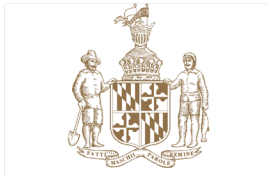


BRIAN E. FROSH
ATTORNEY GENERAL

ELIZABETH F. HARRIS
CHIEF DEPUTY ATTORNEY GENERAL

CAROLYN A. QUATTROCKI
DEPUTY ATTORNEY GENERAL



SANDRA BENSON BRANTLEY
COUNSEL TO THE GENERAL ASSEMBLY

KATHRYN M. ROWE
DEPUTY COUNSEL

JEREMY M. MCCOY
ASSISTANT ATTORNEY GENERAL

DAVID W. STAMPER
ASSISTANT ATTORNEY GENERAL

THE ATTORNEY GENERAL OF MARYLAND
OFFICE OF COUNSEL TO THE GENERAL ASSEMBLY

February 4, 2021

The Honorable Mary A. Lehman
Maryland General Assembly
317 House Office Building
Annapolis, Maryland 21401
Sent via email

Dear Delegate Lehman:

You asked for advice about a draft bill concerning nursing homes. As you describe it, your proposal “will require nursing homes to develop guidelines allowing visitation of a family or other designated caregiver to provide emotional support during COVID-19 or another similar pandemic.” You asked “whether legislation with a goal of allowing very limited visitation for a designated person or persons to a nursing home during a pandemic would supersede the Governor’s authority to issue restrictions under the Public Safety Article, Title 14, Subtitle 3A.” As explained below, it is my view that the proposed bill would not supersede the Governor’s authority to prohibit visitation in nursing homes. Moreover, because the federal government regulates nursing homes, its directives would override any State law.

Nothing in the language of the bill indicates that its provisions override the Governor’s emergency powers. Moreover, your letter states that “[i]t is neither my intent nor desire to supersede the Governor’s authority with this legislation.” The General Assembly has enacted several provisions empowering the Governor to prepare for and tackle public emergencies. *See* Title 14, Public Safety Article (“PS”). The emergency powers are spread across three main subtitles in Title 14, which overlap to a degree. Those subtitles are Subtitles 1, 3, and 3A.¹ Once the Governor declares an emergency, the Maryland Emergency Management Act authorizes the Governor, among other things “in order to protect the public health, welfare, or safety,” to “suspend the effect of any statute or rule or regulation of an agency of the State or a political subdivision.” PS § 14-107(d)(1)(i). Moreover, if the Governor proclaims a Catastrophic Health Emergency, the Governor is authorized to issue certain orders, if necessary to save lives or prevent

¹ Subtitle 2 provides certain civil relief, including the temporary suspension of the enforcement of civil liabilities against persons in emergency management service.

exposure to a viral agent, including ordering individuals to remain at home or refrain from congregating. PS § 14-3A-01(c)(1) and 14-3A-03(d)(2).

In addition, the Secretary of Health and local health officers are authorized to issue directives. Under Health-General Article (“HG”), § 18-102(b), the Secretary has the responsibility to investigate diseases believed to endanger the public health and to “[a]ct properly to prevent the spread of the disease.” HG § 18-208(b)(1) imposes a similar responsibility on local health officers to “act immediately to prevent the spread of” infectious diseases in the county. Moreover, HG § 18-208(b)(3) requires a local health officer to cooperate with the Secretary of Health to prevent the spread of infectious diseases.

Further, COMAR 10.06.01.06A provides that the Secretary or health officer shall:

- (1) Take any action or measure necessary to prevent the spread of communicable disease or to control a reportable disease and condition; and
- (2) Issue, when necessary, special instructions for control of a disease or condition.

Additionally, the Secretary or health officer may order cessation of operation of a business or facility determined or suspected to be a threat to public health until the public health threat is determined by the health officer to have ceased. COMAR 10.06.01.06C.

Your proposal directs the Maryland Department of Health to develop guidelines for nursing homes that meet several requirements, including allowing visitation by a compassionate care visitor or a personal care visitor, and establishing circumstances under which “a personal care visitor may be limited, suspended, or terminated, including increased local infection rates and health care capacity.” Thus, it is possible under your proposal that the Secretary could prohibit nursing home visitation by a personal care visitor by exercising the Secretary’s authority to do so under current law. Whether your bill would allow the same with regard to a compassionate care visitor is unclear. Nevertheless, if the Governor issued an executive order doing so, as head of the Executive Branch, the Governor could direct the Secretary of Health regarding issuing orders during a declared state of emergency or catastrophic health emergency because the Secretary of Health is under the direction of the Governor.

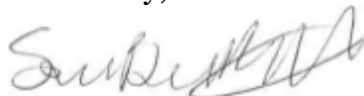
The General Assembly could enact laws that limit or override the Governor’s emergency powers, including limiting the Governor’s authority, or the Secretary of Health’s authority, to prohibit visitation in nursing homes. Nevertheless, given the extensive and long-standing emergency authority granted to both the Governor and the Secretary of Health, the legislative intent to do so should be expressly stated if this is indeed intended by your proposal. *See* PS § 14-302(a) (explaining that “[t]he General Assembly recognizes the Governor’s broad authority in the exercise of the police power

of the State to provide adequate control over persons and conditions during impending or actual public emergencies” and noting that the emergency provisions “shall be broadly construed to carry out the purpose of” the emergency provisions).

Despite the foregoing, however, nursing homes are regulated by the federal government through the Centers for Medicare & Medicaid Services (“CMS”). This past year, CMS issued several orders related to the pandemic, including mandatory restrictions in nursing homes. For example, on March 13, 2020, CMS ordered facilities to “restrict visitation of all visitors and non-essential health care personnel, except for certain compassionate care situations, such as an end-of-life situation.” (CMS, “Guidance for Infection Control and Prevention of Coronavirus Disease 2019 (COVID-19) in Nursing Homes” (REVISED)). These federal directives would preempt any State laws allowing visitation in nursing homes.

Please let me know if you have any other questions.

Sincerely,

A handwritten signature in black ink, appearing to read 'Sandra Benson Brantley', written in a cursive style.

Sandra Benson Brantley
Counsel to the General Assembly