

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT**

CONNECTICUT ASSOCIATION OF HEALTH CARE FACILITIES, INC.,	:	
	:	
Plaintiff,	:	CIVIL ACTION NO.
	:	
v.	:	
	:	
M. JODI RELL, in her official capacity as Governor of the State of Connecticut,	:	January 28, 2010
	:	
Defendant.	:	

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

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Plaintiff Connecticut Association of Health Care Facilities, Inc. (“CAHCF”), by and through its attorneys Murtha Cullina LLP and Proskauer Rose LLP, files this Complaint for Declaratory and Injunctive Relief against Defendant M. Jodi Rell (“Governor Rell”), and alleges as follows:

NATURE OF THE ACTION

1. The State of Connecticut’s system for paying Medicaid-participating nursing facilities is broken. Neither the methods and procedures Connecticut uses to determine and make payments nor the payments themselves assure efficient, economical or quality nursing facility services, nor do they assure that Medicaid beneficiaries have access to such services to the same extent as the general population. CAHCF files this action on behalf of its members to fix the State’s broken Medicaid payment system, to assure that its member-facilities are fairly and adequately compensated for the essential services they provide, and to assure that the Connecticut citizens whom CAHCF members are privileged to serve have access to and receive the economic, efficient, and quality nursing facility services they deserve.

2. Connecticut’s broken payment system impacts more than just Medicaid beneficiaries and the nursing facilities that serve them. Because the State significantly underpays nursing facilities for the services they provide to Medicaid beneficiaries, those Medicaid-

participating nursing facilities must, if they can, absorb the loss themselves or try to make up the difference elsewhere. For example, it is estimated that Connecticut's broken payment system underpays the allowable costs of Medicaid-participating nursing facilities in an amount exceeding \$100,000,000 annually. However, this shortfall must be paid by someone. Therefore, Medicaid-participating nursing facilities subsidize the Medicaid program by absorbing some or all of the shortfall themselves or, alternatively, the uncompensated Medicaid costs are subsidized to the extent possible by other payors, including private individuals and private insurance. Imposition of the uncompensated cost of care provided to Medicaid beneficiaries on Medicaid-participating nursing facilities, on private individuals and on private insurers forces those entities and persons to bear a burden that more properly should be borne by the State as a whole.

3. Among other things, CAHCF seeks a declaratory judgment that the payment system for Medicaid-participating nursing facilities in Connecticut conflicts with federal law and is otherwise unlawful. Plaintiffs also seek preliminary and permanent injunctive relief against Governor Rell, her agents, servants, employees, successors and assigns, enjoining them from enforcing and maintaining the State's illegal payment system for Medicaid-participating nursing facilities.

4. Medicaid is a cooperative federalism program in which the Federal Government provides States with federal matching funds, which are used by the States to provide health care goods and services to certain low-income and disabled individuals.

5. Although a State's participation in Medicaid is voluntary, once a State chooses to participate, it must comply with certain federal statutes and regulations. One of the principal federal statutes at issue in this case instructs that a State must use "methods and procedures" that "assure that payments are consistent with efficiency, economy, and quality of care and are

sufficient to enlist enough providers so that care and services are available under the [state plan for medical assistance] at least to the extent that such care and services are available to the general public in the geographic area.” 42 U.S.C. § 1396a(a)(30)(A).

6. Connecticut has chosen to participate in Medicaid. Based on its presumed compliance with federal requirements, Connecticut receives hundreds of millions of dollars each year in federal matching funds. Yet, Connecticut has implemented a payment system for Medicaid-participating nursing facilities that violates federal law and pays nursing facilities well below the cost that economical and efficient nursing facilities must incur to provide the care and treatment needed by the Connecticut citizens nursing facilities serve.

7. On October 5, 2009, Governor Rell signed legislation that exacerbates the already dire situation in which the State’s illegal payment system has placed many Medicaid-participating nursing facilities and, through them, the tens of thousands of elderly and frail Connecticut citizens served by those facilities and the tens of thousands of persons employed by those facilities. After years of underpayment, most nursing facilities were scheduled to receive a significant increase in their payment rates due to a longstanding state statutory requirement that payment rates be adjusted periodically so that changing conditions impacting the cost of providing nursing facility services are reasonably taken into account during the process of establishing nursing facility payments.

8. However, based solely on state budgetary considerations, the legislation recently signed by Governor Rell eliminates the scheduled adjustments and freezes most nursing facilities’ payment rates at their already-depressed levels until July 1, 2011.

9. To make matters worse, on November 24, 2009, Governor Rell asked the Connecticut General Assembly to enact yet another significant reduction in nursing facilities’

payment rates. Although the General Assembly ultimately rejected Governor Rell's request, it remains likely that Governor Rell will call for similar cuts during the General Assembly's 2010 Regular Session, which is scheduled to begin on February 3, 2010.

10. Therefore, this Court's intervention is required to ensure that Connecticut's payment system for Medicaid-participating nursing facilities complies with federal law and that Connecticut nursing facilities have the resources necessary to meet the needs of their residents.

JURISDICTION AND VENUE

11. This Court has subject-matter jurisdiction over this action and the parties thereto pursuant to 28 U.S.C. §§ 1331 and 1343. This Court has subject-matter jurisdiction to decide CAHCF's state-law claims pursuant to 28 U.S.C. § 1367.

12. Venue is proper in this district pursuant to 28 U.S.C. § 1391(b) because Governor Rell resides in this district. Venue is also proper in this district because a substantial part of the events giving rise to the claims asserted herein occurred in this district.

PARTIES

13. Plaintiff Connecticut Association of Health Care Facilities, Inc. is the largest not-for-profit trade association representing Connecticut health care facilities that provide long-term, subacute and rehabilitative services. CAHCF's members serve over 14,000 Connecticut citizens. CAHCF's business address is 111 Founders Plaza, Suite 1002, East Hartford, Connecticut 06108. CAHCF has standing to pursue this action on behalf of its members under the three-element test enunciated in *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333 (1977), because (1) CAHCF's members would otherwise have standing to sue in their own right, (2) the interests at stake in this case are germane to CAHCF's organizational purposes, and (3) neither the claims asserted nor the relief requested require the participation of CAHCF's individual members.

14. Defendant M. Jodi Rell is the Governor of the State of Connecticut. Governor Rell is sued in her official capacity only. Governor Rell's business address is 210 Capitol Avenue, Hartford, Connecticut 06106. As the State's chief executive officer, Governor Rell has legal responsibility for her official actions and for the official actions of state agencies and their employees. *See* Conn. Const. Art. IV, § 5 ("The supreme executive power of the state shall be vested in the governor."); *id.* § 12 ("[The governor] shall take care that the laws be faithfully executed."). Under the doctrine of *Ex parte Young*, 209 U.S. 123 (1908), neither sovereign immunity nor the Eleventh Amendment to the United States Constitution preclude this suit because CAHCF seeks declaratory and prospective injunctive relief to stop ongoing violations of federal law.

FACTUAL BACKGROUND

A. The Medicaid Program Generally

15. Medicaid is a cooperative federal-state program authorized by Title XIX of the Social Security Act, which is codified at 42 U.S.C. §§ 1396-1396v (the "Medicaid Act"). If a State agrees to be bound by, and to comply with, the provisions of the Medicaid Act, the Medicaid Act instructs that federal matching funds will be paid to the State so that it may furnish medical care to needy individuals. *See* 42 U.S.C. § 1396.

16. A State's participation in the Medicaid program is voluntary; however, once a State chooses to participate, it must comply with the Medicaid Act and its implementing regulations.

17. In order to participate in the Medicaid program, a State must submit a state plan for medical assistance ("State Plan") to the Centers for Medicare & Medicaid Services ("CMS"). CMS is an operating component of the United States Department of Health and Human Services.

On behalf of the Secretary of Health and Human Services, CMS administers the day-to-day federal responsibilities imposed by the Medicaid Act.

18. Among other things, the State Plan must list the categories of individuals who will receive medical assistance and the specific kinds of medical care and services that will be covered. If the State Plan is approved by the Secretary, the State is thereafter eligible to be reimbursed by the Federal Government for a specified percentage of the amounts expended by the State as medical assistance under the State Plan.

19. Although States are afforded some discretion in deciding what types of services to provide, the Medicaid Act requires participating States to provide nursing facility services. 42 U.S.C. §§ 1396a(a)(10)(A), 1396d(a)(4)(A).

20. Payment for services is made directly by States to the individuals or entities that furnish the services. 42 C.F.R. § 430.0.

21. The Medicaid Act requires that States “provide such methods and procedures relating to . . . the payment for[] care and services available under the [State Plan] . . . as may be necessary . . . to assure that payments are consistent with efficiency, economy, and quality of care and are sufficient to enlist enough providers so that care and services are available under the [State Plan] at least to the extent that such care and services are available to the general population in the geographic area.” 42 U.S.C. § 1396a(a)(30)(A).

22. Federal law also requires that, for nursing facilities and certain other institutional providers, States must establish payment rates through a public process that includes: (a) publication of proposed rates, the methodologies underlying the establishment of such rates, and justifications for the rates; (b) a reasonable opportunity for comment on the proposed rates, methodologies and justifications by providers, beneficiaries and their representatives, and other

concerned state residents; and (c) publication of the final rates, the methodologies underlying the establishment of such rates, and justifications for such final rates. 42 U.S.C. § 1396a(a)(13)(A); 42 C.F.R. § 447.205.

23. A nursing facility cannot demand additional payment from an individual Medicaid beneficiary; it must accept the State's payment as payment in full. Conn. Gen. Stat. § 17b-340(a), (c).

24. Connecticut has chosen to participate in the Medicaid program, and has designated the Connecticut Department of Social Services ("DSS") as the "single State agency" responsible for administering the State's Medicaid program pursuant to 42 U.S.C. § 1396a(a)(5). *See* Conn. Gen. Stat. § 17b-2(8).

25. Historically, the Federal Government has paid approximately 50 percent of the total cost of Connecticut's Medicaid program. Recently, however, that percentage has been increased to over 60 percent under the American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5. *See* 74 Fed. Reg. 64,697, 64,699 (Dec. 8, 2009); 74 Fed. Reg. 18,235, 18,236 (Apr. 21, 2009).

B. Connecticut Nursing Facilities Generally

26. There are approximately 238 licensed nursing facilities and 28,000 nursing facility beds in Connecticut. Office of Certificate of Need & Rate Setting, Conn. Dep't of Soc. Servs., *Overview of Nursing Facility Rate Setting* at 1 (Oct. 2009) ("*DSS Overview*"). "These facilities have total revenues of approximately \$2.5 billion and employ over 30,000 people." *Id.*

27. The majority of these facilities are operated by for-profit entities. Legislative Program Review & Investigations Comm., Conn. Gen. Assembly, *Nursing Home Medicaid Rate-Setting System* ch. 2 (2001) ("LPRI Committee Report"), available at <http://www.cga.ct.gov/pri/archives/2001nhreportchap2.htm>.

28. Most nursing facilities in Connecticut were built before 1980. Nursing facilities vary in size, from 30 beds to well over 300, with approximately 120 beds being the average size. *See* LPRI Committee Report ch. 2.

29. There are two levels of licensed nursing facility beds in Connecticut: chronic and convalescent nursing homes (“CCNH”) and rest homes with nursing supervision (“RHNS”). The vast majority of nursing facility beds in Connecticut are licensed under the CCNH category.

30. Nursing facilities in Connecticut are supported by three major sources of revenue:

A. Medicaid;

B. Medicare (i.e., the totally federal-funded health care program for elderly and disabled individuals that only covers relatively short-term, rehabilitative and sub-acute services); and

C. Private pay (i.e., residents themselves, or their private insurance, pay for nursing facility care).

31. Most nursing facilities in Connecticut participate in Medicaid.

32. In state fiscal year (“FY”) 2009, approximately 68 percent of all nursing facility days in Connecticut were paid for by Medicaid. *DSS Overview* at 1. Medicare, in comparison, only accounted for approximately 14 percent, while private pay accounted for 15 percent. *Id.*

C. Connecticut’s Payment System For Medicaid-Participating Nursing Facilities

33. Under state law, Medicaid-participating nursing facilities are paid a facility-specific per diem rate for each Medicaid beneficiary they serve, regardless of the costs actually incurred by the nursing facility to provide care to a particular Medicaid beneficiary. *See* Conn. Gen. Stat. § 17b-340.

34. Section 17b-340 of the Connecticut General Statutes instructs that each nursing facility's per diem rate is to be calculated annually. The annual rate year is July 1 through June 30.

1. Annual Cost Reporting And Cost Components

35. By December 31 of each year, Medicaid-participating nursing facilities are required to submit cost reports for the preceding period of October 1 through September 30. As described by DSS, the "annual cost report is a thirty-nine page document that includes detailed cost, statistical (e.g. residents days, therapy service volume, nursing hours) and ownership/related party transaction information." *DSS Overview* at 1.

36. Reported expenditures are organized into five cost categories:

A. "Direct," which includes nursing and nurse aide personnel salaries, related fringe benefits and nursing pool costs;

B. "Indirect," which includes professional fees, dietary, housekeeping, laundry personnel costs and expenses and supplies related to patient care;

C. "Administrative and General" ("A&G"), which includes maintenance, utilities and plant operation expenses, as well as salaries and related fringe benefits for administrative and maintenance personnel;

D. "Property," which means a "fair rental value" allowance in lieu of interest and depreciation costs; and

E. "Capital-Related," which includes such things as property taxes, insurance expenses, equipment leases and equipment depreciation. *See Conn. Gen. Stat. § 17b-340(f)(1)*.

37. Medicaid rates, however, are calculated based on "allowable" costs, and not all costs are allowable. According to regulations promulgated by DSS: "All costs included in the

computation of the per diem reimbursement rate must be reasonable and directly related to the provision of services necessary for patient care.” Conn. Agencies Regs. § 17-311-52(i). For example, bad debt expense is not allowable, nor are advertising costs (except for help-wanted advertisements). *Id.*

2. Cost Ceilings, Deemed Occupancy Rate And Inflation Factor

38. In addition, by state statute, facility costs in the Direct, Indirect and A&G cost categories are limited by certain ceilings, which are established as percentages of statewide median costs. Costs in excess of these ceilings are not recognized as allowable costs. *See* Conn. Gen. Stat. § 17b-340(f)(3).

39. For costs within the Direct category—which includes nursing and nurse aide personnel salaries, related fringe benefits and nursing pool costs—the statutory ceiling is 135 percent of the median allowable cost of the facility’s peer grouping. Conn. Gen. Stat. § 17b-340(f)(3). Peer groupings are established using two criteria: licensure type (i.e., CCNH versus RHNS) and location (Fairfield County versus non-Fairfield County). *See* Conn. Gen. Stat. § 17b-340(f)(2). For example, a CCNH located in Fairfield County is allowed higher costs in the Direct cost category because, in theory, wages are higher in Fairfield County. Similarly, a CCNH located in Fairfield County is allowed higher costs than a RHNS in the same county because, in theory, it is more expensive to staff a facility in order to provide the higher CCNH level of care.

40. For costs in the Indirect category—which includes professional fees, dietary, housekeeping, laundry personnel costs and expenses and supplies related to patient care—the statutory ceiling is 115 percent of the statewide median allowable cost. Conn. Gen. Stat. § 17b-340(f)(3).

41. Finally, for the A&G category—which includes maintenance and plant operation expenses, and salaries and related fringe benefits for administrative and maintenance personnel—the statutory ceiling is 100 percent of the statewide median allowable cost. Conn. Gen. Stat. § 17b-340(f)(3).

42. After application of all ceilings, the allowable costs that will be used to calculate a facility's payment rate may be further reduced. For rate computation purposes, allowable costs are divided by the higher of reported total resident days for the year or the number of days equal to a minimum, assumed facility occupancy of 95 percent of licensed capacity. Conn. Gen. Stat. § 17b-340(f)(14).

43. The Regional Consumer Price Index and the projected value of that index are used to inflate costs from the cost year to the rate year. According to DSS, allowable cost year 2007 costs “have been inflated by 3.03% for the July 1, 2009 rate period representing actual and estimated inflation between the cost period and rate period.” *DSS Overview* at 3.

3. Rebasing

44. “Rebasing” is a common element within many Medicaid payment systems. Because costs, and the factors that affect the cost of care (such as inflation and intensity of service, among other things), can change from time to time, periodic rebasing is used to assess and incorporate those cost changes in the computation of a nursing facility's Medicaid payment rate.

45. Periodic rebasing is necessary to take into account changes in the prices of resources nursing facilities purchase to provide services and to capture changes in costs due to, for example, the types and volume of services provided. Rebasing occurs when allowable costs incurred in a base year used to calculate payments are recalculated or adjusted to reflect more current cost data.

46. Until recently, DSS was required by state statute to rebase nursing facilities' allowable costs "no less frequently than every four years." Conn. Gen. Stat. § 17b-340(f)(8).

47. Because Connecticut had not rebased nursing facilities' allowable costs since FY 2006, most Medicaid-participating nursing facilities in Connecticut would have received a significant increase in their FY 2010 reimbursement rates due to the statutorily required rebasing. Overall, the State estimated that rebasing would result in a rate increase of 9.64 percent in FY 2010 at a cost of \$113.7 million to the State. However, the legislation recently signed by Governor Rell freezes most nursing facilities' reimbursement rates at their already-depressed levels until July 1, 2011.

4. The Stop-Gain Provision

48. Despite the requirement that allowable costs are to be kept current by periodic rebasing, state law limits a nursing facility's annual rate increase to a predetermined, across-the-board percentage that is unrelated to the actual cost of providing services.

49. Commonly known as the "stop-gain provision," section 17b-340(f)(4) of the Connecticut General Statutes is an absolute ceiling on the per diem rate ultimately paid to a facility, imposed in disregard of a facility's actual, allowable costs or the care needs of a facility's residents.

50. For example, until recently, the stop-gain provision stated, in relevant part:

For the fiscal year ending June 30, 2007, each facility shall receive a rate that is three per cent greater than the rate in effect for the period ending June 30, 2006, except any facility that would have been issued a lower rate effective July 1, 2006, than for the rate period ending June 30, 2006, due to interim rate status or agreement with the department, shall be issued such lower rate effective July 1, 2006. For the fiscal year ending June 30, 2008, each facility shall receive a rate that is two and nine-tenths per cent greater than the rate in effect for the period ending June 30, 2007, except any facility that would have been issued a lower rate effective July 1, 2007, than for the rate period ending June 30, 2007, due to interim rate status or agreement with the department, shall be issued such lower rate effective July 1, 2007. For the fiscal year ending June 30, 2009, rates in effect for

the period ending June 30, 2008, shall remain in effect until June 30, 2009, except any facility that would have been issued a lower rate for the fiscal year ending June 30, 2009, due to interim rate status or agreement with the department shall be issued such lower rate.

Conn. Gen. Stat. § 17b-340(f)(4).

5. Connecticut's Shadow Payment System: Interim Rates

51. Connecticut's statutory rate-setting methodology allows the Commissioner of DSS limited discretion to pay financially troubled facilities so-called "interim rates," so long as he can do so "within available appropriations." Conn. Gen. Stat. § 17b-340(a).

52. The Commissioner may grant a nursing facility's request for an interim rate only if (1) the rate increase is necessary to avoid a nursing facility filing a petition for bankruptcy, (2) the facility has been placed in state receivership, or (3) there has been substantial deterioration in the facility's financial condition that may be expected to adversely affect resident care and the continued operation of the facility. Conn. Gen. Stat. § 17b-340(a). If one or more of the foregoing conditions is met, the Commissioner must then determine whether the "continued operation of the facility is in the best interest of the state." *Id.*

53. When reviewing a nursing facility's request for an interim rate, Connecticut law instructs that the Commissioner must consider the following five factors: "(1) Existing [CCNH] or [RHNS] utilization in the area and projected bed need; (2) physical plant long-term viability and the ability of the owner or purchaser to implement any necessary property improvements; (3) licensure and certification compliance history; (4) reasonableness of actual and projected expenses; and (5) the ability of the facility to meet wage and benefit costs." Conn. Gen. Stat. § 17b-340(a).

54. Interim rates come with strings, however. For example, section 17b-340(a) of the Connecticut General Statutes expressly provides that, "[i]n the event that a facility granted an

interim rate increase pursuant to this section is sold or otherwise conveyed for value to an unrelated entity less than five years after the effective date of such rate increase, the rate increase shall be deemed rescinded and the department shall recover an amount equal to the difference between payments made for all affected rate periods and payments that would have been made if the interim rate increase was not granted. The commissioner may seek recovery from payments made to any facility with common ownership.” Conn. Gen. Stat. § 17b-340(a). The Commissioner can waive the payback requirement for good cause shown, but only with the approval of the Secretary of the Office of Policy and Management. *Id.*

55. According to DSS, in FY 2008, 16 facilities obtained interim rates. Gary M. Richter, Conn. Dep’t of Soc. Servs., *Presentation to Long Term Care Financial Managers Association Meeting* at 13 (Nov. 12, 2009). Out of the \$11.2 million requested, DSS provided only \$4.6 million. *Id.* In FY 2009, 41 facilities obtained interim rates. *Id.* Out of the \$31.0 million requested, DSS provided only \$12.2 million. *Id.* In FY 2010, DSS has already approved at least seven interim rate requests worth \$2.2 million (\$9.3 million had been requested). *Id.* There are at least 26 additional interim rate requests currently pending seeking a combined \$14.8 million. *Id.*

56. Upon information and belief, DSS also uses the interim rate process to impose additional, ad hoc requirements on nursing facilities.

57. Upon information and belief, the interim rate system is administered in an ad hoc, arbitrary fashion.

D. Unheeded Warnings That Connecticut’s Payment System For Medicaid-Participation Nursing Facilities Is Broken

58. The flaws of Connecticut’s payment system for Medicaid-participating nursing facilities are well documented—indeed, well documented by the State itself.

59. For example, the Legislative Program Review and Investigations Committee (“LPRI Committee”) is a joint, bipartisan, statutory committee of the Connecticut General Assembly. The LPRI Committee was established in 1972 to evaluate the efficiency, effectiveness, and statutory compliance of selected state agencies and programs, recommending remedies where needed.

60. In 2001, the LPRI Committee conducted an investigation of the State’s Medicaid rate-setting system for nursing facilities in order to examine the efficacy and equity of that system. See Legislative Program Review & Investigations Comm., Conn. Gen. Assembly, *Nursing Home Medicaid Rate-Setting System* (2001) (“LPRI Committee Report”), available at <http://www.cga.ct.gov/pri/archives/2001nhreport.htm>.

61. Among other things, the LPRI Committee investigated whether Connecticut’s rate-setting system adequately recognized costs incurred by nursing facilities in providing care to Medicaid beneficiaries, concluding:

Although the committee believes cost-containment features should play a major role in the rate-setting process, homes also must be adequately reimbursed based on reasonable costs. In recent years, the rate-setting system has been superceded [sic] by a single system component—the stop gain provision. Furthermore, since FY 99, the stop gain provision has evolved into a flat percent increase with specific percent increases established through the state budget process and applied to all facilities’ prior year’s rates.

The program review committee finds adoption of flat percent increases for rate reimbursement has eliminated the relationship between facilities’ allowed costs and the Medicaid rate ultimately issued. Under Connecticut’s rate-setting system, facilities submit cost reports, and a two-step process determines allowable costs to compute rates. First, DSS excludes costs not allowed under the Medicaid program, and then disallows costs above the cost ceilings in three of the five categories (direct care, indirect care, and administrative and general) in which costs are arrayed. The costs are then used to calculate per diem Medicaid rates. However, since FY 00, the stop gain provision has made this calculation pointless, since a flat rate increase percentage is merely applied to the prior year’s rate to yield the new per diem issued to a facility. In other words, the rate ultimately established has no connection to the costs submitted by the facility.

LPRI Committee Report ch. 3 (emphasis in original).

62. The LPRI Committee also found that the statutory stop-gain provision “had an adverse effect on fair reimbursement rates.” LPRI Committee Report ch. 3. According to the LPRI Committee, the “rate computed based on the major components of the system (i.e., allowable cost ceilings, efficiency incentives, occupancy standards, CPI inflation, and fair rent) can differ from the actual rate issued to a facility because of stop gain/stop loss limits that are applied. *Once the stop gain is applied to a facility’s rate for multiple years, the cumulative effect of the loss is even greater, weakening the relationship between a facility’s costs and the rate it receives.*” *Id.* (emphasis in original).

63. The LPRI Committee also addressed the State’s interim rate system, which the LPRI Committee characterized as a “shadow” rate system. LPRI Committee Report ch. 3. “[I]n any discussion involving adequate Medicaid reimbursement in Connecticut,” the report concluded, “it is important to remember interim rate increases have become so common, that case-by-case review has replaced a systemic approach to rate setting.” *Id.*

64. On the heels of the LPRI Committee Report, leaders of the General Assembly created the Ad Hoc Task Force on Nursing Home Costs, which was comprised of members of the General Assembly, as well as health care professionals and union representatives. The Ad Hoc Task Force on Nursing Home Costs echoed the concerns of the LPRI Committee, issuing a report stating, in relevant part:

The Task Force finds that, while the current Medicaid reimbursement system in Connecticut was soundly conceived when first implemented a decade ago, the cumulative effect of stop-gain/stop-loss ceilings, infrequent rebasing, and a highly discretionary Interim Rate process have undermined the operational effectiveness of that system. Specifically, in terms of the Task Force’s charge, it was agreed that the current system does *not* “adequately reflect the actual costs of wages, benefits and staffing.”

Final Report of the Ad Hoc Task Force on Nursing Home Costs in Connecticut at 8 (Feb. 15, 2002) (emphasis in original).

65. The Ad Hoc Task Force recommended that nursing facilities “in which Medicaid patients account for more than 90% of patient days should also receive supplemental disproportionate share payments, in recognition of the greater costs to facilities of taking care of low-income persons and the fact that Medicaid rates are lower than those of any other payor.” *Final Report of the Ad Hoc Task Force on Nursing Home Costs in Connecticut* at 10.

66. The Medicaid payment system addressed by the LPRI Committee and the Ad Hoc Task Force remains in effect. The LPRI Committee’s and the Ad Hoc Task Force’s findings and recommendations have, for the most part, never been implemented.

67. The Supreme Court of Connecticut recently made findings similar to those of the LPRI Committee and the Ad Hoc Task Force. In *St. Joseph’s Living Center, Inc. v. Town of Windham*, 966 A.2d 188 (Conn. 2009), the Court was asked to decide whether a town properly denied a non-profit nursing facility’s application for a property tax exemption. One of the factors to be considered in answering that question was “whether the organization’s activities relieve the state of a burden it otherwise would be compelled to bear.” *Id.* at 211. In finding that the nursing facility’s Medicaid participation relieved the State of a burden it otherwise would be compelled to bear, the Supreme Court of Connecticut held that the trial court’s conclusion to the contrary was clearly erroneous, explaining:

The town claims that the Center does not relieve the state of any such burden because it applies for, and accepts, taxpayer funding through the Medicare and Medicaid programs. The Center argues that furnishing services to the elderly who cannot afford such services is charitable, despite the existence of state funding, because such funding is, in many cases, deficient. We agree with the Center.

...

The Center clearly undertakes a “financial burden” by virtue of the fact—which the trial court expressly recognized—that reimbursement under the Medicaid program “does not fully [compensate] the [Center] for actual patient care costs.” This funding gap relieves the state of having to shoulder the entire financial burden of caring for the indigent elderly.

Id. at 211-13 (alterations in original).

68. The findings of the *St. Joseph’s Living Center* Court are not unique. On average, Medicaid-participating nursing facilities in Connecticut receive a per diem rate that is approximately \$18 less per day than the cost of providing care to a Medicaid beneficiary. That shortfall is either absorbed by the facility or, to the extent possible, is subsidized by other payors, such as Medicare and private insurance.

E. Barriers That Prevent Nursing Facilities From Exiting Connecticut’s Medicaid Program

69. Connecticut law erects various barriers that preclude or inhibit a nursing facility from exiting the State’s Medicaid program or leaving the business altogether.

70. For example, in order to terminate a service or decrease substantially its total bed capacity, a nursing facility in Connecticut must apply for and receive a certificate of need. *See* Conn. Gen. Stat. § 17b-352(b)(3).

71. In addition, at the same time that any such facility files a letter notifying the State of the facility’s desire to terminate a service or decrease substantially its total bed capacity, the facility must also provide a detailed written notice

to all patients, guardians or conservators, if any, or legally liable relatives or other responsible parties, if known, and shall post such notice in a conspicuous location at the facility. The notice shall state the following: (A) The projected date the facility will be submitting its certificate of need application, (B) that only [DSS] has the authority to either grant, modify or deny the application, (C) that the department has up to ninety days to grant, modify or deny the certificate of need application, (D) a brief description of the reason or reasons for submitting a request for permission, (E) that no patient shall be involuntarily transferred or discharged within or from a facility pursuant to state and federal law because of the filing of the certificate of need application, (F) that all patients have a right to appeal any

proposed transfer or discharge, and (G) the name, mailing address and telephone number of the Office of the Long-Term Care Ombudsman and local legal aid office.

Conn. Gen. Stat. § 17b-352(d).

72. These statutory provisions substantially impede, if not outright prevent, nursing facilities from leaving the State's Medicaid program and/or closing altogether.

73. Furthermore, a nursing facility wishing to leave the Medicaid program cannot, as a matter of state law, discharge or transfer Medicaid beneficiaries involuntarily.

74. Connecticut law also provides that if a Medicaid-participating nursing facility leaves the Medicaid program, the State will regulate the amount the facility may charge so-called "self-pay patients," which are broadly defined as patients who are "not receiving state or municipal assistance to pay for the cost of care." Conn. Gen. Stat. § 17b-341(a)(1); *see also* Conn. Gen. Stat. § 17b-341(a)(2) (emphasis added) (explaining that the "Commissioner of Social Services shall determine annually, after a public hearing, the rates to be charged to self-pay patients in any of the following licensed facilities *if* the facility does *not* have a provider agreement with the state to provide services to recipients of benefits obtained through" Medicaid). The result of such regulation would be that nursing facilities would be legally required to charge substantially less than the private pay rates they now charge.

75. In other words, Connecticut law effectively penalizes nursing facilities that leave the Medicaid program by regulating the rates they may charge non-Medicaid beneficiaries.

76. Connecticut law also prevents nursing facilities from taking measures to prevent or mitigate the impact of deficient Medicaid reimbursement. For example, Connecticut law provides that (1) Medicaid-participating nursing facilities cannot discriminate against Medicaid beneficiaries, Conn. Gen. Stat. § 19a-533(b)(1) (providing that Medicaid-participating nursing facilities are "prohibited from discriminating against indigent persons who apply for admission

to such facility on the basis of source of payment”); (2) with certain exceptions, all applicants for admission to such nursing facilities must be admitted in the order in which the applicants apply for admission, regardless of payor-type, *id.* (providing that “all applicants for admission to [Medicaid-participating nursing facilities] shall be admitted in the order in which the applicants apply for admission”); and (3) nursing facilities may not seek additional payment from Medicaid beneficiaries, § 19a-553(b)(3) (providing that Medicaid-participating nursing facilities are “prohibited from requiring that an indigent person pay any sum of money or furnish any other consideration . . . as a condition for admission of such indigent person”).

F. The Executive And Legislative Process Leading To The Enactment Of Public Act 09-5, September Special Session, 2009

77. “The General Assembly of the State of Connecticut operates through a bicameral legislature in which members of both the Senate (36 members) and the House of Representatives (151 members) serve two-year terms. The executive power of the state is vested in the Governor who is elected to serve a four-year term. . . . The main responsibility of the Governor is to recommend the budget to the legislature and execute the budget passed by the legislature by carrying out the program mandates through the agencies of the executive branch.” Office of Fiscal Analysis, Conn. Gen. Assembly, *State Budget Process*.

78. In relevant part, the budgetary process in Connecticut has two components. First, the Governor recommends to the General Assembly a biennial budget bill and various others bills to implement the different subject-matter areas covered by the budget. *See* Office of Fiscal Analysis, Conn. Gen. Assembly, *State Budget Process*. Second, the General Assembly considers those bills, amends them as it sees fit, and sends them to the Governor for her signature. *See id.*

79. As set forth below, unambiguous evidence from the extended legislative process that culminated in the State's recently enacted budget legislation demonstrates that the payment methodology for Medicaid-participating nursing facilities conflicts with federal law.

1. Governor Rell's Proposed Budget Bill (House Bill 6365)

80. On February 4, 2009, Governor Rell's proposed budget bill was introduced as House Bill 6365. As proposed, Governor Rell's budget bill would have appropriated \$3,866,375,670 for the Medicaid program. *See* H.B. 6365 § 1, slip law at 15 (Jan. Sess. 2009) (line item T566).

81. Corresponding to Governor Rell's recommended proposed budget bill and also unveiled on February 4, 2009, was the FY 2010-FY 2011 Biennium Governor's Budget document, which reported, among other things, Governor Rell's recommended reduction in nursing facility Medicaid expenditures in the amount of \$115,317,200 for FY 2010 and \$166,405,800 for FY 2011:

Remove Rate Add for Nursing Homes

Under current statute, DSS is required to rebase nursing home rates no more than once every two years and no less than once every four years. Since nursing home rates were last rebased in FY2006, the Current Services budget includes a rate increase of 9.64% in FY2010 to reflect the rebasing of rates at a cost of \$113.7 million in FY2010 and \$127.6 million in FY2011. To comply with DSS' regulations, the Current Services budget also includes a 3% inflationary adjustment in FY2011 based on the anticipated increase in the Data Resources Incorporated (DRI) consumer price index, which tracks inflation specific to the nursing home industry. In addition, under current statute, DSS incorporates an adjustment to accommodate improvements to real property (referred to as a "fair rent adjustment") when setting annual nursing home rates. Legislation is being proposed to eliminate these increases over the biennium.

FY 2010-FY 2011 Biennium Governor's Budget at 518.

82. The FY 2010-FY 2011 Biennial Governor's Budget document also described Governor Rell's proposal to delay half of nursing facilities' June payments until the next state

fiscal year in order to achieve an artificial reduction in FY 2010 spending in the amount of \$53,100,000:

Provide Half of the June Reimbursement for Nursing Homes in July of the Following Fiscal Year

Under this proposal, beginning in 2010, one-half of the June Medicaid payment to nursing homes will be deferred to the following month. This proposal will result in one-time savings in FY2010.

FY 2010-FY 2011 Biennium Governor's Budget at 518.

2. Governor Rell's Proposed Budget-Implementer Bill For Social Services (Senate Bill 843)

83. Also on February 4, 2009, Governor Rell's proposed bill implementing aspects of her budget related to social services became Senate Bill 843.

84. Section 16 of Senate Bill 843, introduced in accordance with the Governor's recommended appropriations and reflected in the proposed FY 2010-FY 2011 Biennium Governor's Budget, contained proposed statutory language that would have nullified the scheduled rebasing of rates by amending the stop-gain provision to read, in relevant part:

For the fiscal years ending June 30, 2010, and June 30, 2011, rates in effect for the period ending June 30, 2009, shall remain in effect until June 30, 2011, except any facility that would have been issued a lower rate for the fiscal year ending June 30, 2010, or the fiscal year ending June 30, 2011, due to interim rate status or agreement with the department, shall be issued such lower rate. The Commissioner of Social Services shall add fair rent increases to any other rate increases established pursuant to this subdivision for a facility which has undergone a material change in circumstances related to fair rent, except for the fiscal year ending June 30, 2010, and the fiscal year ending June 30, 2011.

S.B. 843 § 16, slip law at 15-16 (Jan. Sess. 2009) (Feb. 4, 2009).

85. In addition, Senate Bill 843 would have amended the reimbursement statute in order to provide a payment delay in June payments beginning in FY 2010, stating: "For the fiscal year ending June 30, 2010, and any succeeding fiscal year, one-half of the initial amount payable in June by the state to a facility pursuant to this subsection shall be paid to the facility in June

and the balance of such amount shall be paid in July.” S.B. 843 § 50, slip law at 38 (Jan. Sess. 2009) (Feb. 4, 2009).

86. The foregoing language is substantially similar to what would eventually become law on October 5, 2009, upon Governor Rell’s signing of Public Act 09-5, September Special Session, 2009, although the payment delay was altered to begin one year later than first proposed. Public Act 09-5 is discussed in more detail below.

87. On February 5, 2009, the General Assembly’s Office of Fiscal Analysis (“OFA”), whose primary function is to provide technical support to the Committee on Appropriations and certain other committees, issued its initial analysis of the Governor’s proposed budget bill (House Bill 6365). *See* Office of Fiscal Analysis, Conn. Gen. Assembly, *Synopsis of the Governor’s 2010-2011 Biennial Budget* (Feb. 5, 2009). Under the heading “Long Term Care,” OFA’s initial analysis concluded that removing rate increases for nursing facilities would reduce state spending by \$115.3 million in FY 2010 and \$166.4 million in FY 2011, whereas delaying one-half of June nursing facility payments would save the State \$53.1 million in FY 2010. *Id.* at 8.

3. The February 18, 2009 Appropriations Committee Hearings On House Bill 6365

88. Public hearings on Governor Rell’s proposed budget bill (House Bill 6365) were broken up by issue area and were conducted from February 9, 2009, to February 23, 2009.

89. Testimony relating to Governor Rell’s proposed cuts to nursing facilities’ Medicaid payment rates was presented on February 18, 2009, in morning and afternoon sessions before the Committee on Appropriations.

90. That testimony clearly reflected the perilous financial condition of the State's long-term care industry. For example, Nancy Shaffer, the State Long Term Care Ombudsman, testified as follows:

In the State of Connecticut we currently have ten skilled nursing facilities that are in state receivership. There are also six skilled nursing facilities in bankruptcy. A nursing home closed in December 2008 and two homes are awaiting the DSS Commissioner's decision regarding their request to close. In less than one month, 27 skilled nursing facilities face union activity. And by all accounts there are other facilities facing the prospect of closing in the very near future. As the State Ombudsman I am currently the Court appointed Patient Care Ombudsman in six bankrupt homes; and until recently also the Patient Care Ombudsman in four other homes.

These are perilous times. They are challenging, difficult times for the Connecticut long term care industry and that translates into significantly critical times for long term care residents. . . .

Tr. of Afternoon Hr'g Before the Appropriations Comm., Conn. Gen. Assembly, Regarding H.B. 6365 at 70 (Feb. 18, 2009), available at <http://cga.ct.gov/2009/APPdata/chr/2009APP00218-R001600-CHR.htm>.

91. Written testimony submitted to the Appropriations Committee used blunt terms as well. CAHCF, for example, explained to the Appropriations Committee:

5 facilities are currently in bankruptcy and 10 are being run by the State under the receivership program with little likelihood of finding a buyer. With this record number of facilities in receivership the State of CT is now the 5th largest provider in CT! Since the first of this year three (3) nursing homes have closed or announced they will be closing very soon. That is an historic record of closures in such a short time frame. A sickening record when you know the heartbreak and devastating toll it takes on the residents in those facilities when they are forced out of their home because their nursing home is no longer financially viable and closes.

Nursing Homes received a zero increase this fiscal year at a time of record increases in expenses. These closures are a direct result of inadequate funding. And the more poor people you care for the more at risk you are of being forced to close!

The Governor's budget zero funds nursing home care for the next two years and eliminates a statutorily required cost of living increase to rates that we receive

once every 4 years so the Medicaid program can try to keep pace with the costs of providing care. The Governor's budget estimates nursing homes have experienced a 9.64% increase in expenses while trying to operate with a zero % increase in rates and expected to deliver top notch care. And she is looking to re-implement a ridiculous budget gimmick that severely impacts a facility's cash flow with the reinstatement of the June half payment where nursing homes only get a half payment in June and the other half in the next fiscal year in the July payment. When [you are] running on zero with sky rocketing costs for heat, food, meds, diapers and electricity receiving every penny you are owed in a timely manner is essential.

Written Testimony of Toni M. Fatone, Executive Vice President, CAHCF, at 1-2 (Feb. 18, 2009), available at <http://cga.ct.gov/2009/APPdata/Tmy/2009HB-06365-R000218-DSS%20-%20Fatone,%20Toni%20-%20CT%20Association%20of%20Health%20Care%20Facilities-TMY.PDF>.

92. Similar testimony was presented by groups representing solely not-for-profit nursing facilities, as well as union representatives.

93. However, during both the morning and afternoon hearings on House Bill 6365, no consideration was given to the impact Governor Rell's proposed budget would have on the State's legal obligation under 42 U.S.C. § 1396a(a)(30)(A) to use "methods and procedures" that "assure that payments are consistent with efficiency, economy, and quality of care and are sufficient to enlist enough providers so that care and services are available under the [State Plan] at least to the extent that such care and services are available to the general public in the geographic area."

4. The March 3, 2009 Human Services Committee Hearing On Senate Bill 843

94. The General Assembly's Human Services Committee is a joint House-Senate committee with jurisdiction over Medicaid issues.

95. On March 3, 2009, the Human Services Committee held a hearing on the Governor's proposed bill implementing aspects of her budget related to social services (Senate Bill

843). See Tr. of Hr'g Before the Human Servs. Comm., Conn. Gen. Assembly, Regarding S.B. 843 (Mar. 3, 2009) ("Mar. 3, 2009 Hr'g Tr."), available at <http://www.cga.ct.gov/2009/HSdata/chr/2009HS-00303-R001000-CHR.htm>.

96. During that hearing, the following colloquy took place between Representative Toni E. Walker, co-chair of the Human Services Committee, and the chief rate-setting official from DSS, Gary M. Richter:

REP. WALKER: How many beds do we have basically for the state of Connecticut for—for nursing homes? How many beds do we have now?

GARY RICHTER: Approximately 28,000 beds.

REP. WALKER: About 28,0000?

GARY RICHTER: And we pay for—we have an average of—I think we're about a little under 18,000 are Medicaid cases. We can give you—I'll give you the specifics. We have in our—I think the Commissioner had in his presentation.

REP. WALKER: Okay the next question I have is how many of them are in receivership right now that are in jeopardy?

GARY RICHTER: Right now we have ten facilities in receivership.

REP. WALKER: Okay.

GARY RICHTER: We have ten facilities in receivership.

REP. WALKER: So the question then I go to is that section 16 which talks about the rebasing of the rate—the increase—we have a very fragile industry here and for a variety of reasons; costs, our reimbursement rates, I mean some obviously some other issues that have happened in there but this impact is not—is this going to impact the number of nursing homes that are going to end up closing also? Have we looked at that long-term?

GARY RICHTER: Well I think there's going to be pressure on the whole system. Clearly an increase would probably avoid problems for some homes. We do have a safety valve in the statute related to interim rates for facilities in financial distress.

And when those facilities come to the Department we evaluate the situation. Whether there's adequate bed supply in the area, physical condition of the building, so forth and so on. We can't give grants—we can grant rate relief and we have done that this year.

REP. WALKER: I just see a perfect storm coming here. Baby boomers are aging. People are having many more illnesses and they're ending up in nursing homes or they need long-term care. We haven't got Money Follows the Person totally enacted and here we have the fragile industry sort of shaking in their boots because they're not sure whether they're going to make it day to day.

So I just think that we need to look at this whole process that we're doing for long-term care and for elderly because I think we're going to end up in an emergency state within the next year or two. . . .

Mar. 3, 2009 Hr'g Tr. at 64-65.

97. During the hearing, no consideration was given to the impact Governor Rell's proposed statutory changes would have on the State's legal obligation under 42 U.S.C. § 1396a(a)(30)(A) to use "methods and procedures" that "assure that payments are consistent with efficiency, economy, and quality of care and are sufficient to enlist enough providers so that care and services are available under the [State Plan] at least to the extent that such care and services are available to the general public in the geographic area."

5. The Joint Favorable Substitute To Senate Bill 843

98. On March 19, 2009, the Human Services Committee approved a Joint Favorable Substitute to Governor Rell's proposed budget-implementer bill (Senate Bill 843). The Joint Favorable Substitute did not alter the rate-freeze language found in Governor Rell's proposed bill, although the language was moved to a new section within the bill (from section 16 to section 2). *See* Substitute S.B. 843 § 2, slip law at 6-7 (Jan. Sess. 2009) (Mar. 19, 2009). The delay of June payments found in Governor Rell's proposed bill was deleted altogether.

99. The significant financial ramifications of the Joint Favorable Substitute were well documented. For example, the Human Services Committee report that accompanied the Joint Favorable Substitute quoted Deputy DSS Commissioner Claudette Beaulieu as explaining:

Governor Rell stated in her budget address that none of the proposed cuts were easy to make and that they are not inconsequential, but that they do represent a return to a level of government spending that is affordable in these times. . . .

...

The budget includes a proposal to eliminate the rebasing of nursing home rates that would have resulted in a 9.64% increase in FY 2010 and a 3% inflationary adjustment in FY 2011 resulting in savings of \$115.3 million in FY 2010 and \$166.4 million in FY 2011.

Human Servs. Comm., Joint Favorable Report Regarding S.B. 843 at 2-4 (Jan. Sess. 2009) (Apr. 1, 2009) (statement of Dep’y Comm’r Beaulieu).

100. The OFA fiscal note that later accompanied the Joint Favorable Substitute contained similar language, stating:

Section 2 freezes at FY 09 levels Medicaid rates the state pays to nursing homes and intermediate care facilities for people with mental retardation in FY 10 and FY 11. This will result in a reduction of \$118,175,690 in FY 10 and \$172,595,400 in FY 11 to state Medicaid costs. This section also eliminates fair rent increases to nursing home rates in FY 10 and FY 11. Section 6 makes an exception to the freeze for facilities that have received interim rates. If that interim rate would have resulted in a lower rate on July 1, 2009, they will receive that lower rate.

Substitute S.B. 843 (File No. 461) at 28 (Jan. Sess. 2009) (Apr. 6, 2009).

101. The bill analysis prepared by the General Assembly’s Office of Legal Research (“OLR”), which helps the General Assembly make policy by providing the General Assembly with research and policy analysis, included similar language. *See* Substitute S.B. 843 (File No. 461) at 33-34 (Jan. Sess. 2009) (Apr. 6, 2009).

102. At the same time, the Human Services Committee report explained that the Connecticut Commission on Aging, which is an independent state agency of the General Assembly devoted to enhancing the lives of older adults and to promote responsible public policy in preparation of an aging population, had testified that the Governor’s proposal “does not provide sufficient Medicaid reimbursement rates to providers across the continuum of long-term care, threatening the very existence of services across the spectrum.” Human Servs. Comm., Joint

Favorable Report Regarding S.B. 843 at 12 (Jan. Sess. 2009) (Apr. 1, 2009) (statement of Deb Polun, Legislative Director, Connecticut Commission on Aging).

103. Although the significant financial ramifications of the Joint Favorable Substitute to Senate Bill 843 were well documented, there is no evidence in the legislative record that Governor Rell, the Human Services Committee, DSS, OFA or OLR addressed the impact these changes would have on the State's legal obligation under 42 U.S.C. § 1396a(a)(30)(A) to use "methods and procedures" that "assure that payments are consistent with efficiency, economy, and quality of care and are sufficient to enlist enough providers so that care and services are available under the [State Plan] at least to the extent that such care and services are available to the general public in the geographic area."

6. The Joint Favorable Substitute To House Bill 6365

104. On April 2, 2009, the Committee on Appropriations approved a Joint Favorable Substitute to Governor Rell's proposed budget bill (House Bill 6365), which provided \$3,863,903,700 for Medicaid (\$2,471,970 less than what the Governor's proposed bill requested). *See* Substitute H.B. 6365 § 1, slip law at 19 (Jan. Sess. 2009) (Apr. 2, 2009) (line item T708).

105. That same day, OFA issued a lengthy report explaining differences between Governor Rell's proposed budget bill and the Joint Favorable Substitute approved by the Committee on Appropriations, stating, in relevant part:

Medicaid Long Term Care Cost and Caseload Update

-(Governor) Under current statute, DSS is required to rebase nursing home rates no more than once every two years and no less than once every four years. Since nursing home rates were last rebased in FY 06, the Current Services budget includes a rate increase of 9.64% in FY 10 to reflect the rebasing of rates at a cost of \$113.7 million in FY 10 and \$127.6 million in FY 11. To comply with DSS' regulations, the Current Services budget also includes a 3% inflationary adjustment in FY 11 (\$49.6 million) based on the anticipated increase in the Data Re-

sources Incorporated (DRI) consumer price index, which tracks inflation specific to the nursing home industry. In addition, under current statute, DSS incorporates an adjustment to accommodate improvements to real property (referred to as a “fair rent adjustment”) when setting annual nursing home rates, which is estimated to cost \$2.1 million in FY 10 and \$4.2 million in FY 11. . . .

. . .

-(Committee) Same as Governor.

. . .

Restore Nursing Home Payment Delay

-(Governor) The Governor recommends that, beginning in 2010, one-half of the June Medicaid payment to nursing homes be deferred to the following month. This proposal will result in one-time savings of \$53.1 million in FY 10.

-(Committee) The Committee provides that the delay be implemented in FY 11, rather than FY 10.

. . .

Eliminate Rate Increases for Nursing Homes and IFC/MR’s

-(Governor) The Governor recommends reductions of \$118.2 million in FY 10 and \$172.6 million in FY 11 to reflect the elimination of statutorily required rate increases for nursing homes and ICF/MR’s. These rate increases are detailed in the above write-up entitled *Medicaid Long Term Care Cost and Caseload Update*.

-(Committee) Same as Governor.

. . .

Limit Nursing Home Administrative Costs

-(Committee) The Committee recommends reducing the Medicaid administrative cost cap within the nursing home rate setting procedures by 10%, for an annual savings of \$20 million.

Office of Fiscal Analysis, Conn. Gen. Assembly, *2009 Appropriations Committee JF Report* at 237-39 (Jan. Sess. 2009) (Apr. 2, 2009) (emphasis in original).

106. Although the significant financial ramifications of the Joint Favorable Substitute to House Bill 6365 were well documented, there is no evidence in the legislative record that

Governor Rell, DSS or the Committee on Appropriations addressed the impact these changes would have on the State's legal obligation under 42 U.S.C. § 1396a(a)(30)(A) to use "methods and procedures" that "assure that payments are consistent with efficiency, economy, and quality of care and are sufficient to enlist enough providers so that care and services are available under the [State Plan] at least to the extent that such care and services are available to the general public in the geographic area."

7. The May 18, 2009 "Informational Forum" Before The Appropriations, Aging, Human Services, And Public Health Committees

107. On May 18, 2009, the Appropriations, Aging, Human Services, and Public Health Committees held a "Joint Informational Forum on Nursing Home Funding" at which the committees heard from representatives of the Office of Fiscal Analysis, DSS and CAHCF, among others. A recording of the hearing is available at http://ctnv1.ctn.state.ct.us/A/app_5-18-09.wmv.

108. Testifying on behalf of DSS, Mr. Richter explained the State's payment methodology for Medicaid-participating nursing facilities. For example, in explaining the stop-gain provision, Mr. Richter stated: "Every year, we set the rates for the homes based on the formula and then, every home gets a computation based on the formula and statute and regulation. And then, at the end, we say 'okay, well, what did the legislature allow for an increase?'" Video Recording at 01:59:14-01:59:34.

109. Mr. Richter went on to explain to the several committees:

I don't envy your job. Why have we limited these expenses? I think you, for example, Representative Walker, you have said it's not just nursing homes. It's other service areas that have been capped. Our fee schedules, have, uh, you know you've heard from providers. I think legislators had to make a choice. Are we going to add coverage, expand coverage to more areas, more eligible groups, uh, under our option? Provide more services for the uninsured? Can't do everything. Plus, you have demands from not just the Department of Social Services, you've

had demands from DCF, Corrections, everything else. And this is what's, uh, you've been able to do in the nursing home area.

Video Recording at 02:00:55-02:01:34.

110. Representatives of CAHCF, in turn, explained to the several committees the dire situation facing many nursing facilities in Connecticut and explained that the significant cuts in reimbursement being proposed would jeopardize the very existence of the industry.

111. Similar testimony was presented by groups representing solely not-for-profit nursing facilities, as well as union representatives.

8. The State Budget Impasse

112. With no further legislative action on House Bill 6365 and Senate Bill 843 forthcoming, and with the General Assembly scheduled to adjourn on June 3, 2009, Governor Rell issued a press release on May 28, 2009, announcing that she was proposing a second budget. *See* Press Release, Governor Rell Delivers Second 'No-Tax' Budget of Legislative Session (May 28, 2009).

113. The press release quoted Governor Rell as stating that her new budget contained “deeper cuts and no tax increases. It also preserves municipal aid so that tax increases are not passed on to local taxpayers. Connecticut residents and businesses cannot afford massive tax increases,” Governor Rell said. ‘It is a budget that the families of Connecticut can afford and one that their government can ill-afford to delay any longer. They are counting on us to make those cuts and to finish our business on time.’” Press Release, Governor Rell Delivers Second ‘No-Tax’ Budget of Legislative Session (May 28, 2009).

114. An attachment to the press release entitled “BUDGET NEGOTIATIONS – ALL YES OPTIONS” described several new initiatives to significantly reduce state spending on nursing facility services. The attachment to Governor Rell’s press release stated, in relevant part:

Reduce Medicaid Provider Rates by 1%

Net impact after accounting for federal reimbursement at enhanced [federal matching] rate. Gross savings of \$23.2 million in FY 10 (11 months of savings) and \$26.3 million annualized. Reflects reduction in Medicaid provider rates by 1%, including nursing homes, effective 7/1/09. . . .

...

Limit Nursing Home Administrative Costs

Consistent with the [Appropriations] Committee's budget, this proposal reduces the administrative cap for nursing home rates by 10%. Given that nursing home closures and receiverships are increasing, and the proposed 1% rate reduction, this proposal could force financially viable homes into financial distress. Reflects net impact after accounting for federal reimbursement at enhanced [federal matching] rate. Gross savings of \$20 million in each year of the biennium. Legislation is required to implement this option.

...

Restrict Interim Rates for Nursing Homes

The Governor's budget includes \$8.5 million in FY 10 and an additional \$8.5 million in FY 11 for receivership and hardship (i.e., interim rates). Under this proposal, all additional rate increases would be required to go thru OPM for approval with the goal of reducing interim rates. Since it is likely that interim rates would continue for those homes that fall under receivership per court order, it is assumed that only 20% of the requests are due to receiverships. This will result in gross savings of \$6.8 million in FY 10 and \$13.6 million in FY 11. Reflects net impact after accounting for federal reimbursement at enhanced [federal matching] rate. It should be noted that restricting interim rates will likely result in additional closures for homes that are struggling financially. Legislation should allow DSS to waive certain exemptions under the [certificate-of-need] process in order to address access issues and ensure available nursing home beds. In FY 08, DSS granted interim rates to 16 facilities, excluding the Haven homes, valued at \$11.5 million. As of 10/29/08, DSS had received requests for rate increases totaling over \$21.6 million on an annualized basis, excluding the Haven homes. Legislation is required to implement this option.

Attachment to Press Release, Governor Rell Delivers Second 'No-Tax' Budget of Legislative Session at 21-22 (May 28, 2009).

115. None of the above recommendations were included in the final appropriations legislation.

9. DSS's June 1, 2009 Notice And The Governor's Second Proposed Budget

116. On June 1, 2009, DSS caused to be published in newspapers throughout the State a document entitled "NOTICE OF PROPOSED CHANGES TO THE MEDICAID STATE PLAN GOVERNING PAYMENTS TO NURSING FACILITIES AND PRIVATELY-OPERATED INTERMEDIATE CARE FACILITIES FOR THE MENTALLY RETARDED" (the "June 1, 2009 Notice").

117. The June 1, 2009 Notice stated, in relevant part:

The State Department of Social Services (DSS) proposes to revise nursing facility and intermediate care facility for the mentally retarded (ICF/MR) rate setting methodologies in the Medicaid State Plan. The State Plan Amendment (SPA) will be submitted to the Federal Centers for Medicare and Medicaid Services (CMS) within the Department of Health and Human Services.

Changes to Medicaid State Plan

Based upon the Governor's Recommended Budget for SFY 2010 and actions to date by the General Assembly, it is anticipated that the Medicaid State Plan will be amended to reduce nursing facility and ICF/MR rates by approximately 2.4% and 1%, respectively, effective July 1, 2009. While a final budget and related implementing legislation have not yet been adopted and budget development is ongoing, public notice is required at this time under federal regulations. With no changes to the current Medicaid State Plan or state statutes, it is projected that July 1, 2009 nursing facility and ICF/MR rates would increase by an average of 9.6% and 4.7%, respectively.

Fiscal Information

The expected revisions to nursing facility and ICF/MR rate setting will result in Medicaid savings of approximately \$152 million in SFY 2010. . . .

118. A DSS document acquired by CAHCF on June 2, 2009, explained that at the time DSS issued its June 1, 2009 Notice, DSS had not yet conducted a complete evaluation of the impact of Governor Rell's proposal, stating: "The Department is continuing to evaluate the proposed reduction, but at this point the analysis indicates that even with the rate reduction there

will continue to be adequate access to quality nursing facility services for Medicaid-eligible individuals.”

119. Also on June 1, 2009, Governor Rell issued a press release stating that the “General Assembly is just days away from its deadline for finishing its work. Yet we still do not have a state budget for the next two years.” Press Release, *A Budget We Can Afford* (June 1, 2009).

120. Governor Rell’s June 1, 2009 press release explained that she refused to increase taxes, stating:

In February, I proposed a two-year budget that would cut state spending, consolidate or merge dozens of state agencies, maintain state aid to cities and towns so burdens would not fall on property taxpayers and give those municipalities much-needed relief from costly state mandates—all without raising taxes.

...

And most importantly, this budget is in line with what the people of our state *can afford*—just like my budget in February. That means it contains *no tax increases* and actually *reduces* spending from current levels in Fiscal 2010.

...

Consider that nearby states like New York and New Jersey are raising their income taxes while Massachusetts is raising its sales tax. The top income tax rates in New York and New Jersey are now 8.97 percent (in New York City it’s an astonishing *12.62 percent!*), while the top bracket in Rhode Island is 9.9 percent.

Connecticut’s top rate is currently 5 percent.

By holding the line on taxes and making the tough decisions now, we will [sic] are making Connecticut a beacon of opportunity—our state becomes infinitely more affordable for business and infinitely more appealing for investment.

Press Release, *A Budget We Can Afford* (June 1, 2009) (emphases in original).

121. According to Governor Rell, all tax increases do “is ‘feed the beast’—and two years later the beast is back, hungry again, and always a little bit larger.” Press Release, *A Budget We Can Afford* (June 1, 2009). “I am not looking for a battle,” Governor Rell explained, but she was “willing to fight one.” *Id.*

122. On June 3, 2009, the General Assembly adjourned its 2009 Regular Session without enacting a biennial budget.

10. Senate Bill 1801

123. The General Assembly subsequently convened a special session.

124. On June 26, 2009, the General Assembly passed Senate Bill 1801, entitled “An Act Concerning the State Budget for the Biennium Ending June 30, 2011, and Making Appropriations Therefor.” Senate Bill 1801 would have appropriated \$3,878,659,700 for Medicaid.

125. However, on June 27, 2009, Governor Rell issued a press release stating that she would veto Senate Bill 1801. *See* Press Release, Governor Rell Will Veto Democrats’ Budget Bill With \$2.5 Billion in New Taxes and Built-in Future Deficits (June 27, 2009). Governor Rell’s press release also stated: “At a time when states surrounding and near Connecticut are raising income, sales and business taxes, Connecticut has the opportunity to become a beacon of opportunity. Holding the line now—making difficult but necessary decisions about state spending now—will make Connecticut a far more attractive place to live and do business, keeping and attracting the jobs and new economic development that is essential to our recovery from the current recession.” *Id.*

11. Executive Order 28 And Governor Rell’s Veto Of Senate Bill 1801

126. On June 30, 2009, the State’s fiscal year ended without an approved appropriations act for FY 2010.

127. That same day, Governor Rell signed Executive Order 28. Among other things, Executive Order 28 asserted that the State was confronted with a “severe financial emergency.”

128. Section 4 of Executive Order 28 explained that “all expenditures for the period from July 1, 2009 through July 31, 2009 or the date of approval of an appropriations act for the

fiscal year commencing July 1, 2009, whichever occurs first, shall be in accordance with the allotments for the month of July 2009 which are appended to this executive order.”

129. Executive Order 28, which allotted \$340 million in state funds for Medicaid, explained that it would “take effect on July 1, 2009 and shall expire on July 31, 2009 or upon the approval of an appropriations act for the fiscal year commencing July 1, 2009, whichever occurs first.”

130. Also on June 30, 2009, Governor Rell issued a press release stating, in relevant part: “Governor M. Jodi Rell today announced she has signed an Executive Order that will ensure the continued efficient operation of state government until a new, two-year state budget has been signed into law. The action is necessary because Wednesday marks the beginning of a new fiscal year for Connecticut but the General Assembly and the Governor have not yet completed negotiations on a new budget.” Press Release, Governor Rell: Executive Order Continues Funding for State Operations While Budget Talks Continue (June 30, 2009).

131. On July 1, 2009, Governor Rell followed through on her promise and vetoed Senate Bill 1801.

12. Executive Order 31 And Governor Rell’s Third Proposed Budget

132. Governor Rell signed Executive Order 31 on July 30, 2009, explaining that there was still no approved appropriations act for FY 2010. Section 4 of Executive Order 31 provided that “all expenditures for the period from August 1, 2009 through August 31, 2009 or the date of approval of an appropriations act for the fiscal year commencing July 1, 2009, whichever occurs first, shall be in accordance with the allotments for the month of August 2009 which are appended to this executive order.”

133. Executive Order 31, which allotted \$360 million for Medicaid, explained that it would “take effect on August 1, 2009 and shall expire on August 31, 2009 or upon the approval of an appropriations act for the fiscal year commencing July 1, 2009, whichever occurs first.”

134. Also on July 30, 2009, Governor Rell issued a press release announcing that she was recommending a third proposed budget to the General Assembly that reduced state spending by \$1 billion. *See* Press Release, Governor Rell Offers Third Budget Proposal (July 30, 2009).

13. Executive Order 31A

135. On August 11, 2009, Governor Rell signed Executive Order 31A.

136. Section 4 of Executive Order 31A explained that “all expenditures for the period from August 1, 2009 through August 31, 2009 or the date of approval of an appropriations act for the fiscal year commencing July 1, 2009, whichever occurs first, shall be in accordance with the allotments for the month of August 2009 which are appended to this executive order provided, however, that the Governor, may in her discretion, provide for additional emergency expenditures as they occur.”

137. Executive Order 31A, which allotted \$360 million for Medicaid, stated that it would take effect on August 1, 2009, and expire on August 31, 2009, “or upon the approval of an appropriations act for the fiscal year commencing July 1, 2009, whichever occurs first.”

14. Governor Rell’s Fourth Proposed Budget

138. On August 26, 2009, Governor Rell announced that she had issued a fourth proposed budget. *See* Press Release, Governor Rell Offers Compromise Budget Alternative (Aug. 26, 2009).

139. According to her press release, Governor Rell’s fourth proposed budget “provide[d] an immediate tax cut for everyone, require[d] \$520 million in spending cuts and

propose[d] \$710 million in new revenue.” Press Release, Governor Rell Offers Compromise Budget Alternative (Aug. 26, 2009).

15. The Final Budget Bill (House Bill 6802)

140. On August 31, 2009, new budget legislation (House Bill 6802) was introduced in both the House and the Senate. As introduced, House Bill 6802 would have appropriated \$3,837,084,700 for the State’s Medicaid program, \$29,290,970 more than that first proposed by Governor Rell on February 4, 2009.

141. No public hearings were held on House Bill 6802, and the House and Senate passed House Bill 6802 the same day that it was introduced.

142. Although the significant financial ramifications of House Bill 6802 were well documented, there is no evidence in the legislative record that Governor Rell or the General Assembly addressed the impact these changes would have on the State’s legal obligation under 42 U.S.C. § 1396a(a)(30)(A) to use “methods and procedures” that “assure that payments are consistent with efficiency, economy, and quality of care and are sufficient to enlist enough providers so that care and services are available under the [State Plan] at least to the extent that such care and services are available to the general public in the geographic area.”

143. House Bill 6802 was transmitted to Governor Rell for her signature on August 31, 2009.

16. Executive Order 33

144. On September 1, 2009, Governor Rell signed Executive Order 33, section 4 of which provided that “all expenditures for the period from September 1, 2009 through September 30, 2009 or the date of approval of an appropriations act for the fiscal year commencing July 1, 2009, whichever occurs first, shall be in accordance with the allotments for the month of

September 2009 which are appended to this executive order provided, however, that the Governor, may in her discretion, provide for additional emergency expenditures as they occur.”

145. Executive Order 33, which allotted \$320 million for the State’s Medicaid program, stated that it would “take effect on September 1, 2009 and shall expire on September 30, 2009 or upon the approval of an appropriations act for the fiscal year commencing July 1, 2009, whichever occurs first.”

146. Also on September 1, 2009, Governor Rell issued a press release announcing that the General Assembly’s final budget bill (House Bill 6802) would become law without her signature. *See* Press Release, Governor Rell: Budget Will Become Law Without Her Signature—and Without Pork-Barrel Spending (Sept. 1, 2009).

147. Governor Rell used the opportunity to criticize the final budget bill, stating that, “in the hours before this budget was brought to a vote the Democrats had the audacity to add *more* spending. It is as if they believe the people of Connecticut do not care, are not watching and will not notice.” Press Release, Governor Rell: Budget Will Become Law Without Her Signature—and Without Pork-Barrel Spending (Sept. 1, 2009) (emphasis in original). “It is hardly a compromise. Last week I put a new budget proposal on the table—my fourth—in which I accepted tax increases I did not want in return for cuts in state spending. The Democrats just could not cut, once again showing they are unwilling—or simply unable—to make meaningful reductions.” *Id.*

17. Public Act 09-3, June Special Session, 2009

148. On September 8, 2009, House Bill 6802 became law without Governor Rell’s signature and was designated Public Act 09-3, June Special Session, 2009.

149. Entitled “An Act Concerning Expenditures and Revenue for the Biennium Ending June 30, 2011,” Public Act 09-3 appropriated \$3,837,084,700 for the State’s Medicaid program. Pub. Act No. 09-3 § 1, slip law at 55 (June Sp. Sess. 2009).

150. Although the significant financial ramifications of Public Act 09-3 were well documented, there is no evidence in the legislative record that Governor Rell or the General Assembly addressed the impact these changes would have on the State’s legal obligation under 42 U.S.C. § 1396a(a)(30)(A) to use “methods and procedures” that “assure that payments are consistent with efficiency, economy, and quality of care and are sufficient to enlist enough providers so that care and services are available under the [State Plan] at least to the extent that such care and services are available to the general public in the geographic area.”

18. The Final Budget-Implementer Bill (House Bill 7005)

151. On September 24, 2009, House Bill 7005 was introduced in the General Assembly.

152. Entitled “An Act Implementing the Provisions of the Budget Concerning Human Services and Making Changes to Various Social Services Statutes,” House Bill 7005 repealed the stop-gain provision of section 17b-340(f)(4) of the Connecticut General Statutes and, in relevant part, replaced it by adding the following italicized language:

For the fiscal years ending June 30, 2010, and June 30, 2011, rates in effect for the period ending June 30, 2009, shall remain in effect until June 30, 2011, except any facility that would have been issued a lower rate for the fiscal year ending June 30, 2010, or the fiscal year ending June 30, 2011, due to interim rate status or agreement with the department, shall be issued such lower rate. The Commissioner of Social Services shall add fair rent increases to any other rate increases established pursuant to this subdivision for a facility which has undergone a material change in circumstances related to fair rent, except for the fiscal year ending June 30, 2010, and the fiscal year ending June 30, 2011, such fair rent increases shall only be provided to facilities with an approved certificate of need

H.B. 7005 § 32, slip law at 28 (Sept. Sp. Sess. 2009) (Sept. 24, 2009).

153. House Bill 7005 also imposed a delay on June payments beginning in FY 2011, stating: “For the fiscal year ending June 30, 2011, and any succeeding fiscal year, one-half of the initial amount payable in June by the state to a facility pursuant to this subsection shall be paid to the facility in June and the balance of such amount shall be paid in July.” H.B. 7005 § 39, slip law at 35 (Sept. Sp. Sess. 2009) (Sept. 24, 2009).

154. The House passed House Bill 7005 the same day it was introduced.

155. Although no public hearings were held on House Bill 7005, the following colloquy took place during the House’s consideration of the bill:

REP. CHAPIN (67th):

Thank you, Mr. Speaker.

Having received the copy, this latest copy maybe half an hour ago, and the fiscal note just a few moments ago, I haven’t gone through it, I’m sure, as extensively as the Chairlady from Human Services, but I was looking at Sections 32, 35 and 40 through 42 that looks as if we’re eliminating Medicaid rate increases that were scheduled to take place. Is that correct?

Through you, Mr. Speaker.

SPEAKER DONOVAN:

Representative Walker.

REP. WALKER (93rd):

Through you, Mr. Speaker, that is correct.

SPEAKER DONOVAN:

I was pondering that answer.

Representative Chapin.

REP. CHAPIN (67th):

Thank you, Mr. Speaker.

Could the Chairlady tell me what the percentages for those increases would have been for these facilities?

Through you, Mr. Speaker.

SPEAKER DONOVAN:

Representative Walker.

REP. WALKER (93rd):

Through you, Mr. Speaker, just one moment, please.

In Sections 33, the increases for the annual enrollment fee for ConnPACE is going from 35 to 45.

Could you also—through you, Mr. Speaker, could you identify the other sections that you asked, sir?

SPEAKER DONOVAN:

Representative Chapin.

REP. CHAPIN (67th):

Thank you, Mr. Speaker.

Specifically, Sections 32, according to the fiscal note, Sections 32, 35 and 40, 41 and 42 eliminate these statutory increases, increases for nursing homes, intermediate care facilities for the mentally retarded and residential care homes.

I was wondering if the Chairman of the Human Services Committee could tell me what those percentage increases are that these facilities will no longer receive if this bill were to pass?

Through you, Mr. Speaker.

SPEAKER DONOVAN:

Representative Walker.

REP. WALKER (93rd):

Through you, Mr. Speaker, I'm not exactly sure what the percentages are, but the assumes—excuse me.

Is about—through you, Mr. Speaker, it's about 9 percent, but if you note in the fiscal note, the savings is 122 million in FY10 and 181 million in FY11. . . .

Tr. of Proceedings Before the House of Representatives, Conn. Gen. Assembly, Regarding H.B. 7005 at 40-42 (Sept. 24, 2009), available at <http://www.cga.ct.gov/2009/trn/H/2009HTR00924-R00-TRN.htm>.

156. Meanwhile, the Senate passed House Bill 7005 on October 2, 2009.

157. During the Senate's consideration of House Bill 7005, no comments were made regarding the significant cuts to Medicaid reimbursement for nursing facilities.

19. Public Act 09-5, September Special Session, 2009

158. On October 5, 2009, Governor Rell signed House Bill 7005, which became Public Act 09-5, September Special Session, 2009. Governor Rell did not issue a press release marking the occasion.

159. Entitled "An Act Implementing The Provisions Of The Budget Concerning Human Services And Making Changes To Various Social Services Statutes," Public Act 09-5 amended Connecticut's stop-gain provision by adding the following italicized language to section 17b-340(f)(4) of the Connecticut General Statutes:

For the fiscal years ending June 30, 2010, and June 30, 2011, rates in effect for the period ending June 30, 2009, shall remain in effect until June 30, 2011, except any facility that would have been issued a lower rate for the fiscal year ending June 30, 2010, or the fiscal year ending June 30, 2011, due to interim rate status or agreement with the department, shall be issued such lower rate. The Commissioner of Social Services shall add fair rent increases to any other rate increases established pursuant to this subdivision for a facility which has undergone a material change in circumstances related to fair rent, except for the fiscal year ending June 30, 2010, and the fiscal year ending June 30, 2011, such fair rent increases shall only be provided to facilities with an approved certificate of need

Pub. Act No. 09-5 § 32, slip law at 29 (Sept. Sp. Sess. 2009).

160. Public Act 09-5 also imposed a delay on June payments to Medicaid-participating nursing facilities beginning in FY 2011 by amending section 17b-340(f)(11) of the Connecticut General Statutes so that it now reads as follows: "For the fiscal year ending June 30, 2011, and

any succeeding fiscal year, one-half of the initial amount payable in June by the state to a facility pursuant to this subsection shall be paid to the facility in June and the balance of such amount shall be paid in July.” Pub. Act No. 09-5 § 39, slip law at 36 (Sept. Sp. Sess. 2009).

20. DSS’s Failure To Revise And Republish The June 1, 2009 Notice

161. Public Act 09-5 changed many of the assumptions on which DSS’s June 1, 2009 Notice was based. However, as of the date of this filing, DSS has not published a revised notice.

162. Despite the fact that DSS has not published a revised notice, on September 30, 2009, DSS sent a letter to CMS that incorrectly assures CMS that DSS has satisfied the Medicaid Act’s public-notice requirements.

163. DSS’s September 30, 2009 letter also forwarded to CMS a proposed state plan amendment, designated transmittal number 09-012, which reflects the changes made to the stop-gain provision by Public Act 09-5. However, DSS’s state plan amendment does not reflect the fact that Public Act 09-5 also imposes a delay on June payments beginning in FY 2011.

G. Governor Rell’s Recent Call For Even Further Reductions In Nursing Facilities’ Payment Rates

164. On November 24, 2009, Governor Rell asked the General Assembly to enact a further 2 percent reduction in nursing facilities’ payment rates. *See* Press Release, Governor Rell Proposes Comprehensive Plan to Erase Deficit of Nearly \$470 Million (Nov. 24, 2009). According to Governor Rell, her proposed reduction in nursing facilities’ payment rates would reduce state spending by an additional \$14 million.

165. On November 25, 2009, Governor Rell announced that she had set a date of December 15, 2009, to call the General Assembly back into special session to consider her proposed spending cuts. *See* Press Release, Governor Rell Calls Legislature Into Special Session On December 15 to Close \$466.5 Million Budget Gap (Nov. 25, 2009).

166. On December 9, 2009, the Appropriations Committee held a public hearing to discuss Governor Rell's proposed spending cuts. Various nursing facility stakeholders testified, including representatives of CAHCF.

167. On December 21, 2009, legislation delaying scheduled reductions in the State's estate tax was introduced and passed by the General Assembly. *See* H.B. 7101 (Dec. Sp. Sess. 2009). That same day, deficit-reduction legislation was introduced and passed by the General Assembly. *See* S.B. 2101 (Dec. Sp. Sess. 2009). Neither piece of legislation included any further reductions in nursing facility spending.

168. Governor Rell vetoed both measures on December 28, 2009, claiming that they did not do enough to cut state spending. *See* Press Release, Governor Rell Vetoes Both Democrat Deficit Bills (Dec. 28, 2009).

H. Threat Of Imminent Irreparable Harm To CAHCF's Members

169. Connecticut's illegal payment system for Medicaid-participating nursing facilities has harmed and will continue to harm CAHCF's members irreparably in the absence of injunctive relief.

170. For example, each day Connecticut's illegal payment methodology is allowed to operate, CAHCF's members lose tens of thousands of dollars that cannot be compensated by a later money damages award because of the Eleventh Amendment to the United States Constitution.

171. In addition, if the State continues to deprive CAHCF's members of the resources necessary to efficiently and effectively operate their facilities, any number of CAHCF's members may be forced into bankruptcy or receivership, as has already happened with alarming frequency over the past several years. *See* Gary M. Richter, Conn. Dep't of Soc. Servs., *Presentation to Long Term Care Financial Managers Association Meeting* at 18 (Nov. 12, 2009)

(describing at least ten nursing facilities currently in state receivership and recent bankruptcies that have plagued the nursing facility industry in Connecticut).

172. Furthermore, if the resources necessary to care for the tens of thousands of frail and elderly Connecticut citizens served by CAHCF's members are not made available, those citizens face the very real prospect of being denied the care and services the State has promised to provide. Moreover, if the State continues to deprive CAHCF's members of the resources necessary to efficiently and effectively operate their facilities, thousands of persons employed by CAHCF's members face the very real prospect of being laid off.

CAUSES OF ACTION

COUNT I:

Procedural Violation of 42 U.S.C. § 1396a(a)(30)(A)/Supremacy Clause

173. CAHCF repeats and realleges paragraphs 1-172, above, as if set forth fully herein.

174. The Supremacy Clause provides that “[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.” U.S. Const. art. VI, cl. 2.

175. Although a State's participation in Medicaid is voluntary, once a State chooses to participate, it must comply with certain federal statutes and regulations.

176. In relevant part, the Medicaid Act requires that States “provide such methods and procedures relating to . . . the payment for[] care and services available under the [State Plan] . . . as may be necessary . . . to assure that payments are consistent with efficiency, economy, and quality of care and are sufficient to enlist enough providers so that care and services are available

under the [State Plan] at least to the extent that such care and services are available to the general population in the geographic area.” 42 U.S.C. § 1396a(a)(30)(A).

177. Therefore, when a State establishes Medicaid reimbursement rates, it must assure that payments are consistent with efficiency, economy, quality of care and equality of access. At a minimum, the State’s decision that reimbursement rates satisfy 42 U.S.C. § 1396a(a)(30)(A) can be sustained only if the State has set payment rates on an objective, reasonable and principled basis.

178. In enacting the payment methodology for Medicaid-participating nursing facilities in Connecticut, neither Governor Rell nor the General Assembly considered whether payments to nursing facilities assured that the statutory factors contained in 42 U.S.C. § 1396a(a)(30)(A) were satisfied.

179. Rather than utilizing an objective, reasonable and principled basis to set nursing facility payment rates as required by 42 U.S.C. § 1396a(a)(30)(A), Governor Rell and the General Assembly established the FY 2010 and FY 2011 payment rates based solely on state budgetary factors.

180. Because Connecticut’s payment methodology for Medicaid-participating nursing facilities is an obstacle to the accomplishment and execution of the full purposes and objectives of Congress in its enactment of 42 U.S.C. § 1396a(a)(30)(A), Connecticut’s payment methodology for Medicaid-participating nursing facilities is preempted by federal law, rendering it null and void.

COUNT II:
Substantive Violation of 42 U.S.C. § 1396a(a)(30)(A)/Supremacy Clause

181. CAHCF repeats and realleges paragraphs 1-172, above, as if set forth fully herein.

182. The Medicaid Act requires that States assure their Medicaid payments are in fact “consistent with efficiency, economy, and quality of care and are sufficient to enlist enough providers so that care and services are available under the [State Plan] at least to the extent that such care and services are available to the general population in the geographic area.” 42 U.S.C. § 1396a(a)(30)(A).

183. Connecticut’s Medicaid payments to nursing facilities are not in fact consistent with efficiency, economy, quality of care and equality of access. That conclusion is evidenced by, among other things, the fact that a majority of those nursing facilities with the lowest costs in the State do not receive a Medicaid payment rate that covers the actual cost of providing care to Medicaid beneficiaries.

184. Because Connecticut’s payment methodology for Medicaid-participating nursing facilities is an obstacle to the accomplishment and execution of the full purposes and objectives of Congress in its enactment of 42 U.S.C. § 1396a(a)(30)(A), Connecticut’s payment methodology for Medicaid-participating nursing facilities is preempted by federal law, rendering it null and void.

COUNT III:
Violation of 42 U.S.C. § 1396a(a)(30)(A)/42 U.S.C. § 1983

185. CAHCF repeats and realleges paragraphs 1-172, above, as if set forth fully herein.

186. Title 42 U.S.C. § 1983 provides that “[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation

of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress”

187. Under federal law, States must use “such methods and procedures relating to . . . the payment for[] care and services available under the [State Plan] . . . as may be necessary . . . to assure that payments are consistent with efficiency, economy, and quality of care and are sufficient to enlist enough providers so that care and services are available under the [State Plan] at least to the extent that such care and services are available to the general population in the geographic area.” 42 U.S.C. § 1396a(a)(30)(A).

188. Title 42 U.S.C. § 1396a(a)(30)(A) confers rights, privileges or immunities on Medicaid-participating nursing facilities that are enforceable under 42 U.S.C. § 1983.

189. The Connecticut payment system for nursing facility services violates the rights, privileges or immunities conferred on Medicaid-participating nursing facilities by 42 U.S.C. § 1396a(a)(30)(A).

**COUNT IV:
Violation of 42 U.S.C. § 1396a(a)(13)(A)/42 U.S.C. § 1983**

190. CAHCF repeats and realleges paragraphs 1-172, above, as if set forth fully herein.

191. States must establish payment rates for nursing facilities using a public process that includes: (a) publication of proposed rates, the methodologies underlying the establishment of such rates, and justifications for the rates; (b) a reasonable opportunity for comment on the proposed rates, methodologies and justifications by providers, beneficiaries and their representatives, and other concerned state residents; and (c) publication of the final rates, the methodologies underlying the establishment of such rates, and justifications for such final rates. 42 U.S.C. § 1396a(a)(13)(A).

192. Title 42 U.S.C. § 1396a(a)(13)(A) confers rights, privileges or immunities on Medicaid-participating nursing facilities that are enforceable under 42 U.S.C. § 1983.

193. Connecticut's payment system for Medicaid-participating nursing facilities was not established in conformance with 42 U.S.C. § 1396a(a)(13)(A).

**COUNT V:
Taking Of Private Property Without Just Compensation
In Violation Of The Fifth Amendment To The United States Constitution**

194. CAHCF repeats and realleges paragraphs 1-172, above, as if set forth fully herein.

195. The Takings Clause of the Fifth Amendment to the United States Constitution instructs: "nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V, cl. 5.

196. The Takings Clause applies to the States via the Fourteenth Amendment. *Kelo v. New London*, 545 U.S. 469, 472 n.1 (2005) (citing *Chicago, B. & Q. R. Co. v. Chicago*, 166 U.S. 226 (1897)).

197. CAHCF's members have a legally cognizable property interest in receiving a reasonable return on the value of their property, which includes their nursing facilities and the services provided therein.

198. As the Supreme Court of Connecticut explained in *St. Joseph's Living Center, Inc. v. Town of Windham*, 966 A.2d 188 (Conn. 2009), Connecticut's payment methodology for Medicaid-participating nursing facilities does not fully compensate nursing facilities for actual resident care costs, and the resulting burden imposed on nursing facilities relieves the State of having to shoulder the entire financial burden of caring for the indigent elderly.

199. In violation of the Fifth Amendment to the United States Constitution, Connecticut law effects a *per se* taking of CAHCF members' private property without just compensation by, among other things, (1) paying a confiscatory reimbursement rate that bears no reasonable

relationship to the actual cost of providing services to Medicaid beneficiaries, (2) granting Medicaid beneficiaries an irrevocable license to physically occupy member-facilities, and (3) precluding those facilities from exiting the Medicaid program or leaving the business altogether.

**COUNT VI:
Taking Of Private Property Without Just Compensation
In Violation Of Article I, § 11 Of The Connecticut Constitution**

200. CAHCF repeats and realleges paragraphs 1-172, above, as if set forth fully herein.

201. The Connecticut Constitution provides that the “property of no person shall be taken for public use, without just compensation therefor.” Conn. Const. art. I, § 11.

202. CAHCF’s members have a legally cognizable property interest in receiving a reasonable return on the value of their property, which includes their nursing facilities and the services provided therein.

203. As the Supreme Court of Connecticut explained in *St. Joseph’s Living Center, Inc. v. Town of Windham*, 966 A.2d 188 (Conn. 2009), Connecticut’s payment methodology for Medicaid-participating nursing facilities does not fully compensate nursing facilities for actual resident care costs, and the resulting burden imposed on nursing facilities relieves the State of having to shoulder the entire financial burden of caring for the indigent elderly.

204. In violation of the Connecticut Constitution, Connecticut law effects a *per se* taking of CAHCF members’ private property without just compensation by, among other things, (1) paying a confiscatory reimbursement rate that bears no reasonable relationship to the actual cost of providing services to Medicaid beneficiaries, (2) granting Medicaid beneficiaries an irrevocable license to physically occupy CAHCF member-facilities, and (3) precluding those facilities from exiting the Medicaid program or leaving the business altogether.

**COUNT VII:
CAHCF Is Entitled To A Judgment Declaring Its Members' Legal Rights**

205. CAHCF repeats and realleges paragraphs 1-172, above, as if set forth fully herein.

206. As demonstrated by the foregoing allegations, there is an actual controversy of sufficient immediacy and concreteness relating to the legal rights of CAHCF's members and the legal responsibilities of Governor Rell to warrant relief under 28 U.S.C. § 2201.

207. The harm to CAHCF's members as a direct and indirect result of Governor Rell's conduct is sufficiently real and imminent to warrant the issuance of a conclusive declaratory judgment clarifying the legal relations of the parties.

REQUEST FOR RELIEF

WHEREFORE, CAHCF respectfully requests that the Court:

- A. Provide for expeditious proceedings in this action;
- B. Declare that Connecticut's payment methodology for Medicaid-participating nursing facilities conflicts with federal law and is therefore null and void under the Supremacy Clause;
- C. Preliminarily and permanently enjoin Governor Rell, her agents, servants, employees, successors and assigns from implementing the illegal payment rate reductions recently signed into law by Governor Rell;
- D. Declare that, when setting Medicaid payment rates for nursing facilities, Governor Rell, her agents, servants, employees, successors and assigns must use methods and procedures that assure payment rates are consistent with efficiency, economy, quality of care, and access.
- E. Declare that Medicaid payment rates for nursing facilities must in fact be consistent with efficiency, economy, quality of care, and access.

F. Declare that, as currently structured, Connecticut's payment system for Medicaid-participating nursing facilities effects an uncompensated taking of private property in violation of the United States and Connecticut Constitutions;

G. Award CAHCF its costs and attorney's fees incurred in this action; and

H. Award such other relief as the Court may deem just and proper.

Dated: January 28, 2010

Respectfully submitted,

By: /s/ Michael J. Donnelly
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**Motion for Admission Pro Hac Vice to Be Filed*