

# NYSBA HOUSE OF DELEGATES COVID-19 RESOLUTIONS

## Resolution #1

### Recommendations

#### A. Public Health Legal Reforms and Emergency Preparedness

- A. 1. Recommend the Department of Health (DOH), (or through it, the NYS Task Force on Life and the Law(NYSTFLL)), review and consider:
  - (a) Enactment into New York Law of the **Model State Emergency Health Powers Act** (MSEHPA), developed by the Center for Law and Public Health at Georgetown and John Hopkins Universities (2001), as informed by the Columbia University Center for Health Policy Gap Analysis (2008), and as otherwise updated; and
  - (b) Adoption of the, “**Crisis Standards of Care,**” developed by the Institute of Medicine in 2012, as is, or as otherwise updated and amended.
- A. 2. Recommend DOH review and consider:
  - (a) Appoint and maintain a core team of emergency preparedness experts to review evidentiary sources and draft legislation to strengthen emergency preparedness planning;
  - (b) Re-evaluate the public benefit and costs of reinstating laws waived during COVID-19.

**Resolution #1 (continued)**

**B. Ethical Issues: Ethics Guidelines including Allocation of Life-Saving Equipment, and DNR/Futility and Virus Testing**

**B.1.** Recommend DOH, NYSTFLL, or Governor review/consider:

- (a) NYSTFLL 2015 Report, “Ventilator Allocation Guidelines,” and adopt the policy as is, or as amended; and
- (b) Issue emergency regulations mandating all providers and practitioners follow the ethics guidelines, and ensure:
  - i. the needs of vulnerable populations, including persons and communities of color, older adults and nursing home residents, persons with disabilities or who are incarcerated, and immigrants, are met in a non-discriminatory manner in the implementation of emergency regulations and guidelines;
  - ii. provision of palliative care as an ethical minimum to mitigate suffering among those who are in institutional, facility, residential, or home care settings during the COVID-19 crisis, especially when access to life-saving measures, desired equipment or other resources are not available;
  - iii. provision of education and training to physicians, health care practitioners, and institutional triage and ethics committees; and
  - iv. provision of generalist-level palliative care education and training for all health care workers and health-related service workers in all settings who are providing supportive care.

**B.2.** Recommend amendment of the New York State Public Health Law: Article 29-C “Health Care Proxy,” to require in the case of a State Disaster Emergency Declaration:

- (a) at least one, rather than two, witnesses, or
- (b) attestation by a notary public in person or remotely.

**B.3.** Recommend the DOH or Governor review and consider: Establishing a coordinated statewide plan for Virus Testing to ensure:

- (a) frontline health care workers are prioritized in access to rapid diagnostic testing; and
- (b) the most vulnerable individuals from health status and essential business/employee standpoint have equitable access to rapid diagnostic testing.

## Resolution #2

### Recommendations

#### A. Providers

##### A.1. Amend New York Law:

Purchasing Necessary Supplies: Amend New York General Business Law Section 396-r to include prohibition from exorbitant pricing of all equipment and products of any kind used either in patient care or to protect health care workers from infection.

##### A.2. Continue Waivers and Executive Orders (See also Immunities):

(a) Ability to Exceed Certified Bed Capacity for Acute Care Hospitals: Continue the waiver by the Governor's Executive Orders 202.1 and 202.10 of the DOH regulations governing certified bed restrictions for the pendency of the State Disaster Emergency.

(b) Limitation on Resident Hours Working in Acute Care Hospitals: Continue the Governor's Executive Order 202.10's waiver of NYCRR Article 10, Section 405, limiting resident work hours for the pendency of the State Disaster Emergency.

(c) Temporary Changes to Existing Hospital Facility Licenses Services and the Construction and Operation of Temporary Hospital Locations and Extensions: Continue the waiver provided in Executive Orders 202.1 and 202.10 of the State requirements that restrict the ability of Article 28 facilities to reconfigure and expand operations as necessary, for the pendency of the State Disaster Emergency.

(d) **Anti-Kickback and Stark (AKS) Law Compliance during the COVID-19 Emergency:** New York State to adopt the waivers provided by CMS and the OIG as to the Anti-Kickback and Stark Laws in substantially similar form for the state versions of the Stark Law and AKS during the State Disaster Emergency, each as tailored for the particular statute at issue.

##### A.3. Older Adults, Nursing Home Providers and Nursing Home Residents: Governor, DOH, DOH Bureau of Long Term Care and State Office for Aging to ensure:

(a) Equitable allocation of scarce resources from the Public Health and Social Services Emergency Fund—established by the CARES Act—to older adults and their health care providers, prioritizing under-resourced long-term care providers;

(b) Adequate provision of PPE;

(c) Adequate levels of staffing;

(d) Adequate funding of employee testing, as required under Executive Order 202.30;

## **Resolution #2 (continued)**

- (e) Consistent and timely tracking and reporting of case and death data;
- (f) Adoption of non-discriminatory crisis standards and ethics guidelines; and
- (g) Recognition and honoring of Older New Yorkers' right to health and human rights, as protected under international conventions: and
- (h) Adequate resources for the Office of the State Long Term Care Ombudsman, which provides advocacy for nursing home residents and families and helps residents understand and exercise their rights to quality care and quality of life.

### **A.4. Persons incarcerated and Correctional Facilities and Care:** Governor, NYS Department of Corrections and NYC Department of Corrections, to ensure:

- (a) Adequate access of persons incarcerated to COVID-19 testing, medical care and mental health and supportive services;
- (b) COVID-19 testing of correctional staff and adequate provision of gloves, masks and other protective equipment;
- (c) Release to the community of older persons who are incarcerated or living with advanced illness who do not pose a danger to the community;
- (d) Adequate funding of prison-to-community transitions including access to housing, meals, and supportive services, and non-discriminatory access to employment opportunities; and
- (e) Recognition and honoring of the right to health and human rights of persons who are incarcerated, as protected under international conventions.

### **A.5. Immigrants in Detention Facilities:** Governor, DOH or other state agencies:

In its exercise of state police powers in the COVID-19 public health emergency, New York State must take steps, similar to those outlined above, in cooperation with federal agencies to ensure:

- (a) Reduction of risk of the spread of COVID-19 among immigrants being held in detention centers

### **A.6. Telehealth**

Governor or DOH to review and consider:

Eliminate restrictions on the provision of care by telehealth and increase reimbursement for services provided via telehealth.

**Resolution #2 Continued:**

**B: Workforce, Schools, Child Care and Disproportionate Impact upon Communities of Color and Vulnerable Populations**

**B.1. Governor, Board of Regents or Department of Education:**

(a) Provide clear, timely guidance and support to all non-health care businesses and academic institutions to coordinate effective implementation of universal precautions and other workplace safety best practices to facilitate public health and trust, while mitigating disparate conditions during the phase-in process and long-term.

(b) Consider publicly posting essential/non-essential business operations decisions with an industry-wide impact on the Empire State Development (ESD) website in real time to mitigate confusion and enhance institutional compliance.

(c) Consider granting staffing firms dedicated to childcare the provider status necessary to enable them to operate in New York State and supplement the childcare workforce in order to ensure the health and safety of our children, while enabling businesses to effectively reopen within sufficient childcare support.

(d) Consider education and training pertaining to crisis standards and civil and criminal immunity to assure all practitioners are supported as they exercise professional medical judgment in triage, treatment and services.

(e) Consider enhanced employee assistance and other mental health counseling programs to address and mitigate the moral distress suffered by front-line health care workers under crisis conditions.

**B.2. Governor or DOH or other state agencies: Enhance regulatory oversight, to ensure:**

(a) adequate and non-discriminatory allocation of resources to persons and communities of color and vulnerable populations;

(b) equitable access of persons and communities of color and vulnerable populations to health and mental health services, including palliative care as an ethical minimum to mitigate suffering among those persons who remain in institutional, facility, residential or home or care settings, or are hospitalized during the COVID-19 crisis, especially when desired equipment or other resources are not available;

(c) provision of PPE to essential health care workers at highest risk in delivering essential services to vulnerable populations; and

(d) monitoring conformity with federal laws barring discrimination.

### **Resolution #3**

#### **Vaccine Mandate Recommendation (revised 6-12-20)**

*After testing and as supported by scientific evidence, once a safe and effective COVID-19 vaccine becomes available, the NYSBA Health Law Section recommends;*

A.1. That a vaccine subject to scientific evidence of safety and efficacy be made widely available, and widely encouraged, and if the public health authorities conclude necessary, required, unless a person's physician deems vaccination to be clinically inappropriate.

A.2. Steps to ensure a planned vaccination program:

(a) Rapid mass vaccination achieved through equitable distribution;

(b) Prioritizing health care workers and individuals at highest risk for complications and virus transmission to others if inadequate vaccine supply; and

(c) Linguistically and culturally competent vaccine educational and acceptance program.  
(Schaffer DeRoo S, Pudalov NJ, Fu LY. Planning for a COVID-19 Vaccination Program. *JAMA*. Published online May 18, 2020. doi:10.1001/jama.2020.8711)

## **Resolution #4**

### **Recommendations**

#### **A. COVID-19 Qualified Legal Immunities for Providers and Practitioners**

##### **3.A.1. Patient Care Immunities:** Federal and NYS Governments:

Provide/extend criminal and civil immunity for physicians, nurses and other health care practitioners and Article 28 facilities related to provision of care to patients in connection with the COVID-19 disaster emergency (excluding willful or intentional criminal misconduct, gross negligence, reckless misconduct, or intentional infliction of harm).

##### **3.A.2. Ethics Guidelines Immunities:** Governor or DOH :

(a)waive/suspend certain NYS laws to provide/extend immunity from civil and criminal liability to providers and practitioners who follow the ethics guidelines (excluding willful or intentional criminal misconduct, gross negligence, reckless misconduct, or intentional infliction of harm); and

(b)direct all state agencies to interpret and apply the law and regulations in a way to support compliance with the ethics/triage guidelines.

**3.A.3. DNR/Medical Futility Immunities:** Governor, DOH, or Amend Law: provide/extend immunity from criminal and civil immunity for physicians, nurses and other health care practitioners and Article 28 facilities, when the following steps are taken (excluding willful or intentional criminal misconduct, gross negligence, reckless misconduct, or intentional infliction of harm):

(a)a practitioner, as defined in Public Health Law Section 2994-a, determines that a patient's resuscitation would be "medically futile" as defined in PHL 2961.12;

b) a second practitioner concurs with the determination; and

c) both practitioners document their determination in the medical record; and in connection therewith, revoke or amend all laws and regulations prohibiting or penalizing such determinations and actions, including without limitation, those set forth on page 12 of this Report.

#### **B. COVID-19 Business of Health Care Immunities:**

##### **3.B.1. Anti-Kickback and Stark Laws:** New York State:

**Resolution #4 continued:**

Adopt the waivers provided by CMS and the OIG as to the Anti-Kickback and Stark Laws in substantially similar form for the state versions of the Stark Law and AKS during the State Disaster Emergency, each as tailored for the particular statute at issue.

**3.B.2. Vendors:** New York State:

Consider extending immunity under NY UCC section 2-615(a) to supply chain vendors where specific performance under a contract becomes impracticable due to unforeseen event or good faith compliance with governmental orders or regulations during crisis.

**C. COVID-19 Regulatory Waiver Immunities:** New York State:

**3C.** Provide/extend immunity from civil and criminal liability for practitioners and providers related to acts or omissions under regulatory waivers, such as would be applicable to credentialing, licensure, registration, and scope of practice, during the COVID-19 declared emergency and disaster (excluding willful or intentional criminal misconduct, gross negligence, reckless misconduct, or intentional infliction of harm).