

PART GG

S. 2507--C

37

A. 3007--C

1 Section 1. The public health law is amended by adding a new section
2 2828 to read as follows:

3 **§ 2828. Residential health care facilities; minimum direct resident**
4 **care spending.** 1. (a) Notwithstanding any law to the contrary, the
5 **department shall promulgate regulations governing the disposition of**
6 **revenue in excess of expenses for residential health care facilities**
7 **consistent with this section. Beginning on and after January first, two**
8 **thousand twenty-two, every residential health care facility shall spend**
9 **a minimum of seventy percent of revenue on direct resident care, and**
10 **forty percent of revenue shall be spent on resident-facing staffing,**
11 **provided that amounts spent on resident-facing staffing shall be**
12 **included as a part of amounts spent on direct resident care.**

13 **(b) Fifteen percent of costs associated with resident-facing staffing**
14 **contracted out by a facility for services provided by registered profes-**
15 **sional nurses or licensed practical nurses licensed pursuant to article**
16 **one hundred thirty-nine of the education law or certified nurse aides**
17 **who have completed certification and training approved by the department**
18 **shall be deducted from the calculation of the amount spent on resident-**
19 **facing staffing and direct resident care.**

20 **(c) Such regulations shall further include at a minimum that any resi-**
21 **dential health care facility for which total operating revenue exceeds**
22 **total operating and non-operating expenses by more than five percent of**
23 **total operating and non-operating expenses or that fails to spend the**
24 **minimum amount necessary to comply with the minimum spending standards**
25 **for resident-facing staffing or direct resident care, calculated on an**
26 **annual basis, shall remit such excess revenue, or the difference between**
27 **the minimum spending requirement and the actual amount of spending on**
28 **resident-facing staffing or direct care staffing, as the case may be, to**
29 **the state, with such excess revenue which shall be payable, in a manner**
30 **to be determined by such regulations, by November first in the year**
31 **following the year in which the expenses are incurred. The department**
32 **shall collect such payments by methods including, but not limited to,**
33 **bringing suit in a court of competent jurisdiction on its own behalf**
34 **after giving notice of such suit to the attorney general, deductions or**
35 **offsets from payments made pursuant to the Medicaid program, and shall**
36 **deposit such recouped funds into the nursing home quality pool, as set**
37 **forth in paragraph d of subdivision two-c of section two thousand eight**
38 **hundred eight of this article. Provided further that such payments of**
39 **excess revenue shall be in addition to and shall not affect a residen-**
40 **tial health care facility's obligations to make any other payments**
41 **required by state or federal law into the nursing home quality pool,**

42 including but not limited to medicaid rate reductions required pursuant
43 to paragraph g of subdivision two-c of section two thousand eight
44 hundred eight of this article and department regulations promulgated
45 pursuant thereto. The commissioner or their designees shall have author-
46 ity to audit the residential health care facilities' reports for compli-
47 ance in accordance with this section.

48 2. For the purposes of this section the following terms shall have the
49 following meanings:

50 (a) "Revenue" shall mean the total operating revenue from or on behalf
51 of residents of the residential health care facility, government payers,
52 or third-party payers, to pay for a resident's occupancy of the resi-
53 dential health care facility, resident care, and the operation of the resi-
54 dential health care facility as reported in the residential health care
55 facility cost reports submitted to the department; provided, however,

S. 2507--C

38

A. 3007--C

1 that revenue shall exclude the average increase in the capital portion
2 of the Medicaid reimbursement rate from the prior three years.

3 (b) "Expenses" shall include all operating and non-operating expenses,
4 before extraordinary gains, reported in cost reports submitted pursuant
5 to section twenty-eight hundred five-e of this article, except as
6 expressly excluded by regulations and/or this section. Such exclusions
7 shall include, but not be limited to, any related party transaction or
8 compensation to the extent that the value of such transaction is greater
9 than fair market value, and the payment of compensation for employees
10 who are not actively engaged in or providing services at the facility.

11 (c) "Direct resident care" includes the following cost centers in the
12 residential health care facility cost report: (i) Nonrevenue Support
13 Services - Plant Operation & Maintenance, Laundry and Linen, House-
14 keeping, Patient Food Service, Nursing Administration, Activities
15 Program, Nonphysician Education, Medical Education, Medical Director's
16 Office, Housing, Social Service, Transportation; (ii) Ancillary Services
17 - Laboratory Services, Electrocardiology, Electroencephalography, Radiology,
18 Inhalation Therapy, Podiatry, Dental, Psychiatric, Physical Therapy,
19 Occupational Therapy, Speech/Hearing Therapy, Pharmacy, Central Services
20 Supply, Medical Staff Services provided by licensed or certified profes-
21 sionals including and without limitation Registered Nurses, Licensed
22 Practical Nurses, and Certified Nursing Assistant; and (iii) Program
23 Services - Residential Health Care Facility, Pediatric, Traumatic Brain
24 Injury (TBI), Autoimmune Deficiency Syndrome (AIDS), Long Term Ventila-
25 tor, Respite, Behavioral Intervention, Neurodegenerative, Adult Care
26 Facility, Intermediate Care Facilities, Independent Living, Outpatient
27 Clinics, Adult Day Health Care, Home Health Care, Meals on Wheels,
28 Barber & Beauty Shop, and Other similar program services that directly

29 address the physical conditions of residents. Direct resident care does
30 not include, at a minimum and without limitation, administrative costs
31 (other than nurse administration), capital costs, debt service, taxes
32 (other than sales taxes or payroll taxes), capital depreciation, rent
33 and leases, and fiscal services.

34 (d) "Resident-facing staffing" shall include all staffing expenses in
35 the ancillary and program services categories on exhibit h of the resi-
36 dential health care reports as in effect on February fifteenth, two
37 thousand twenty-one.

38 (e) "Cost Report" shall mean the annual financial and statistical
39 report submitted to the department pursuant to sections two thousand
40 eight hundred five-e and two thousand eight hundred eight-b of this
41 article, and regulations promulgated pursuant thereto, which includes
42 the residential health care facility's revenues, expenses, assets,
43 liabilities and statistical information.

44 3. For the purposes of this section, residential health care facili-
45 ties shall not include (a) facilities that are authorized by the depart-
46 ment to primarily care for medically fragile children, people with
47 HIV/AIDS, persons requiring behavioral intervention, persons requiring
48 neurodegenerative services, and other specialized populations that the
49 commissioner deems appropriate to exclude; and (b) continuing care
50 retirement communities licensed pursuant to article forty-six or forty
51 six-a of this chapter.

52 4. The commissioner may waive the requirements of this section on a
53 case-by-case basis with respect to a nursing home that demonstrates to
54 the commissioner's satisfaction that it experienced unexpected or excep-
55 tional circumstances that prevented compliance. The commissioner may
56 also exclude from revenues and expenses, on a case-by-case basis,

S. 2507--C

39

A. 3007--C

1 extraordinary revenues and capital expenses, incurred due to a natural
2 disaster or other circumstances set forth by the commissioner in requi-
3 lation. At least thirty days before any action by the commissioner under
4 this subdivision, the commissioner shall transmit the proposed action to
5 the state office of the long-term care ombudsman and the chairs of the
6 senate and assembly health committees, and post it on the department's
7 website.

8 5. The commissioner shall issue regulations, seek amendments to the
9 state plan for medical assistance, seek waivers from the federal Centers
10 for Medicare and Medicaid Services, and take such other actions as
11 reasonably necessary to implement this section.

12 6. The commissioner shall, if necessary, update reporting forms
13 completed by residential health care facilities under section twenty-
14 eight hundred five-e of this article to include information to ensure
15 all items referred to in this section and organize such information

16 **consistent with the terms of this section.**

17 § 2. Severability. If any provision of this act, or any application of
18 any provision of this act, is held to be invalid, that shall not affect
19 the validity or effectiveness of any other provision of this act or any
20 other application of any provision of this act.

21 § 3. This act shall take effect immediately.