personal caregiving visitation and compassionate caregiving visitation that comply with these regulations and the governing statutes, PHL § 2801-h and SSL § 461-u. Insofar as facilities are obligated to establish policies and procedures for other facility operations, this responsibility should be managed using existing resources.

Costs to Local and State Governments:

There are no anticipated costs to any regulated parties, including nursing homes and ACFs operated by a local or State government.

Costs to the Department of Health:

This regulation will not result in any additional operational costs to the Department of Health. Any increased surveillance and enforcement activities relating to this regulation will be handled with existing resources.

Paperwork:

This regulation requires facilities to develop and maintain visitation policies relating to personal caregiving visitation and compassionate caregiving visitation. However, this requirement is expected to be of minimal burden to facilities, which are currently obligated to

develop and maintain other policies and procedures relating to facility operations, and the requirements for such visitation policies and procedures are thoroughly detailed in these regulations and the governing statutes, PHL § 2801-h and SSL § 461-u.

Local Government Mandates:

Nursing homes and ACFs operated by local governments will be affected and will be subject to the same requirements as any other nursing home licensed under PHL Article 28 or ACF licensed under SSL Article 7, Title 2. Currently, there are 21 nursing homes operated by local governments (counties and municipalities) and 6 nursing homes operated by the State. Additionally, there are currently two adult care facilities operated by county governments.

Duplication:

These regulations do not duplicate any State or federal rules.

Alternatives:

There are no viable alternatives. The alternative of not issuing these regulations was rejected given the statutory directive to promulgate these regulations, pursuant to PHL § 2801-h and SSL § 461-u.

Federal Standards:

The federal Centers for Medicare & Medicaid Services (CMS) has issued visitation guidance applicable to Medicaid- and Medicare-enrolled nursing homes, titled “Nursing Home Visitation - COVID-19 (REVISED)” (QSO-20-29-NH), dated March 10, 2021. This visitation guidance discusses general visitation in nursing homes including compassionate care visitation. The Department has reviewed this CMS guidance and finds that the proposed regulations are consistent with the CMS guidance insofar as they both relate to compassionate care visitation in nursing homes. No other federal standards apply.

Compliance Schedule:

The regulations will become effective upon filing with the Secretary of State.

Contact Person: Katherine Ceroalo
New York State Department of Health
Bureau of Program Counsel, Regulatory Affairs Unit
Corning Tower Building, Room 2438
Empire State Plaza
Albany, New York 12237
(518) 473-7488
(518) 473-2019 (FAX)
REGSQNA@health.ny.gov

REGULATORY FLEXIBILITY ANALYSIS

Effect on Small Business and Local Government:

This regulation will not impact local governments or small businesses unless they operate a nursing home or adult care facility (ACF). Currently, there are 21 nursing homes operated by local governments (counties and municipalities) and 6 nursing homes operated by the State. Additionally, there are currently two ACFs operated by county governments (Chenango and Warren Counties). Additionally, to date, 79 nursing homes in New York qualify as small businesses given that they have 100 or fewer employees. There are also 483 ACFs that have 100 or fewer employees and therefore qualify as small businesses.

Compliance Requirements:

This regulation requires nursing homes and ACFs to develop policies and procedures relating to compassionate caregiver visitation and personal caregiver visitation that are consistent with these regulations and the governing statutes, Public Health Law (PHL) § 2801-h and Social Services Law (SSL) § 461-u.

Professional Services:

No professional services are required by this regulation.

Compliance Costs:

There are no costs associated with this regulation.

Economic and Technological Feasibility:

There are no economic or technological impediments to the rule changes.

Minimizing Adverse Impact:

This regulation is consistent with resident right standards and current CMS and Department visitation guidance. Therefore, the Department expects no adverse impact to facilities given that nursing homes and ACFs are currently required to comply with similar standards and are expected to have already developed policies and procedures in accordance with those existing standards. In any event, the Department is required by PHL § 2801-h and SSL § 461-u to promulgate these regulations; as such, any adverse impact on covered facilities cannot be avoided due to the statutory mandate.

Small Business and Local Government Participation:

Due to the emergent nature of COVID-19 and the 45-day period to implement these regulations pursuant to PHL § 2801-h and SSL § 461-u, facilities operated by small business and local governments were not directly consulted. However, facilities were put on notice of the forthcoming promulgation of these regulations upon the enactment of PHL § 2801-h and SSL § 461-u, as enacted by Chapter 108 of the Laws of 2021.

RURAL AREA FLEXIBILITY ANALYSIS

Type and Estimated Numbers of Rural Areas:

Although this rule applies uniformly throughout the state, including rural areas, for the purposes of this Rural Area Flexibility Analysis (RAFA), “rural area” means areas of the state defined by Executive Law § 481(7) (SAPA § 102(10)). Per Executive Law § 481(7), rural areas are defined as “counties within the state having less than two hundred thousand population, and the municipalities, individuals, institutions, communities, and programs and such other entities or resources found therein. In counties of two hundred thousand or greater population ‘rural areas’ means towns with population densities of one hundred fifty persons or less per square mile, and the villages, individuals, institutions, communities, programs and such other entities or resources as are found therein.”

The following 43 counties have a population of less than 200,000 based upon the United States Census estimated county populations for 2010:

Allegany County	Greene County	Schoharie County
Cattaraugus County	Hamilton County	Schuyler County
Cayuga County	Herkimer County	Seneca County
Chautauqua County	Jefferson County	St. Lawrence County
Chemung County	Lewis County	Steuben County
Chenango County	Livingston County	Sullivan County
Clinton County	Madison County	Tioga County
Columbia County	Montgomery County	Tompkins County
Cortland County	Ontario County	Ulster County
Delaware County	Orleans County	Warren County
Essex County	Oswego County	Washington County
Franklin County	Otsego County	Wayne County
Fulton County	Putnam County	Wyoming County
Genesee County	Rensselaer County	Yates County
	Schenectady County	

The following counties have populations of 200,000 or greater, and towns with population densities of 150 person or fewer per square mile, based upon the United States Census estimated county populations for 2010:

Albany County	Monroe County	Orange County
Broome County	Niagara County	Saratoga County
Dutchess County	Oneida County	Suffolk County
Erie County	Onondaga County	

Both licensed nursing homes and ACFs are located in these identified rural areas.

Reporting, recordkeeping, and other compliance requirements; and professional services:

This regulation imposes no additional paperwork.

Compliance Costs:

There are no costs associated with this regulation.

Economic and Technological Feasibility:

There are no economic or technological impediments to the rule changes.

Minimizing Adverse Impact:

This regulation is consistent with resident right standards and current CMS and Department visitation guidance. Therefore, the Department expects no adverse impact to facilities given that nursing homes and ACFs are currently required to comply with similar standards and are expected to have already developed policies and procedures in accordance with those existing standards. In any event, the Department is required by PHL § 2801-h and SSL § 461-u to promulgate these regulations; as such, any adverse impact on covered facilities cannot be avoided due to the statutory mandate.

Rural Area Participation:

Due to the emergent nature of COVID-19 and the 45-day period to implement these regulations pursuant to Public Health Law (PHL) § 2801-h and Social Services Law (SSL) § 461-u, operators and other parties representing rural areas were not directly consulted. However, facilities were put on notice of the forthcoming promulgation of these regulations upon the enactment of PHL § 2801-h and SSL § 461-u, as enacted by Chapter 108 of the Laws of 2021.

STATEMENT IN LIEU OF JOB IMPACT STATEMENT

A Job Impact Statement for these regulations is not being submitted because it is apparent from the nature and purposes of the amendments that they will not have a substantial adverse impact on jobs and/or employment opportunities.

EMERGENCY JUSTIFICATION

Chapter 108 of the Laws of 2021, which amended Public Health Law (PHL) § 2801-h and Social Services Law (SSL) § 461-u, requires nursing homes and adult care facilities (ACFs) to permit personal and compassionate caregiving visitations. The new law became effective immediately and required that regulations be promulgated within forty-five days after enactment. Thus, the law authorized the promulgation of emergency regulations.

The purpose of the new law is to benefit the health and general well-being of nursing home and ACF residents. This emergency rulemaking is necessary to satisfy the statutory requirement, provide clarity to facility operators and administrators as well as residents and their families regarding the process for implementing personal caregiving requirements under the newly enacted law.

Furthermore, throughout the COVID-19 pandemic, visitation guidance for long-term care facilities has been issued by several authorities, including the Department and federal Centers for Medicare & Medicaid Services (CMS). Facility outreach to the Department and surveillance activities show that many nursing homes and adult care facilities have not appropriately adhered to these guidance documents or have implemented their own form of personal caregiving visitation policies. This emergency rulemaking will protect resident rights to visitation and assist facilities in understanding their legal obligations with respect to visitation by providing additional information as to who may access a facility during periods of visitation closure, and what, if any, restrictions can be implemented on personal caregiving and compassionate caregiving visitation.