

CONNECTICUT ASSOCIATION OF HEALTH CARE FACILITIES, INC.

March 18, 2015

Written testimony of Matthew V. Barrett, Executive Vice President of the Connecticut Association of Health Care Facilities (CAHCF), Inc. Re: H.B. No. 6887 (RAISED) AN ACT CONCERNING THE DEPARTMENT OF PUBLIC HEALTH'S RECOMMENDATIONS REGARDING THE PROTECTION OF RESIDENTS IN HEALTH CARE INSTITUTIONS.

Good afternoon Senator, Representative Ritter and to the members of the Public Health Committee. My name is Matthew V. Barrett, Executive Vice President of the Connecticut Association of Health Care Facilities (CAHCF), our state's one hundred and sixty- member trade association of skilled nursing facilities and rehabilitation centers. Thank you for this opportunity to offer testimony this afternoon concerning H.B. No. 6887 (RAISED) AN ACT CONCERNING THE DEPARTMENT OF PUBLIC HEALTH'S RECOMMENDATIONS REGARDING THE PROTECTION OF RESIDENTS IN HEALTH CARE INSTITUTIONS.

Section 1. Nursing Home Administrator Responsibility

This section proposes amending Conn. Gen. Stat. §19a-511 to add that the administrator "shall be responsible for the quality and safety of all services in the licensed nursing home." CAHCF asks that the committee take no action on the proposal as drafted and that our association be given the opportunity to work with the proponent of the bill on a substitute version of this section.

Subjecting the administrator for overall responsibility for the quality of care and services is troubling for a number of reasons. First, administrators typically are not clinicians. For this reason alone, the proposed language should not be permitted. Second, the Department already has the authority to initiate an action against an administrator's license under Conn. Gen. Stat. §19a-517 and §19a-17 for any "illegal, incompetent or negligent conduct; [] violation of any provision of state or federal law governing the license holder's practices within a nursing home; or [] violation of any provision of this chapter or any regulation adopted hereunder." The proposed language only conceivably adds responsibility for clinical issues.

Moreover, the proposed language could be interpreted as creating strict liability for administrators on issues that may be out of the administrator's control. In other words, there would not need to be any proof as to how the administrator failed but rather, for example, the facility's clinical failures will be imputed to the administrator leaving administrators very few defenses in actions against their licenses for quality of care failures.

This situation is similar to a medical director tag being assessed for overall quality of care issues without any specific findings about a medical director's failures. The Administrative Law Judges ("ALJ") have consistently held that such a finding is improper.

CMS must do more than show the existence of other deficiencies in order to establish noncompliance with section 483.75(i)(2)[F501]. The regulation states

that a medical director is "responsible for" implementation of care policies and coordination of medical care. . . CMS did not identify a specific instance in which the medical director's actions or inaction with respect to a resident, or to the resident community at large, resulted in or contributed to a failure to implement care policies. Nor did CMS identify an instance in which the medical director failed to coordinate medical care under circumstances where coordination by the medical director was necessary or required. Because it is conceivable that deficiencies may exist despite a medical director's best and reasonable efforts to oversee and supervise the medical care in the facility, the mere assertion by CMS that deficiencies were found to exist on the medical director's watch is insufficient to establish that the medical director failed to assume the specified responsibilities.

Western Care Management Corp. dba Rehab Specialties Inn Petitioner - v. - Centers for Medicare Medicaid Services, DAB No. 1921; 2004 HHSDAB LEXIS 73, *174-76 (May 10, 2004). While the language under F501 is not as broad as the proposed statutory language (F501 – the medical director is “responsible for implementation of resident care policies and the coordination of medical care in the facility”), the ALJ analysis is helpful in developing an argument as to why such a strict liability standard is not appropriate.

For the reasons stated above, CAHCF would like to work with the proponents on a compromise substitute for this section. The new language could mirror the regulation and say that the administrator is responsible for the overall management of the facility. See Conn. Agencies Reg. §19-13-D8t(f)(3). Such language would permit an action against an administrator’s license for failing to manage but such failure could not be based on clinical issues that did not stem from management failures. Although such an action is already permitted under Conn. Gen. Stat. § 19a-517(b)(5), which permits actions for violations of regulations, the recommended substitute would provide a more explicit statement of the “overall management” responsibilities in the statute itself.

Section 3. Increase in Violation Fines

This section proposes increasing Class A violations fines to not more than \$10,000 (currently \$5,000) and Class B violation fines to not more than \$5,000 (currently \$3,000). We believe that the current penalties already have punitive and deterrent effect and that increasing the penalties at this time will only harm SNFs already undergoing a period of financial distress due to the state budget crisis and undermine resident care. In addition, SNF deficiencies upon which the citations are based are nearly always duplicative of the federal deficiencies cited which also frequently result in a CMS fine. Therefore, facilities are often being “double” fined by CMS and the state for the same deficient practice. We urge the committee to take no action on this provision for these reasons.

Section 4. Management Company Sanctions

This section proposed to subject management companies to fines up to \$1,000 per-day where there is a substantial failure to comply with statutory or regulatory requirements, and that the per day fine accrues until the facility is in “substantial compliance.” CAHCF believes the

per-day fine is over-reaching, especially given that DPH already has the option to initiate a disciplinary action against a management company under Conn. Gen. Stat. §19a-561 and §19a-494. Moreover, CAHCF believe it is unreasonable to single out management companies for particular sanctions and inappropriately targets for profits who are typical users of management company services. The authority now exists for DPH to impose sanctions on a licensee for the actions or inactions of the management company under contract. The management company is not licensed by DPH and should not be singled out for sanctions where appropriate recourse is available against the licensee.

We understand that DPH bases its need for such sanctions on statistics regarding nursing homes with findings of Immediate Jeopardy (IJ) or special focus status. There is no reasonable connection between the use of management companies and poor care as alleged by DPH. The vast majority of nursing homes in the state are operated by management companies. It is therefore not surprising that a higher proportion of facilities with IJ also are operated by management companies.

CAHCF also oppose the requirement for criminal background checks for management companies. Currently, licensees already are required to undergo criminal background checks. These checks almost always take four (4) months to clear, even as the DPH is working to improve these delays. While work to improve these timeframes is underway, the state should not require such checks for management companies and doing so will unreasonably impair the ability of nursing homes to utilize management companies.

Section 5. Report of Major Systems Failures to DPH

The proposed language requires that all health care institutions report any major system failures (e.g. loss of heat, water, electricity) and any incident that causes activation of the facility's emergency preparedness plan. Failure to report could result in a per day fine up to \$100/day. Additional clarification is needed to address several issues pertaining to the lack of clarify concerning proposed reporting timeframe. Is the report to be made immediately? Within 24 hours? How are reports to be made if there are major electricity or communication failures? Once these issues are resolved in a way that provides a facility a reasonable timeframe within which to report under the circumstances, the provision may not be objectionable.

Thank you for this opportunity to submit written testimony. For additional information, contact Matthew V. Barrett, 860-290-9424 or mbarrett@cahcf.org.