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

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

(c) (i) Except as provided in subparagraph (ii) of this paragraph, such regulations shall further include at a minimum that any residential health care facility for which total operating revenue exceeds total operating and non-operating expenses by more than five percent of total operating and non-operating expenses or that fails to spend the minimum amount necessary to comply with the minimum spending standards for resident-facing staffing or direct resident care, calculated on an annual basis, or for the year two thousand twenty-two, on a pro-rata basis for only that portion of the year during which the failure of a residential health care facility to spend a minimum of seventy percent of revenue on direct resident care, and forty percent of revenue on resident-facing staffing, may be held to be a violation of this chapter, shall remit such excess revenue, or the difference between the minimum spending requirement and the actual amount of spending on resident-facing staffing or direct care staffing, as the case may be, to the state, with such excess revenue which shall be payable, in a manner to be determined by such regulations, by November first in the year following the year in which the expenses are incurred. The department shall collect such payments by methods including, but not limited to, bringing suit in a court of competent jurisdiction on its own behalf

after giving notice of such suit to the attorney general, deductions or offsets from payments made pursuant to the Medicaid program, and shall deposit such recouped funds into the nursing home quality pool, as set forth in paragraph (d) of subdivision two-c of section twenty-eight hundred eight of this article. Provided further that such payments of excess revenue shall be in addition to and shall not affect a residential health care facility's obligations to make any other payments required by state or federal law into the nursing home quality pool, including but not limited to medicaid rate reductions required pursuant to paragraph (g) of subdivision two-c of section twenty-eight hundred eight of this article and department regulations promulgated pursuant thereto. The commissioner or their designees shall have authority to audit the residential health care facilities' reports for compliance in accordance with this section.

(ii) Notwithstanding the requirements prescribed by subparagraph (i) of this paragraph, the provisions of a demonstration project established pursuant to a chapter of the laws of two thousand twenty-three that amended this subparagraph shall apply to those residential health care facilities who qualify for such demonstration project.

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

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

(i) the capital portion of the Medicaid reimbursement rate;

(ii) funding received as reimbursement for the assessment under subparagraph (vi) of paragraph (b) of subdivision two of section twenty-eight hundred seven-d of this article, as reconciled pursuant to paragraph (c) of subdivision ten of section twenty-eight hundred seven-d of this article; and

(iii) any grant funds from the federal government for reimbursement of COVID-19 pandemic-related expenses, including but not limited to funds

received from the federal emergency management agency or health resources and services administration.

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

(c) "Direct resident care" includes the following cost centers in the residential health care facility cost report: (i) Nonrevenue Support Services - Plant Operation & Maintenance, Laundry and Linen, Housekeeping, Patient Food Service, Nursing Administration, Activities Program, Nonphysician Education, Medical Education, Medical Director's Office, Housing, Social Service, Transportation; (ii) Ancillary Services - Laboratory Services, Electrocardiology, Electroencephalogy, Radiology, Inhalation Therapy, Podiatry, Dental, Psychiatric, Physical Therapy, Occupational Therapy, Speech/Hearing Therapy, Pharmacy, Central Services Supply, Medical Staff Services provided by licensed or certified professionals including and without limitation Registered Nurses, Licensed Practical Nurses, and Certified Nursing Assistant; and (iii) Program Services - Residential Health Care Facility, Pediatric, Traumatic Brain Injury (TBI), Autoimmune Deficiency Syndrome (AIDS), Long Term Ventilator, Respite, Behavioral Intervention, Neurodegenerative, Adult Care Facility, Intermediate Care Facilities, Independent Living, Outpatient Clinics, Adult Day Health Care, Home Health Care, Meals on Wheels, Barber & Beauty Shop, and Other similar program services that directly address the physical conditions of residents. Direct resident care does not include, at a minimum and without limitation, administrative costs (other than nurse administration), capital costs, debt service, taxes (other than sales taxes or payroll taxes), capital depreciation, rent and leases, and fiscal services.

(d) "Resident-facing staffing" shall include all staffing expenses in the ancillary and program services categories on exhibit h of the residential health care reports as in effect on February fifteenth, two

thousand twenty-one.

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

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

4. The commissioner may waive the requirements of this section on a case-by-case basis with respect to a nursing home that demonstrates to the commissioner's satisfaction that it experienced unexpected or exceptional circumstances that prevented compliance. The commissioner may also exclude from revenues and expenses, on a case-by-case basis, extraordinary revenues and capital expenses, incurred due to a natural disaster or other circumstances set forth by the commissioner in regulation. At least thirty days before any action by the commissioner under this subdivision, the commissioner shall transmit the proposed action to the state office of the long-term care ombudsman and the chairs of the senate and assembly health committees, and post it on the department's website.

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

6. The commissioner shall, if necessary, update reporting forms completed by residential health care facilities under section twenty-

eight hundred five-e of this article to include information to ensure all items referred to in this section and organize such information consistent with the terms of this section.

* NB There are 2 § 2828's