

2003 Joint Committee on Audit

Nursing Homes and Assisted Living
Facilities

03hr_JC-Au_Misc_pt02a through pt02n



State of Wisconsin
Department of Health and Family Services

Scott McCallum, Governor
Phyllis J. Dubé, Secretary

April 4, 2002

The Honorable Tommy G. Thompson
Secretary
U.S. Department of Health and Human Services
200 Independence Avenue S.W.
Washington, DC 20201

Dear Secretary Thompson:

The State of Wisconsin requests authorization to pilot a modified nursing home survey process. We are making this request pursuant to section 1115 of Public Law 92-603. This law provides broad authority to the Secretary of Health and Human Services to allow for demonstrations, experiments, and pilot projects in efforts to resolve major health care financing issues and to develop innovative methods for the administration of Medicare and Medicaid. The current survey process limits states' ability to allocate necessary resources to nursing homes experiencing significant problems. Our proposal allows Wisconsin the flexibility needed to improve the quality of care and quality of life for vulnerable nursing home residents to a greater extent than we are presently able to do.

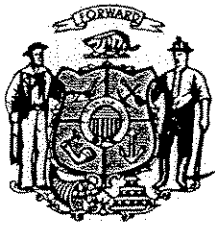
Wisconsin's pilot proposal has been developed collaboratively among the Wisconsin Department of Health and Family Services, nursing home representatives, and resident advocates. It uses the entire framework of the existing nursing home survey process, as required by the Centers for Medicare and Medicaid Services, but tailors the length and depth of the survey to the individual facility. Some facilities will experience no change in the current survey process. Others will experience either directed or a more intensive survey, depending upon the facility's history and the problems that are identified during the initial phase of the survey. This proposal does not change the frequency of nursing home surveys, all Wisconsin nursing homes continue to be surveyed annually.

Our proposal retains the focus upon quality of care, quality of life, and resident rights. At the same time, it offers flexibility to the state survey agency, allowing it to target limited state survey agency staff for facilities experiencing more significant problems than their peers. It will also allow the survey agency to assist noncompliant facilities to come into compliance, ultimately improving quality of care and quality of life, through the provision of limited technical assistance and the sharing of "best practice" guidelines.

Wisconsin will continue to survey for recertification all nursing homes within the present 9-15 month interval, maintaining a 12-month average as required by federal law. Each survey, at a minimum, will include the required elements outlined in Title XVIII of the Social Security Act, section 1819(g)(2)(a)(ii). Specifically, each survey will include a case-mix stratified sample of residents that evaluates:

- the quality of care furnished, as measured by indicators of medical, nursing, and rehabilitative care, dietary, and nutrition services, activities and social participation and sanitation, infection control and the physical environment;

Wisconsin.gov



SCOTT McCALLUM

Governor
State of Wisconsin

April 8, 2002

The Honorable Tommy G. Thompson
Secretary
U.S. Department of Health and Human Services
200 Independence Avenue S.W.
Washington, DC 20201

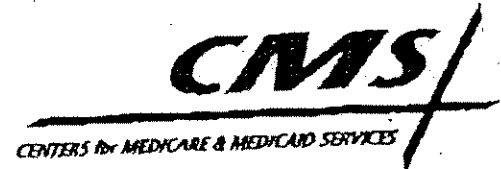
Dear Secretary Thompson:

As you know, the State of Wisconsin has an ongoing interest and commitment to improve its regulatory oversight of nursing homes. We cannot do this without support from the federal government because it controls the process. Therefore, we have developed the attached proposal for your consideration. Our proposal is based on a strong commitment to protect nursing home residents through the existing survey and enforcement structure while better allocating state and federal resources to do so. Regulatory reform is one of your priorities and we applaud your interest in evaluating existing federal rules and making them more efficient and streamlined. In this spirit, our proposal is an opportunity for testing regulatory reform that assures quality compliance and improves state survey agency productivity. It targets survey and enforcement resources to better oversee poor performing facilities while acknowledging excellence in superior facilities. The current nursing home survey and enforcement system under-allocates the resources needed for troubled facilities while overspending them in compliant facilities.

Over this past year the Wisconsin state survey agency, DHFS Bureau of Quality Assurance; the nursing home provider community; the advocate community; and, the University of Wisconsin have developed a revised nursing home survey protocol we can all support. Wisconsin's nursing homes are generally considered to be good homes, and our regulatory oversight of nursing homes is considered to be solid. The advocate community is considered to be strong and assertive. And, the University of Wisconsin has been instrumental in the evolution of the current federal nursing home regulatory system. Wisconsin is an ideal setting in which to conduct this pilot.

It is a rare thing in any regulatory environment to find the regulators, the regulated industry, and the advocates in agreement. Wisconsin's nursing home quality oversight stakeholders agree on this proposal. Together we bring you one shared vision, developed through much hard work, to improve the nursing home survey process. Our proposal offers incentive for quality excellence and recognizes superior care, while reallocating regulatory resources to improve quality compliance in troubled homes or remove them from the program.

DEPARTMENT OF HEALTH & HUMAN SERVICES
Centers for Medicare & Medicaid Services
7500 Security Boulevard, Mail Stop 52-26-12
Baltimore, Maryland 21244-1850



Center for Medicaid and State Operations

NOV 21 2002

The Honorable Scott McCallum
Governor of Wisconsin
P.O. Box 7863
Madison, WI 53707

Dear Governor McCallum:

Thank you for your letter to Secretary Tommy Thompson on the possibility of Wisconsin's use of an alternative survey process for Medicare and Medicaid nursing homes.

After a careful review of your alternative survey process proposal, we believe that it has merit. Under Section 1115 of the Social Security Act, the Secretary would have the discretion to approve an alternative survey process for Medicaid. However, there is no analogous waiver authority under the Medicare program that would address the kind of issues you raise concerning survey and certification requirements. A waiver under section 1115 would only be applicable to surveys of facilities that participate only in the Medicaid program. Such a waiver would not extend to surveys of dually certified facilities, or to facilities that participate only in the Medicare program.

We would be happy to work with you and your staff to develop, implement and evaluate a Medicaid-only alternative survey process. If you believe that there might be other means of assisting the state in achieving its goals, we would be happy to discuss any ideas you might have.

Please call me if you have any questions or if you would like to discuss these issues further.

Sincerely,

A handwritten signature in cursive script that reads "Dennis G. Smith".

Dennis G. Smith
Director

RUSSELL D. FEINGOLD
WISCONSIN

506 HART SENATE OFFICE BUILDING
WASHINGTON, DC 20510
(202) 224-5323
(202) 224-1280 (TDD)
feingold.senate.gov

COMMITTEE ON THE JUDICIARY
COMMITTEE ON FOREIGN RELATIONS
COMMITTEE ON THE BUDGET
SPECIAL COMMITTEE ON AGING
DEMOCRATIC POLICY COMMITTEE

United States Senate

WASHINGTON, DC 20510-4904

April 10, 2003

Steve Pelovitz
Centers for Medicare and Medicaid Services
Survey and Certification Group
U.S. Department of Health and Human Services
7500 Security Blvd
Baltimore, MD 21244

Dear Mr. Pelovitz:

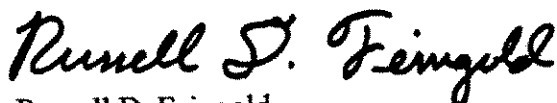
I write with respect to the April 2, 2003 letter to you from the Wisconsin Department of Health and Family Services, and others, regarding their proposal for an alternative nursing home survey pilot program. A copy of that letter is attached.

The April 2nd letter reiterates the group's belief that their proposed pilot program has merit, and that the pilot proposal would not suspend, modify, or deviate from the core elements contained in the federal nursing home statutes. It asks that CMS reconsider its position with respect to the alternative survey proposal.

The letter also requests a meeting with you on this matter at your earliest convenience, and I am writing to make that request on their behalf as well.

Thank you for your consideration.

Sincerely,



Russell D. Feingold
United States Senator

Enclosure

○ 1600 ASPEN COMMONS
ROOM 100
MIDDLETON, WI 53562
(608) 828-1200
(608) 829-1215 (TDD)

○ 517 EAST WISCONSIN AVENUE
ROOM 408
MILWAUKEE, WI 53202
(414) 276-7282

○ 401 5TH STREET
ROOM 410
WALSAU, WI 54403
(715) 848-5660

○ 425 STATE STREET
ROOM 225
LA CROSSE, WI 54601
(608) 782-5585

○ 1640 MAIN STREET
GREEN BAY, WI 54302
(920) 465-7508



DIVISION OF DISABILITY AND ELDER SERVICES

BUREAU OF QUALITY ASSURANCE
1 WEST WILSON STREET
P O BOX 2969
MADISON WI 53701-2969

Jim Doyle
Governor

Helene Nelson
Secretary

State of Wisconsin

Department of Health and Family Services

Telephone: 608-266-8481
FAX: 608-267-0352
TTY: 608-266-7376
www.dhfs.state.wi.us

April 2, 2003

Mr. Steve Pelovitz
Centers for Medicare and Medicaid Services
Survey and Certification Group
U.S. Dept of Health and Human Services
7500 Security Blvd
Baltimore MD 21244

Subject: Wisconsin Alternative Survey Pilot Program--Meeting Date Requested

Dear Mr. Pelovitz:

We acknowledge CMS' November 21, 2002 response to our Alternative Survey pilot proposal request of April 2002. Unfortunately, the CMS letter from Mr. Dennis Smith was further delayed in our former Governor's office, so our stakeholders did not receive it until February of this year. In March, the stakeholders reviewed the response at a Bureau of Quality Assurance meeting. Although we appreciate your belief that our proposal has merit, we are disappointed with CMS' response. Specifically, we are disappointed that CMS believes that our pilot only could be implemented in Medicaid-only facilities. This has the practical effect of denying our request.

We reiterate that our Alternative Survey pilot proposal would not suspend, modify or deviate from the core elements contained in the federal nursing home statutes. Our proposal would adhere to the principles contained in Title XVIII of the Social Security Act, section 1819 (g)(2)(a)(ii). Further, our proposal is within the broad authority granted to the DHHS Secretary under section 1115 of Public Law 92-630, which explicitly grants authorization for demonstrations, experiments, and pilot projects. In fact, on many occasions DHHS Secretary Tommy Thompson has voiced his public support for innovative approaches to quality improvement and a more efficient and effective utilization of public resources.

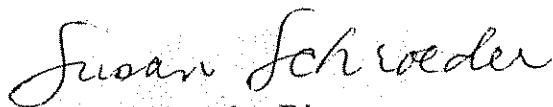
For these reasons we are requesting that CMS reconsider its position with respect to our Alternative Survey pilot proposal. We respectfully request an opportunity to meet with you and your staff at your earliest convenience. Due to state-imposed travel restrictions

Mr. Steve Pelovitz
Page two

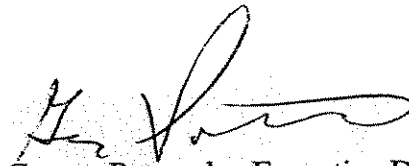
and budget constraints, we request that our meeting be held at the CMS regional office in Chicago.

Please contact Susan Schroeder to confirm our meeting date and agenda. We look forward to hearing from you and continuing our efforts to improve the long term care survey process.

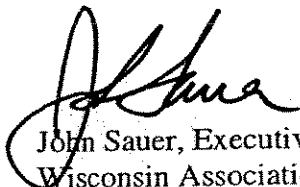
Sincerely,



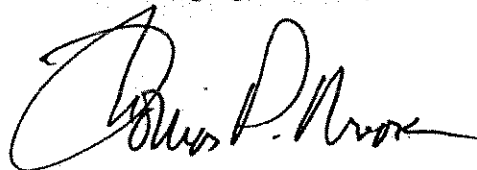
Susan Schroeder, Director
Bureau of Quality Assurance



George Potaracke, Executive Director
Board on Aging and Long Term Care



John Sauer, Executive Director
Wisconsin Association of
Homes & Services for the Aging



Thomas P. Moore, Executive Director
Wisconsin Health Care Association



Doug Olson, PhD
University of Eau Claire
Center for Health and Aging Services

Enclosure: WI Alternative Survey Pilot Proposal

Wisconsin Proposal to Pilot an Alternative Nursing Home Survey

- Providers, regulators, educators, advocates, academics, and others reach agreement and focus on better outcomes.
- Nearly two-year process with several drafts and revisions made to reflect the various interests and concerns of all parties.
- Redirects some survey resources from excellent facilities where they are not needed, to problem facilities where they are needed.
- All facilities would continue to be surveyed, on average, every 12 months. All survey tasks will continue to be performed in all facilities.
- This incremental revision of the survey process improves effectiveness and efficiency. It improves the impact surveys have on overall care and quality, by better targeting limited resources, a benefit to consumers and taxpayers.
- Promotes improved quality care, encourages innovation and aligns the goals of surveyors, advocates and providers.
- Better utilizes limited federal and state regulatory resources.
- DHHS Secretary Thompson has challenged states to advance innovative ways to improve long-term care quality and outcomes. This proposal meets the Secretary's call for innovation and improvement.

Proposal to Pilot an Improved Long Term Care Survey Process Submitted by the State of Wisconsin

Introduction

Providing and insuring that quality care is being offered to residents of nursing homes continues to be a challenge in our society (Dept. of Health and Human Services Nursing Home Quality report, 1999 and past Institute of Medicine reports, 1983, 1986). There has been a lot of progress in redefining the best interests and needs of the consumers over the years (e.g. OBRA, MDS initiatives, and recent QOL activity), although the current federal system does not afford states sufficient flexibility to explore more effective ways of assessing and measuring the extent to which changing consumer needs and federal standards are being met. Advocates are also very concerned about the process of insuring quality standards are being met and have expressed support for modifications to the existing process (Various current National Citizens' Coalition for Nursing Home Reform and AARP publications and policy statements). On the provider front, frustration with the process has continued to grow (e.g. Bad Medicine report, New York Association of Homes and Services for the Aged, 2001), although a willingness to explore new options has only recently seen any significant energy (Pioneers Network Proceedings, 1997, 2000 and the Wellspring evaluation study conducted by the Institute for the Future of Aging Services, 2001). Lastly, agencies charged with the regulatory duty to monitor the quality of care and services delivered have also begun to express interest in exploring approaches for incremental positive change.

On January 8, 2001, a meeting coordinated by nursing home provider organizations of the six Region V states was convened in Chicago, Illinois, to discuss a regional approach to piloting a revised long term care survey process. All six Region V State survey agency directors

1. All homes will continue to be monitored within a 9-15 month schedule during the duration of the pilot program.
2. The survey process will not modify the current federal certification requirements relating to nursing facilities.
3. The survey process will not modify or limit the current provisions relating to adverse actions.
4. The survey pilot will be instead of, rather than in conjunction with the standard, federal survey.
5. The new pilot survey process will not replace BQA responsibility for Life Safety Code issues.

Under the pilot survey process, regulators will assign facilities into one of three categories. These categories will determine the scope and intensity of the individual facility's survey. The three categories are: 1. Intensive; 2. Standard; and 3. Directed. The manner in which facilities are assigned to these survey categories will be determined by a comprehensive pre-survey analysis and the initial findings during the on-site survey visit.

Pre-survey Decision Making

In assigning facilities to a survey category, regulators will use a variety of data, documents, facility characteristics and indicators. Examples are:

- a. Survey compliance history (post IDR);
- b. Complaint history (substantiated and other);
- c. Information from the Ombudsman and other advocates;
- d. Quality indicators (QIs) and MDS data;
- e. Information on change of ownership, administrator, and DON;
- f. Resident census and roster information;
- g. Staffing information;
- h. Preadmission screening/annual resident review (PASARR);

Through this pre-survey review process a survey category is chosen. The categories are:

1. Intensive – current survey supplemented by more and/or specialized surveyors
2. Standard – same as current survey
3. Directed –reduced sample size and focused review.

Compared to the Standard survey, an Intensive survey will be assigned greater survey resources, whereas the Directed survey will require less surveyor time and presence in the facility.

If any of the following criteria are met, the facility will not be considered in the pre-survey decision making as a candidate for a directed survey:

1. Immediate jeopardy (IJ) finding within the last survey cycle;
2. Substandard quality of care finding within the last survey cycle;
3. Had instances of either IJ or substandard quality of care within two of the last four survey cycles.
4. Have had imposed a civil monetary penalty or a denial of payment for new admissions within the last survey cycle;
5. A facility where a temporary manager has been imposed within the past two survey cycles.

Intensive Survey

Facilities assigned to this category will receive heightened regulatory scrutiny and ongoing attention. These facilities are those identified as having serious quality of care/life compliance concerns during the pre-survey process. The intensive survey is generally the same as the “standard” survey process presently used, but with an additional six hours or more scheduled to allow for a more in-depth review of

The record review will be based on resident/family interviews and surveyor observations.

Survey Category Assignment

A critical element of the pilot will be assigning facilities to the appropriate survey category. This assignment process will be developed and refined, consistent with the goals of the pilot program (see page 2) based on experience and facilities' performance and characteristics. The decision-making framework developed by the expert panel will be used as a primary resource by the survey teams participating in the pilot project. This fluid survey system will allow for the movement up or down the continuum of survey categories, based upon the surveyor's experience on-site, once the survey has begun. Therefore, if few or no problems are being detected, a less intensive survey may be completed (e.g., a standard survey becomes a directed survey). If more problems are detected than will have been predicted by the pre-survey activity, a more intensive survey is completed (e.g., a standard survey becomes an intensive survey).

This represents a more flexible approach that takes advantage of the professional decision making ability of our surveyors and regional offices.

Compliance Surveys

Another critical element of the proposed survey pilot is to supplement the annual survey with compliance surveys. The purpose of the compliance visit is to monitor specific providers between follow-up surveys and the next certification survey. The pilot program will aggressively target facilities that have a history of attaining compliance for the follow-up survey, but then regress to non-compliance. The frequency and scope of compliance surveys will be

1. Do the actual changes in the allocation of resources in the redefined survey process improve and/or maintain the quality of care in facilities?
2. How effective does the system target poor performing providers?
3. What is the relationship between the pre-survey decision making information and performance of facilities measured in terms of survey results?
4. What have been the resulting cost implications of these changes?
5. Have providers used outside resources more often to assist in implementing changes to improve their service delivery?
6. What other unanticipated improvements to the survey process have been identified during this pilot project?

The above questions will provide preliminary guidance to help frame the specific implementation and evaluation approach, which will be described in detail for each of these questions in a full proposal.

In general, this evaluation will use pretest-posttest measures to assess the above questions and the nature of this design is non-experimental. The evaluation approach will use both quantitative and qualitative information to help assess the success of the pilot. Initial information that will be used includes the pre-pilot provider characteristics information and past history of survey performance of all the providers in the defined pilot region. This baseline information will be extremely useful when the evaluation team is assessing any changes and their correlation to other variables.

An assessment of perceptions prior to the pilot will be done with providers, and regulators. A sample of perceptions, gathered with the use of structured interviews, will also be done during the pilot period to help insure that any adjustments to the pilot could be made before the end of the study period. This sampling will reflect the three groups of assigned survey intensity levels. A posttest assessment of perceptions will be done with all the participating providers and

experience would be retained by the project. Coordinators and staff for the evaluation and best practice components of the pilot study would be hired for the duration of the project.

Budget Estimate

The proposal contains a two-pronged approach to achieving the goals outlined for this project. The primary focus will be on the effective implementation of this new alternative survey process with all of the participating entities, including regulators, providers and consumers. The evaluation component of this study will also be agreed upon at an early project stage to insure availability of measurable results to assist the researchers and Advisory committee draw conclusions about the success of this pilot.

A second element of this project is the establishment of a "best practices" collection and dissemination unit or system for the participating providers and regulators to use as a resource during the pilot project. These activities would be administered by the Center for Health and Aging Services Excellence at UW-Eau Claire and work in consultation and collaboration with identified resources and/or any State of Wisconsin initiative. This effort would help serve as a model for a broader program implemented on a statewide basis.

Funding for this project would be secured from a variety of sources, although it is the understanding of the planning group that the majority of resources would be requested from an external foundation source. The preliminary budget for this project would include funds for the following:

A. Primary Project Implementation and Evaluation Funds

<u>Personnel:</u>	<u>% of FTE</u>	<u>Year 1</u>	<u>Year 2</u>	<u>Year 3</u>
Principal Investigator Dr. Douglas Olson				
Academic Year	.20	\$10,099	\$10,604	\$11,134
Summer Session	1.0	\$11,220	\$11,781	\$12,270

These estimated expenses would be incurred during the project. The budget would be refined based on further justification outlined in more detail with a detailed plan of activities, and the agreement on the scope of responsibilities required for project implementation, research and evaluation activities, and the successful attainment of a best practices model.

* These are estimates that would be adjusted based on the guidelines and protocols of participating funding sources.

Dissemination

The research team and pilot sponsorship groups would be committed to sharing information on a semi-annual basis regarding progress and any preliminary findings of the project. Further, it is anticipated the results of this project would serve as one of the significant elements of a broader effort to revise and improve the current long-term care survey process in this country.



State of Wisconsin \ LEGISLATIVE AUDIT BUREAU

JAN 31 2003

JANICE MUELLER
STATE AUDITOR

22 E. MIFFLIN ST., STE. 500
MADISON, WISCONSIN 53703
(608) 266-2818
FAX (608) 267-0410
Leg.Audit.Info@legis.state.wi.us

December 13, 2002

Senator Gary R. George and
Representative Joseph K. Leibham, Co-Chairpersons
Joint Legislative Audit Committee
State Capitol
Madison, Wisconsin 53702

Dear Senator George and Representative Leibham:

In addition to our review of the Department of Health and Family Services' regulation of nursing homes and assisted living facilities (report 02-21), which we completed at the direction of the Joint Legislative Audit Committee, we have separately reviewed the performance of nursing homes in the City of Milwaukee. The Department exercises its regulatory authority through staff in five regional offices, and the City of Milwaukee is located in the Southeastern Region. The number of nursing home regulatory staff in this region increased from 38.0 full-time equivalent (FTE) staff in FY 1997-98 to 44.0 FTE staff in FY 2000-01, or by 15.8 percent.

We found that nursing homes in Milwaukee are generally larger than those in the rest of the state, have lower occupancy rates, are reimbursed for a lower percentage of their allowable Medical Assistance (Medicaid) costs, are cited for code violations more frequently, and experience higher staff turnover. Our recommendations to address nursing home regulatory issues statewide are included in report 02-21.

We appreciate the courtesy and cooperation extended to us by the Department of Health and Family Services.

Sincerely,

Janice Mueller
State Auditor

JM/KW/bm

NURSING HOMES IN MILWAUKEE

The Bureau of Quality Assurance within the Department of Health and Family Services is responsible for the regulation of nursing homes in the State of Wisconsin. All nursing homes are subject to annual inspections, which involve on-site reviews by multi-disciplinary teams of inspectors. Nursing homes are also inspected when the Department receives a complaint from a resident, family member, or other interested party. If a facility is found to be in violation of any state or federal regulation, the Department issues a citation for the deficient practice.

Types of Homes

As shown in Table 1, 8.4 percent of the 462 nursing homes in Wisconsin as of June 30, 2001, were located in the City of Milwaukee. These nursing homes included:

- 36 skilled nursing facilities, which serve individuals whose medical needs, as prescribed by a physician, require either direct professional nursing services or care provided under the supervision of professional nurses, such as registered or licensed practical nurses; and
- 2 facilities for the developmentally disabled, which provide specialized care to persons with mental retardation or a related condition. Proportionately, Milwaukee did not have as many of these facilities as the rest of the state; its 2 facilities represented 5.0 percent of the statewide total.

Table 1

Percentage of Nursing Homes in Milwaukee June 30, 2001

<u>Type of Nursing Home</u>	<u>City of Milwaukee</u>	<u>Wisconsin</u>	<u>Percentage in Milwaukee</u>
Skilled care facilities	36	415	8.7%
Intermediate care facilities	0	3	0.0
Facilities for the developmentally disabled	2	40	5.0
Institutes for mental disease	<u>1</u>	<u>4</u>	25.0
Total	39	462	8.4%

The one institute for mental disease in Milwaukee is a home with more than 16 beds that provides diagnosis, treatment, and care for persons with mental illnesses, such as schizophrenia. It is not included in our analyses because the process used to inspect institutes for mental disease is not comparable to the inspection processes used in other types of nursing homes.

Concerns have been expressed regarding nursing home closings and the resulting adverse effects on residents, their families, and the facility owners and employees. From FY 1999-2000 through FY 2000-01, 3 of the 11 nursing homes that closed statewide, or 27.3 percent, were in Milwaukee. During that same period, no new nursing homes opened in Milwaukee and four opened elsewhere in the state.

Capacity and Medicaid Reimbursement in Nursing Homes

Because nursing homes vary in size, we compared the capacity of Milwaukee's nursing homes to the city's population. We found the percentage of licensed beds in Milwaukee proportionate to the city's share of the state's population. As of June 30, 2001, 5,383 of the state's 48,351 licensed beds, or 11.1 percent, were located in Milwaukee, and the city accounted for 11.1 percent of Wisconsin's population.

As shown in Table 2, nursing homes in Milwaukee are larger, on average, than nursing homes in the rest of the state, having 40 more licensed beds. However, the occupancy rate is lower, on average, in Milwaukee than in the rest of the state; 80.3 percent of nursing home beds in Milwaukee are occupied, compared to 86.3 percent in the rest of the state. Because nursing homes have fixed costs, such as utilities and property costs, that they must pay regardless of whether all licensed beds are occupied, the extent to which there are more unoccupied beds in Milwaukee indicates that Milwaukee nursing homes may have higher costs that are not being covered through resident payment.

Table 2

Average Licensed Beds and Daily Census December 31, 2000¹

	<u>Average Licensed Beds per Nursing Home</u>	<u>Average Daily Census per Nursing Home</u>	<u>Occupancy Rate</u>
City of Milwaukee	142	114	80.3%
Balance of state	102	88	86.3

¹ For facilities open as of June 30, 2001.

Furthermore, most nursing homes that received funding through the federal Medical Assistance (Medicaid) program were not reimbursed for all of their federally determined allowable costs. We found that nursing homes in Milwaukee received reimbursement for a lower percentage of their allowable Medicaid costs than nursing homes in the rest of the state. Nursing homes in Milwaukee had an estimated 84.0 percent of allowable Medicaid costs reimbursed in FY 2000-01, while the estimated reimbursement rate in the balance of the state was 89.1 percent. Determining the explanations for this difference was beyond the scope of this limited review.

Citations for Deficient Practices

Department nursing home inspectors are responsible for enforcing both federal and state regulations. We analyzed the citations in Milwaukee relative to all nursing homes in the state. Statewide, the number of federal citations increased from 2,580 in FY 1999-2000 to 2,938 in FY 2000-01, as shown in Table 3. While the number of federal citations outside of Milwaukee increased from 2,132 in FY 1999-2000 to 2,516 in FY 2000-01, or by 18.0 percent, the number in Milwaukee decreased from 448 to 422, or by 5.8 percent. The scope and severity of federal citations issued to skilled and immediate care facilities can be summarized into four categories, as shown in Table 3. These scope and severity levels do not apply to citations issued to facilities for the developmentally disabled.

Table 3

Federal Nursing Home Citations Issued Statewide FY 1997-98 through FY 2000-01

	<u>FY 1997-98</u>	<u>FY 1998-99</u>	<u>FY 1999-2000</u>	<u>FY 2000-01</u>
Skilled and Intermediate Care Facilities				
No harm but potential for minimal harm	383	408	312	354
No harm but potential for more than minimal harm	2,066	2,266	1,862	2,245
Actual harm but not immediate jeopardy	190	183	182	142
Immediate jeopardy to resident health or safety	2	12	24	23
Severity level not available	6	6	5	2
Facilities for the Developmentally Disabled	<u>178</u>	<u>217</u>	<u>195</u>	<u>172</u>
Total	2,825	3,092	2,580	2,938

As shown in Table 4, 14.4 percent of all federal citations issued to skilled and intermediate care nursing homes in Wisconsin in FY 2000-01 were issued to nursing homes in Milwaukee. This percentage is higher than would be expected, based on the percentage of nursing homes and residents in Milwaukee. Furthermore, the percentage of more-severe deficiencies, such as actual harm, was also higher in Milwaukee. However, none of the most severe citations, immediate jeopardy, were issued in Milwaukee in FY 2000-01.

Table 4

**Percentage of Federal Nursing Home Citations Issued in Milwaukee
FY 1997-98 through FY 2000-01**

	<u>FY 1997-98</u>	<u>FY 1998-99</u>	<u>FY 1999-2000</u>	<u>FY 2000-01</u>
Skilled and Intermediate Care Facilities¹				
No harm but potential for minimal harm	9.1%	9.1%	10.6%	8.5%
No harm but potential for more than minimal harm	18.4	17.9	18.4	15.2
Actual harm but not immediate jeopardy	20.0	20.2	17.6	14.8
Immediate jeopardy to resident health or safety	50.0	25.0	8.3	0.0
Severity level not available	0.0	16.7	0.0	0.0
Facilities for the Developmentally Disabled	7.3	3.7	20.0	16.9
Percentage of All Federal Citations in Milwaukee	16.6	15.9	17.4	14.4

¹ There are no intermediate care facilities in the City of Milwaukee

Although only 5.0 percent of the facilities for the developmentally disabled statewide are located in Milwaukee, citations at one—The Jackson Center—accounted for 17.9 percent of federal citations issued to facilities for the developmentally disabled statewide in FY 1999-2000, and 12.2 percent in FY 2000-01. The Jackson Center was placed in receivership in May, and it is expected to close by the end of 2002. The percentage of federal citations it was issued since FY 1997-98 is shown in Table 5.

Table 5

**Percentage of Federal Citations for Facilities for the Developmentally Disabled Statewide
Issued to The Jackson Center
FY 1997-98 through FY 2000-01**

<u>Fiscal Year</u>	<u>Statewide Total</u>	<u>Percentage Issued to The Jackson Center</u>
1997-98	178	2.8%
1998-99	217	0.9
1999-2000	195	17.9
2000-01	172	12.2

The number of complaints filed against nursing homes in Milwaukee has also increased and is disproportionate to the number of licensed beds in the city. In FY 1997-98, 21.1 percent of all complaints were filed in Milwaukee. In FY 2000-01, when Milwaukee accounted for 11.1 percent of licensed nursing home beds, this percentage increased to 23.2 percent.

Staff Turnover

The rate of staff turnover in nursing homes, particularly among certified nursing assistants and registered nurses, can affect resident care. In the survey conducted by the Department for calendar year 2000, Milwaukee nursing homes reported a higher rate of turnover than the rest of the state. For example, 81.1 percent of nursing homes in Milwaukee reported turnover of more than one-half of their certified nursing assistants. In the rest of the state, 53.9 percent of nursing homes reported the same turnover rate. Similarly, 48.6 percent of nursing homes in Milwaukee reported turnover of more than one-half of their registered nurses. In the rest of the state, 19.9 percent of nursing homes reported the same turnover rate.

Regulation of Nursing Homes
and Assisted Living Facilities

Legislative Audit Bureau
February 2003

1

Types of Nursing Homes

- ◆ 418 skilled and intermediate care facilities
- ◆ 40 facilities for the developmentally disabled
- ◆ 4 institutes for mental disease

2

Types of Residential Assisted Living Facilities

- ◆ 1,334 community-based residential facilities
- ◆ 662 adult family homes
- ◆ 118 residential care apartment complexes

3

*State of Ohio
Department of Public Safety*

3

**Long-Term Care
Regulatory Staff**

- ◆ 42.8 FTE central office staff
- ◆ 172.9 FTE positions in the five regional offices
- ◆ Regional staff include 146.9 FTE for nursing home regulation and 26.0 FTE for assisted living facility regulation

4

Nursing Home Regulation

- ◆ Strong federal role in the regulation of nursing homes
- ◆ Survey teams, including at least one registered nurse, visit nursing homes
- ◆ Routine inspections in nursing homes last for several days
- ◆ Nursing home inspectors have more work experience in long-term care

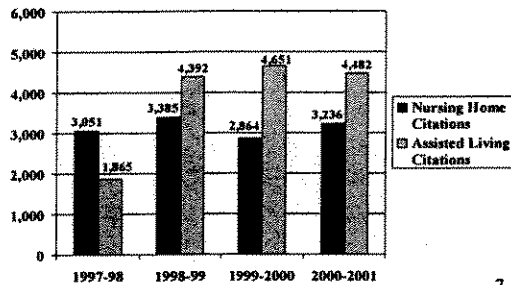
5

Assisted Living Facility Regulation

- ◆ State statutes and administrative code control the regulation of assisted living facilities
- ◆ Individual inspector visits the facility for an inspection
- ◆ Routine inspections last for less than one day
- ◆ Assisted living facility inspectors report less prior work experience in long-term care than do nursing home inspectors

6

Citations, FY 1997-98 through FY 2000-01



7

Regulatory Issues

- ◆ Average number of federal citations issued to nursing homes varied from 1.4 to 4.6 among the regions
- ◆ 82 percent increase in the number of complaints against assisted living facilities outpaced the 35 percent estimated capacity increase
- ◆ 47 percent of assisted living facilities were not visited for at least one year

8

Forfeitures Against Nursing Homes

- ◆ State forfeitures assessed against nursing homes increased from \$545,000 to \$1.3 million
- ◆ 65 percent of citations issued in FY 2000-01 were awaiting review for forfeiture assessment as of February 2002
- ◆ We recommend the Department report on administrative costs related to forfeiture assessment

9

Forfeitures Against Assisted Living Facilities

- ◆ Total assessments increased from \$42,000 to \$96,000
- ◆ Assessments were made only against community-based residential facilities through FY 2000-01
- ◆ We recommend a written procedure to guide the assessment process for assisted living facilities

10

Informal Dispute Resolution

- ◆ Federally required process for nursing homes
- ◆ Decisions are not timely, and 50 percent of the citations are not changed
- ◆ Providers dispute the independence of the process
- ◆ Additional management information is expected in the summer of 2003

11

Criminal Charges

- ◆ Two attorneys and six investigators in the Medicaid Fraud Control Unit
- ◆ Routine flow of information from the regulatory process to the Medicaid Fraud Control Unit for criminal investigations
- ◆ 24 caregivers, 1 assisted living facility, and 1 facility for the developmentally disabled charged

12

Milwaukee Nursing Homes

- ◆ Milwaukee homes are larger and have lower occupancy
- ◆ Declining number of citations in Milwaukee, but increasing number of citations in the rest of the state
- ◆ Higher staff turnover in Milwaukee than in the rest of the state
- ◆ Lower percentage of allowable Medicaid costs reimbursed in Milwaukee

13

Regulation of Nursing Homes and Assisted Living Facilities

Legislative Audit Bureau
February 2003

14

To: Members of the Joint Legislative Audit Committee:

From: Brian R. Purtell, Director of Legal Services

Re: Legislative Audit Bureau Evaluation: *Regulation in Nursing Homes and Assisted Living Facilities*

Date: February 4, 2003

The Wisconsin Health Care Association ("WHCA") would like to thank the members of the Joint Legislative Audit Committee for the opportunity to present testimony in response to the Legislative Audit Bureau evaluation entitled "Regulation in Nursing Home and Assisted Living Facilities," dated December 2002. The Legislative Audit Bureau has done a thorough evaluation of the inspection process, enforcement options, and informal dispute resolution and the appeals process for Wisconsin nursing homes and assisted living facilities. WHCA appreciates the opportunity to provide input into the development of this evaluation, and the Audit Bureau was very receptive to our members' comments and concerns.

The WHCA is a trade association representing about 225 long-term care providers in the State of Wisconsin. WHCA's members are comprised of proprietary, non-profit, and governmental nursing homes. A significant percentage of these members also operate some form of an assisted living facility in conjunction with the operation of the nursing home.

WHCA would like to make the following comments in direct response to the content of the evaluation. We have also included comments as to what the Association feels is useful information not included in the evaluation. Finally, we have provided responses to these specific recommendations found within the evaluation, as well as included our own suggested recommendation that the Committee and Legislature may want to consider in this area.

Response to Contents of Evaluation

- Despite the existence of a comprehensive state system that pre-dates the federal, the inspection process in the State of Wisconsin for nursing homes is driven by the federal requirements. Both the DHFS and the facilities are subject to follow these requirements in addition to the state system. From the provider perspective, the process is flawed and fraught with subjectivity and inconsistency, does not measure or promote quality care, and is absent the opportunity for true due process.
- On page 24 of the report, the LAB indicates that most citation for federal violations for FY1997-98 through FY2000-01 indicate no actual harm occurred to nursing home residents. The report states "[i]n 92.7% of federal citations issued, the Department identified a potentially harmful situation before any residents were harmed." Despite sensational reports otherwise, this would actually indicate that the vast and overwhelming majority of citations issued to nursing homes did not result in harm to the residents, and in many cases would not have resulted in harm even if not identified by the surveyors.

One must keep in mind that during this same time period there were almost 43 million nursing home patient days. Out of these 43 million days the surveyors identified a total of 10,637 citations, 93% of which did not result in any harm to the residents served. While any citations alleging harm to a resident too many, we must note that the 758 citations in which harm was *alleged*, represents roughly .0018% of the days of care.

- Relationship between reimbursement and quality of care: Contained within Appendix 4 of the Evaluation are several sentences that warrant translation for those not acutely familiar with the Medicaid reimbursement mechanism.

The report states "...a facility may be reimbursed a lower percentage of its allowable costs because it is spending more on resident care than the maximum reimbursement rate. As such, the quality of care may be better at a facility with a lower percentage of Medicaid costs reimbursed than at a facility with a higher percentage of costs reimbursed, which may be reflective of that facility's inability to provide additional resources beyond those reimbursed through Medicaid." *See page 4-3.* Later in the same appendix, the report states "it may indicate that homes with a lower percentage of their allowable costs reimbursed, which may have relatively more revenue from sources other than the Medicaid program, are more able to provide the level of care that remains in compliance with federal regulations."

WHCA Translation: The higher the Medicaid population at a facility, the less ability there is to provide the level of care that remains in compliance with federal regulation due to the inadequacies of the Medicaid reimbursement formula.

Simple translation: There is a relationship between quality of care and level of reimbursement relative to costs.

At a time when over 47 nursing homes have recently gone through bankruptcy, and when over 24 have closed, due almost exclusively to financial reasons, we must recognize and acknowledge the connection between being reimbursed for the actual cost of care, and the quality received. Despite the linguistic gymnastics of the report, WHCA feels that the data provided establishes the link.

- Appendix 6 of the Evaluation contains information on the results of requests for Informal Dispute Resolution (IDR). The report indicates that contested citations were not in changed 50.5 percent of decisions. WHCA points out that the corollary of this statement, that in 49.5% of decisions citation were changed, is far more compelling and warranted further examination.. While some changes may have been simply rewording, in 2000-01, 23% of cites were deleted completely upon review, which would appear to indicate an area for concern.
- WHCA recognizes that the DHFS, like all state agencies. face difficult fiscal constraints in the coming years. We strongly encourage the legislature to recognize the role of this agency and the importance it serves in its oversight capacity. However, we would oppose any attempts to increase licensure fees in order to fund the survey process. The current reimbursement system is already wholly inadequate in reimbursing the costs for the care provided to Wisconsin nursing home residents. To add any additional cost to providers would be detrimental to the care provided these residents.

- We encourage the legislature to learn lessons from the mistakes that have been made in the nursing home survey and enforcement process before considering wholesale changes to the oversight of assisted living facilities. We would not encourage an effort to replicate a flawed system that currently inhibits innovation, is punitive in focus, and mandates paperwork compliance. To impose such a similar system on assisted living facilities will be detrimental on the entire provider community and the individuals they serve.
- The evaluation states “the regulation of nursing homes follow a well established inspection process that occurs frequently, is designed to ensure quality...” See page 36. While the *intended* purpose may be to ensure quality, WHCA disagrees that this process does so. Rather, it is designed to enforce compliance with various state and federal regulations, measures that may or may not be indicate quality care. The inspection process is flawed in that it does not provide nor add anything to the quality of care provided. This not a criticism of the BQA or DHFS. Federal requirements stifle attempts to improve the process, as seen recently by the CMS de facto rejection of a modest proposal by providers, regulators, educators, and resident advocates to adjust the survey process allowing surveyors to focus greater attention of facilities with poor performance records. WHCA would strongly encourage the Legislature to consider a hard look at the overall survey and enforcement process and consider a shift in efforts to encourage and assist quality improvement, rather than punish non-compliance. WHCA applauds the recent BQA Technical Assistance pilot project, and urges the Legislature to monitor the progress of this project, as well as the recent federal Quality Improvement Initiative.
- Federally certified nursing homes in Wisconsin are subject to the dual federal and state survey and enforcement system. WHCA is disappointed that the audit report does not contain any evaluation as to the wisdom of operating such a dual system, which subjects providers to both state and federal citations for the exact same fact circumstances. Additionally, and more counterproductively, facilities are subject to state and federal enforcement actions as a result of such citations.
- The report states that Wisconsin has a “well-documented process for determining forfeiture amounts it accesses nursing homes that have been cited for violations of state regulations.” WHCA strongly disagrees with this characterization. State forfeitures are supposed to be determined by four factors in 50.04(5)(b) of the Wisconsin Statutes. In addition to these factors, the DHFS has developed a grid for use in determining forfeiture amounts. This grid has been developed and implemented without input from outside the BQA, and since its implementation, the amount of the average forfeiture has increased beyond levels that could be explained by the statutory adjustments fine levels. This grid operates as an administrative rule, and should be promulgated as such.
- There is significant discussion as to the backlog of forfeiture assessments as well as the forfeitures that have not been paid to the Department. Recently the DHFS has proposed a surcharge on state forfeitures in order to fund additional forfeiture assessment specialists to address the backlog. The WHCA strongly disagrees with such an effort, and points to the staff vacancies within the forfeiture assessment specialists as the direct cause of the backlog. Providers should not be forced to make up for the fact that the Department could not fill these vacancies. On page 43 of the report department staff further attribute

the delay and assessing nursing home forfeitures to an increase in the number and duration of state violations, however we would refer you to Appendix 3, which would indicate that the state cites actually decrease during this period.

- The report indicates that the most frequent imposed penalty is a state forfeiture, and then makes the blanket assertion that prompt imposition of penalties is considered the most effective method of compelling compliance. WHCA would agree that the state enforcement process is focused on financial penalties for non-compliance, however, we would argue that this can be both counterproductive and detrimental to the quality of care. Given the well-documented financial woes of many nursing home providers, emphasizing financial penalties for non-compliance can arguably compound care problems, rather than permit improvement. Compounding this is that the forfeitures paid go directly to the School Fund, rather than going towards the care provided the residents. WHCA would recommend that the Legislature consider options that might allow at least a portion of state forfeitures go towards a fund to be used to improve care. Further, in the alternative, we would encourage the legislature to consider authorizing the BQA an option to direct a facility to expend the forfeiture amount towards internal quality improvement.

Response to Audit Recommendations

The following are several of the specific recommendations found within the Evaluation, and the WHCA response.

1. The Legislature may wish to consider amending statutes so that a portion of the forfeitures assessed is directed to the Department, rather than the school fund. DHFS should report to the Committee numbers and percentages of citations awaiting review for forfeitures, and the percentage of a forfeiture that represents a reasonable estimate of DHFS Administrative costs related to assessments. *See page 46.*

WHCA response: The backlog in determination of assessments does not appear to have been the result of a lack of funding, rather, significant period of time vacancies. While WHCA supports the recommended reports, we would oppose funding these positions through forfeiture assessments.

2. Recommendation that DHFS establish a written procedure to guide the assessment of forfeitures for assisted living facilities. *See page 48.*

WHCA Response: WHCA agrees, pending review of such proposals, with this recommendation and would further urge the Legislature to direct the DHFS to do the same for nursing homes, upon receipt of public input for both. The DHFS has been utilizing a forfeiture grid to establish nursing home forfeitures. This grid is akin to an administrative rule, and should be promulgated as such.

3. Recommend the Legislature amend s. 50.04(4)(d), Wis. Stats., to allow the DHFS to restrict nursing home admissions in a more timely manner. *See page 50.*

WHCA Response: The DHFS currently has authority to restrict admissions under certain circumstances. Federal law also permits the use of the remedy of a ban on

payment for new admissions, a de facto ban on admissions. While WHCA would not outright reject any amendment, the Legislature must be aware of the unintended consequences of aggressive use of a ban on admissions. Restricting admissions, particularly in rural areas, may prevent an individual from placement at a facility of their choice. Further, a ban on admissions can exacerbate an already tenuous financial condition, thus compounding quality problems. Restricting admissions for a period of time may cause a drop in census that might put a facility in a financial hole that they may not be able to emerge, thus putting the remaining residents at additional risk.

4. To apprise the Legislature of its efforts to improve the timeliness of decisions it issues in the nursing home informal dispute resolution process, the evaluation recommends DHFS report on the effect of timeliness of returning responsibility for IDR decision-making; the number of cases resolved through IDR; and the number of cases resolved through IDR that were subsequently appealed. *See page 60.*

WHCA response: WHCA support the recommendation for the reports. WHCA further supports the call for efforts to improve timeliness of IDR. In addition, WHCA would encourage the Legislature to consider the following:

- Require DHFS to set and adhere to timelines for conducting and completing IDR for all long term care providers; and
- Consistent with the adopted recommendation of the DHHS Regulatory Reform Committee recommendation adopted August 2002, require that the state IDR program be conducted through an independent third party who is not connected to the survey agency. In the interim, WHCA urges the DHFS to take swift steps to reinstate the IDR Coordinator position, which was an individual that conducted the IDRs but was not directly supervising the surveyors.

5. Recommend the Legislature amend ch. 50 Wis. Stats., to create a 60-day time frame for providers to file appeals after receiving statements of deficiency for state violations. *See page 63.*

WHCA response: WHCA supports this recommendation, and further urges the Legislature to review the entire appeals process for state violations to address the current process that requires providers to file two appeals, one for the citation and one for the forfeiture assessment.

WHCA again wishes to thank the Committee and the Audit Bureau for its attention to these important issues. Please do not hesitate contacting me directly if you desire additional information or would like to discuss any of the above comments and suggestions in greater detail.



John Muir Chapter

Sierra Club - John Muir Chapter
222 South Hamilton Street, Suite 1, Madison, Wisconsin 53703-3201
Telephone: (608) 256-0565, Fax: (608) 256-4562
cterrell@execpc.com; wisconsin.sierraclub.org

Statement on Proposed Audit of DNR Air Management Title V Program
Before the Joint Committee of Audit
By Caryl Terrell, Director
February 5, 2003

Thank you for the opportunity to speak on the proposed audit of the DNR Air Management Title V Program. You are addressing an issue that can improve the health and quality of life for families throughout the state.

EPA is Now Investigating and Wisconsin Faces Serious Consequences

The Sierra Club and other environmental and public interest groups on December 16, 2002 petitioned the Environmental Protection Agency to protect Wisconsin's families from air pollution by issuing the state a notice of deficiency for failing to adequately administer its Title V Permit Program and ordering prompt remedial action.

Even before we filed, the EPA, on December 6, 2002, wrote DNR questioning their ability to implement the Title V program without the Consumer Price Index (CPI) adjustment eliminated in 1999. EPA is now investigating the DNR program and requesting information similar to that suggested for this audit.

Unless Wisconsin acts to improve the program and its funding, we face serious consequences. Within 18 months, EPA must act to withhold all federal highway funding, estimated \$500-600 million per year. Six months later, EPA must take over the Title V program. Wisconsin can fix this problem and avoid the embarrassment.

The 1970 Clean Air Act promise of clean and healthy air for our residents is already decades over due. Part of this delay in achieving clean air can be traced to the failure to fully fund the DNR's Air Permits Program. This situation is the subject of the May 24, 2001 Legislative Fiscal Bureau report on DNR Air Management Programs. Correcting program funding is our first priority and this solution need not be delayed if the Committee proceeds with an audit.

Lack of Air Regulation Harms Taxpayers

The federal Clean Air Act requires that all fees be paid by air pollution sources and that fees are set to cover the entire cost of programs. By ensuring that the entities needing regulation in order to protect the public are paying for that regulation, the cost doesn't fall on taxpayers.

Because of a historic lack of funding, Wisconsin has the worst permit issuance rate of any state in the Midwest. Federal law required Wisconsin to issue all permits by April 1998. As of December 1, 2002, two hundred and eighty (46 percent) major sources of air pollution in Wisconsin still lacked operating permits.

Lack of Air Permits and Inspections Harms Public Health and the Environment

A significant portion of the air pollution that threatens millions of Wisconsin residents is from risk from paper mills, power plants, incinerators and foundries that emit hundreds of thousands of pounds of dangerous air pollution and that don't have the necessary permits. These industries emit mercury, sulfur dioxide, dioxin and many other hazardous chemicals into the air we breath,

causing thousands of Wisconsinites to suffer the effects, from asthma and other respiratory illnesses to cancer and heart disease.

Properly issued permits protect public health and ensure companies are complying with the safeguards promised by the Clean Air Act. Without permits, it is practically impossible to ensure our largest pollution sources are complying with their clean air obligations or take enforcement actions when they violate the law. There are so few inspectors that inspections are only occurring every three years, rather than annually as EPA policy requires.

Lack of Adequate Air Fees Harms Productivity and Creates Backlogs

The federal Clean Air Act focuses priority attention to major sources of air pollution because they are large, complex and have multiple points of emissions. Permits for these facilities are likewise complex and time consuming to prepare and review.

Properly issued permits provide facility managers with clear performance expectations. When these permits up for review, the facility is more able to provide needed data and expedite the re-issuance.

Beginning in 1996 the DNR has requested higher permits fees to remedy its permit backlog and hire more inspectors. Each year prior Governors and Legislatures rejected the requests.

The Solution is a More Equitable Fee Structure

Today, Wisconsin's major air pollution sources are paying a fee of \$35.71 per ton of certain pollutants up to 5,000 tons per source. This funding stagnated in 1999 when the Legislature eliminated the automatic annual per ton increase that had been linked to the Consumer Price Index ("CPI"). So not only is the fee set too low, but the funding is decreasing in real dollars every year.

To fix this problem means raising permit fees and restoring the annual CPI-adjusted increase. The DNR estimates that in order to finish issuing all permits by December 2004 (six years after the statutory deadline) and conduct annual inspections, fees should be increased from \$9,868,601 to \$17,181,743. Because federal law appropriately requires that the program be funded solely by permit fees (and not other state/federal funding sources) there are at least two ways to do this:

- 1) Increase permit fees by \$26.46 per ton of pollution to a level of \$62.17 per ton while maintaining the 5,000 ton cap per source, or
- 2) Eliminate the 5,000 ton cap and increase permit fees by \$1.48 per ton.

We believe the fairest option is to remove the 5,000 ton cap and make all pollution sources pay the same price per ton of pollutant. This will eliminate the special deal that currently exists for the State's seventeen largest sources of air pollution that emit more than 5,000 tons of pollution. This solution is more equitable for the over 600 facilities.

We urge legislators to raise the permit fees for the Department of Natural Resource Clean Air Permits Program as proposed by Governor Thompson three State Budgets ago. During these tight budget times, we believe this is the most important budget increase that can provide for clean and healthy air.

Thank you for this opportunity to share the viewpoint of the Sierra Club, representing 13,000 Wisconsinites.

Memo

To: Members – Joint Legislative Audit Committee
From: Tom Frazier
Date: February 5, 2003
Re: Audit Report on Nursing Home and Assisted Living Regulation

Thank you for holding this hearing today and conducting the study on the regulation of nursing homes and assisted living facilities. In general, we support the testimony of the Wisconsin Board on Aging and Long Term Care in terms of what needs to be done to correct the problems.

Specifically, I would urge you to adopt the proposal by the BOALTC to fund and add the responsibility to the Ombudsman program for investigating complaints from residents of RCACs. CWAG has proposed this from the very beginning and, in retrospect, I believe many of the problems would have been mitigated if this had been in place from the start of RCAC regulation. For about \$2.00 per month per unit residents of RCACs would have access to third party mediation to help resolve complaints. I believe such a small fee is well worth the peace of mind for RCAC residents to know that help is available if they need it. Also, this would not require additional GPR.

Finally, I believe that we need to develop a way of reimbursing nursing homes based on outcomes similar to the ones developed for Family Care. Nursing homes that provide excellent care should be well paid. Up until now there has been almost no relationship between quality of care and reimbursement for care. I think we have a real opportunity to change that.

Legislative Audit Bureau Testimony CAPOW

Thank you for the opportunity to address you. I am here representing The Community Alliance of Providers of Wisconsin or CAPOW. CAPOW is a non-profit group of providers that serve people with disabilities in community settings. We represent agencies across the state that employ thousands of workers and serve thousands of people both residentially and vocationally. The board of directors collectively has hundreds of years of experience in this field.

We know this business and we organized for one simple reason; we want what is best for the people we serve. The only way to improve the quality of care in the community is through quality staff. In order to attract and retain those staff we must pay a living wage. The state demands a level of quality that the providers in Wisconsin long to provide. They simply cannot without adequate compensation for their staff.

We applaud the report submitted by the L.A.B. and we agree with many of their findings. We am concerned about a couple of things:

1. We think that there is an inherent conflict of interest in directing forfeiture revenue to DHFS.
2. This industry has been under funded for years. There has been no increase in the CIP rate, which funds the majority of placements, since 1994. By contrast, ICF/MR rates increased by 29% during the same period. Daily rates for the state centers have increased by 51% since 1995. Any new legislation should be aimed not at punishing providers more severely but rather at funding them adequately and providing the technical assistance they need.
3. When you look at the quality of care provided you have to look at both attitude and aptitude. The vast majority of providers in Wisconsin have the right attitude. What they lack is the aptitude, or ability to provide an excellent product at the current rate of reimbursement. Forfeitures and criminal charges only address attitude.

We think the addition of BQA staff to provide technical assistance would be helpful to the industry. It would also be helpful to build a more collegial relationship between BQA and the providers. Timeliness of forfeiture determinations is vital, as is the increase in the contest period for forfeitures. Finally, we would like to see assisted living facilities be given the same right to informal appeal that is granted to nursing facilities.

The industry is not perfect but the crux of the problem is the lack of good decision making skills at the direct care level. The only way to address that is through a change in funding that will ensure staff longevity. As long as we are asked to take someone out of a state operated facility where the average daily rate is \$477 (DCTF data – 10/02) and the staff is paid \$12.00 hour and put them into a facility where the daily rate is \$ 178.00 per day and the rate of pay is \$8.00. As long as providers are competing for employees with McDonalds, the quality of service will not meet our expectations. You have the power to change this industry, not with increased forfeitures or new spending but simply by supporting the shift in money, as proposed in the current budget, from the centers to community providers. This is not about profits, it is about quality. Please help our staff make a living wage.

Thank you for this opportunity to address you.

Lincoln J. Burr
Vice President - CAPOW

Wisconsin Association of Homes and Services for the Aging, Inc.

204 South Hamilton Street • Madison, Wisconsin 53703 • 608-255-7060 • FAX 608-255-7064

February 5, 2003

To: State Senator Carol Roessler, Co-Chair
State Representative Suzanne Jeskewitz, Co-Chair
Members, Joint Legislative Audit Committee

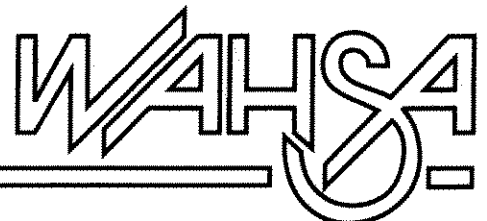
From: John Sauer, Executive Director
Tom Ramsey, Director of Government Relations

Subject: Wisconsin Legislative Audit Bureau Report 02-21, "Regulation of Nursing Homes and Assisted Living Facilities"

The Wisconsin Association of Homes and Services for the Aging (WAHSA) is a statewide membership organization of 198 not-for-profit corporations principally serving elderly and disabled persons through programs ranging from nursing home care to assisted living to hospice and homecare. On behalf of our not-for-profit members, we would like to commend the Legislative Audit Bureau (LAB) for its thorough handling of this complex subject. We are especially grateful to Kate Wade of the LAB and her team for their professionalism and for something so simple yet so important, their willingness to listen. The value of the report comes primarily from its balanced approach and that balance is a result of the LAB's drive to seek out and give voice to all sides of a given issue. From our perspective, a job well done.

We would like to present our response from two perspectives: First of all, to respond to what was in the report, to its recommendations; Secondly, we would like to respond to what was not in the report, or to issues the report touched upon but either provided no recommendations or refrained from taking a position.

Before getting into the specifics of the report, we would like to begin with one simple statement: The quality of care provided in the overwhelming majority of Wisconsin's nursing homes and assisted living facilities is excellent. The job of all of us is to do whatever we can to ensure that excellent care is provided in all long-term care (LTC) facilities. The failure of our current system is that it treats the good facilities the same as the bad and squanders scarce resources by so doing. Applying the same enforcement activities and actions on compliant facilities as are applied to non-compliant facilities is an inefficient use of those scarce resources and must be substantially modified if excellence in quality is to be achieved by all LTC providers.



LAB Recommendations in Report 02-21

- 1) **Assisted Living Survey Revisions:** On Page 37 of the report, the LAB writes that if the Legislature is not satisfied with the current regulatory process for assisted living facilities, it could: A) Establish standards for the frequency with which assisted living facilities should be inspected; B) Establish minimum qualifications for assisted living facilities inspectors; and C) Increase the number of staff assigned to inspect assisted living facilities by seeking additional federal funds, increasing facility licensure fees, or directing the Department of Health and Family Services (DHFS) to reallocate its existing resources OR direct the DHFS to develop technical assistance training programs to better enable assisted living facilities (ALF) to comply with regulations.

WAHSA Response: Although WAHSA would not oppose these recommendations, it must be noted the DHFS Bureau of Quality Assurance (BQA) already has begun implementing these proposed changes. The internal directive of the BQA is to visit each ALF at least once every 24 months; their long range goal is to increase that to once every 18 months but that goal currently is unachievable because they do not have the staff to do so. It would be hypocritical of the Legislature to demand more frequent ALF compliance visits by the BQA without providing the funds necessary, or ensuring that the needed funds are available, to meet this demand. The BQA also has created a new Assisted Living Section with staff dedicated to assisted living. Among those new staff are nine nurses, eight from the Resident Care Review (nursing homes) Section and one funded through federal funds, which will provide both more and better qualified ALF surveyors. Finally, one of the new positions in the Assisted Living Section has been filled by a former ALF licensing specialist whose new responsibilities include the development of technical assistance training programs for both ALF surveyors and providers. The BQA appears to already be moving where the LAB suggests it be going.

WAHSA members believe current statutes and codes provide the BQA with all the regulatory and enforcement tools they need to do their jobs. What the BQA does not have are enough people currently assigned to properly utilize those tools.

- 2) **Written Procedures for ALF Forfeitures:** On Page 48 of the report, the LAB recommends the DHFS establish a written procedure to guide the assessment of forfeitures for ALFs. The LAB argues ALF forfeitures are not based on written criteria such as statutes, administrative code or the DHFS' formal written policies. Rather, the LAB says regional and central office staff confer to determine forfeiture amounts based on a facility's compliance record and the DHFS' treatment of other facilities for similar violations. The LAB concludes that such a practice, which relies exclusively on the individual judgments of staff, could lead to inconsistencies.

WAHSA Response: We disagree with the LAB's conclusion. Indeed, we believe current inconsistencies in citing practices often times are attributable to different interpretations of written procedures and the current DHFS system provides greater flexibility to assess ALF forfeitures more on a case-by-case basis.

- 3) **Diversion of ALF Forfeitures to the DHFS:** On Page 46 of the report, the LAB recommends the DHFS report to the Joint Legislative Audit Committee by March 1, 2003 on the number and percentage of FY 2000-01 and FY 2001-02 state nursing home citations eligible for forfeiture and awaiting review and for the percentage of a forfeiture that represents a reasonable estimate of the

DHFS' administrative costs related to assessing a forfeiture. A positive response to these queries could lead to the Legislature permitting a portion of the nursing home and ALF forfeitures to be redirected to the DHFS rather than to the Common School Fund and allowing resources that currently support forfeiture assessment functions to be redirected to the regulation of long-term care.

WAHSA Response: We are neutral on this recommendation. On the one hand, we are leery of providing the DHFS with a perverse incentive to increase its own coffers by assessing more and larger forfeitures. On the other hand, we see absolutely no value to LTC residents to have LTC forfeitures deposited in the School Fund. We also oppose further funding of DHFS enforcement activities through increased licensure fees, which is simply a tax by another name of providers who can ill afford to divert their already scarce resources to non-resident care uses.

- 4) **Restrict Nursing Home Admissions:** On Page 50 of the report, the LAB quotes DHFS staff as saying that restricting new admissions to nursing homes or ALFs can be an effective enforcement option. The DHFS stated it has not imposed admissions restrictions on nursing homes because s.50.04 (4)(d), Wis. Stats., limits its ability to do so in a timely manner. The LAB recommends permitting the DHFS to restrict nursing home admissions in a more timely manner.

WAHSA Response: Before taking a position, we would have to see the definition of "in a more timely manner." The intent of the current statute was to ensure that a penalty as severe as restricting admissions was applied only for serious violations of state code or statutes. It must be kept in mind that this penalty is severe enough on the provider but it could be particularly devastating on the prospective resident seeking admission to the facility of his/her choice, especially in a rural setting where the next closest facility may be 50 miles from home and family. Further, in some cases the DHFS has sought severe penalties against nursing facilities for alleged deficiencies, only later to have the related citations overturned by appeal.

- 5) **Improvements in the Informal Dispute Resolution (IDR) Process:** On Page 59 of the report, the LAB notes that the DHFS has met its goal of making an IDR decision within 21 days of issuing a statement of deficiency in only 32.5% of its decisions between FY 1997-98 and FY 2000-01. In order to improve the timeliness of IDR decisions by the DHFS, the LAB recommends that the Department report to the Joint Legislative Audit Committee by July 1, 2003 on the effect of timeliness of returning responsibility for the IDR decision-making to regional managers, on the number of cases resolved through the IDR, and on the number of cases resolved through the IDR that were subsequently appealed.

WAHSA Response: WAHSA supports any actions which will improve the timeliness of IDR decision-making. Our concern is with who is making those decisions. The current system, with regional managers reviewing the decisions of their peer regional managers, certainly raises issues of objectivity. Instead, we support Recommendation #210 of Department of Health and Human Services (DHHS) Secretary Tommy Thompson's Advisory Committee on Regulatory Reform, which would require IDR programs to be conducted through an independent third party not connected to the state survey agency or to the nursing facility. The LAB notes on page 61 of the report that a pilot program utilizing this approach currently is being conducted in Iowa and Texas. Alternatively, if a truly independent process is not immediately implemented, WAHSA recommends that DHFS assign staff to administer the IDR process who do not directly supervise or oversee BQA surveyors or regional operations.

- 6) **60-Day Timeframe for Provider Appeals:** On Page 62 of the report, the LAB noted that Wisconsin law allows nursing home and assisted living providers ten days to file an appeal after receiving a statement of deficiency or a forfeiture assessment for violations of state regulations. However, 79.1% of the appeals filed in FY 1998-99 through FY 2000-01 were closed before those appeals hearings were held. In order to save those needless administrative expenses, the LAB recommends creating a 60-day timeframe for providers to file appeals after receiving statements of deficiency for state violations.

WAHSA Response: We support the LAB recommendation, which would parallel the federal appeals process.

What LAB Report 02-21 Did Not Say

In her December 13, 2002 issuance letter of this report to Senator George and (then) Representative Leibham, State Auditor Janice Mueller wrote: "Although both nursing homes and assisted living facilities are inspected by state staff, there are significant differences in the oversight provided. Nursing homes are inspected under a well-established process that is dictated by federal regulations designed to ensure quality, occurs frequently, and employs teams of inspectors that include registered nurses who evaluate resident care. In contrast, the regulatory system for assisted living facilities, which is controlled entirely by the State, is less-established, and each inspection typically involves a single inspector who is not required to have medical credentials."

On Page 19 of the report, a similar point is made: "Nursing home inspections typically involve a greater number of staff, with more education and prior long-term care experience, who are on-site for a longer period of time. Nursing homes also are inspected more frequently than assisted living facilities."

Inadequacies of the Nursing Home Survey System

The message, that the assisted living inspection and enforcement system should more closely mirror the nursing home system, certainly can be inferred from the LAB report. The problem is that very few of the individuals who are directly involved in the nursing home enforcement system – the regulators, providers and consumer advocates – are satisfied with that system.

Listed below are a few examples of that dissatisfaction:

- In an April 4, 2002 letter to DHHS Secretary Tommy Thompson seeking to pilot a modified nursing home survey process in Wisconsin, the signatories wrote: "The current survey process limits states' ability to allocate necessary resources to nursing homes experiencing significant problems. Our proposal allows Wisconsin the flexibility needed to improve the quality of care and quality of life for vulnerable nursing home residents to a greater extent than we are presently able to do so." The signatories included former Governor Scott McCallum; BQA Director Susan Schroeder; George Potaracke, the executive director of the Wisconsin Board on Aging and Long-Term Care; Tom Moore, the executive director of the Wisconsin Health Care Association; and WAHSA Executive Director John Sauer.
- A study of the federal survey process in New York State (a process similar to Wisconsin's because both are based on the same federal regulations) says the process- and paperwork-oriented survey

process threatens the care of New York's nursing home residents because caregivers and providers: A) Have trouble attracting and retaining staff, many of whom often quit rather than deal with the negative-focused, morale-eroding survey process; B) Cannot adequately compensate staff due to low government reimbursement levels; C) Have difficulty innovating and improving quality of care when burdened by an incoherent and inflexible regulatory system; and D) Have no hope of success when faced with a subjective and process-oriented, rather than an outcome-based, survey system. (The report, "Bad Medicine – How Government Oversight of Nursing Homes is Threatening Quality Care," was published in August 2001 by the New York Association of Homes and Services for the Aging, our New York State affiliate.)

- In a research paper supported by the Commonwealth Fund, "Regulating U.S. Nursing Homes: Are We Learning From Experience?" Kieran Walshe, a senior research fellow at the Health Services Management Centre at the University of Birmingham in the United Kingdom, outlined the failings of the U.S. nursing home survey system in a 2001 article in Health Affairs. In describing the characteristics of a survey system which "may have detracted from its effectiveness and contributed to its disappointing results," Walshe wrote: "At present, nursing home regulation exhibits few, if any, of the features of responsive regulation. Nursing homes are surveyed annually and treated similarly, regardless of whether they are good or poor performers – a 'cookie-cutter' approach that neither adequately rewards good-quality care nor deals forcefully enough with poor-quality care. Nursing home regulators have little scope to use their discretion and professional judgment in applying the highly prescriptive regulations and are actually prevented by the regulations from giving nursing homes advice or assistance."
- In a March 20, 2001 letter to DHHS Secretary Tommy Thompson on behalf of the Association of Health Facility Survey Agencies (AHFSA), the professional association of health facility licensure directors, H. Michael Tripple, the president of AHFSA and director of the Facility and Provider Compliance Division of the Minnesota Department of Health, listed a series of recommendations on ways to improve the DHHS' Nursing Home Initiative. One of those recommendations called for a deliberate discussion of nursing home regulation and alternatives to the current nursing home survey process. Tripple wrote: "Several states have been directed to look at alternatives to the current federal regulatory process. Minnesota and other states have requested waivers to create more effective survey procedures and have been denied due to the lack of waiver authority at both the Medicare and Medicaid levels. We realize that these discussions will be controversial. However, these discussions must start in order to better utilize resources as well as to encourage innovations at the state level. We are seeing increasing dissatisfaction among providers and consumers as to the scope and intensity of the current survey process. This dissatisfaction is often expressed to our Legislatures and there is increasing state pressure to change the survey process in ways that challenge and potentially conflict with current federal provisions. A deliberate discussion of the overall direction of regulation is essential."
- The issue is clearly laid out on Page 36 of the LAB report: "The Department, nursing home providers, and resident advocates have concerns that the nursing home inspection process, as prescribed by the federal government, limits the State's ability to focus resources on nursing homes that have histories of noncompliance with regulations or high rates of complaints. From FY 1997-98 through FY 2000-01, 49.6% of nursing home inspections and complaint investigations in Wisconsin resulted in no citations. Under current federal inspection requirements, states are to allocate the same

resources to compliant nursing homes as they allocate to nursing homes with long histories of noncompliance.”

The federal nursing home survey process measures a facility’s compliance with a set of minimum standards at a point in time; a deficiency-free survey simply means you are in compliance at that point in time with those minimum standards, not that you are providing quality care. It’s a process that has been described above as ineffective, inflexible, inefficient, and paper- and process-oriented rather than outcome-based. It limits the ability of nurse surveyors to “be nurses,” to share their expertise and experience to improve quality, by forcing them to become a form of healthcare police. Worst of all, it destroys the morale of the overworked, underpaid compassionate long term caregiver. Imagine a process in which the best you can possibly do is to be told you didn’t mess up. Not that you’re doing an excellent job in providing quality care, but that you didn’t mess up “this time.” Is it any wonder nursing homes are having difficulty in recruiting and retaining competent and compassionate staff? And why would we contemplate applying the tenets of the nursing home survey process to assisted living?

Our ability to change the federal nursing home survey process is admittedly limited but we will continue to do all in our power to bring about those needed changes. What we implore of the members of the Joint Legislative Audit Committee is to not allow the mistakes we’ve made in regulating nursing homes to be duplicated in assisted living. We need to use the flexibility of state regulation of assisted living to permit the efficient use of limited resources by focusing those resources on the poor performing assisted living providers and we need a regulatory environment in assisted living which focuses on collaboration and technical assistance for all other ALFs, using punitive compliance penalties only as a last resort.

Compelling Compliance and the Fixation on Forfeitures

The LAB report is replete with references to forfeitures and various ways to improve their assessment and collection. But the analysis never categorically states that the assessment of forfeitures and the imposition of other punitive measures is an effective tool to compel or entice compliance. Our assertion is there’s no such empirical evidence and, at the very least, the question is open to debate.

In Kieran Walshe’s paper mentioned above (“Regulating U.S. Nursing Homes: Are We Learning From Experience?”), Walshe notes that regulatory theorists often use two terms – “deterrence” and “compliance” – to describe the paradigms within which regulators work. “Deterrence regulators see the organizations they regulate as ‘amoral calculators,’ out to get what they can and willing to break the rules if they need to get away with it. As a result, their approach to regulation is formal, legalistic, punitive, and sanction-oriented,” Walshe states. In other words, the nursing home survey process.

(Note: In a 2000 article in the University of California Press (“Regulatory Encounters: Multinational Corporations and American Adversarial Legalism”), Robert Kagan and Lee Axelrod argue that regulation is very much a product of the political, social, and economic environment and that approaches to regulation vary considerably among countries. “The United States is perhaps the foremost proponent of deterrence regulation and use this approach in many fields in which other countries use compliance approaches successfully,” wrote Kagan and Axelrod, who categorize the American tradition of deterrence regulation as “adversarial legalism” and assert that it has high costs, a divisive and corrosive effect on relationships between organizations, and few compensating benefits.)

Walshe says, in contrast, “compliance regulators see organizations as fundamentally good, well-intentioned, and likely to comply with regulations if they can. Their approach to regulation is generally

more informal, supportive, and developmental, and they use sanctions only as a last resort." It is the compliance-regulator approach that WAHSA members would prefer to see used in assisted living, both because we believe it can work to ensure quality in LTC facilities and because we are certain the punitive nature of the current nursing home survey system has resulted in the failure of that system to ensure quality.

The point here is not to debate regulatory theorism; the point is there are differing viewpoints on the effectiveness of the type of deterrence regulation currently used to regulate nursing homes.

From the theoretical to the practical, the concerns we have with the reliance on forfeitures as a tool to compel compliance is there's no direct benefit to residents and it's forcing facilities in financial distress to pay fines they can't afford.

As the LAB report notes, forfeitures paid by nursing homes and ALFs are deposited in the Common School Fund; they cannot be used to help cure the ills that caused their imposition and cannot be used to improve the quality of care provided to residents. They are strictly and solely imposed as punitive measures; we see no empirical data, and the LAB report showed none, either, which indicates that the assessment of such forfeitures serves as a deterrent to acts of noncompliance. On the contrary, the imposition of forfeitures denies facilities resources they should be applying (and indeed should be forced to apply) to improve resident care.

These forfeitures, in many instances, are being assessed on facilities which have a limited ability to pay them. As noted on Page 44 of the LAB report, \$1.3 million of the nearly \$2 million in unpaid nursing home forfeitures as of May 7, 2002 were assessed against nursing homes which have filed for bankruptcy. In addition, the DHFS conducted an internal analysis at the end of last year which identified 192 nursing homes out of the 379 facilities analyzed as being at "financial risk:" 138 facilities were operating at a net loss, 111 facilities were operating with negative working capital, and 57 facilities were operating both at a net loss and with negative working capital. With their current financial status tied to an inadequate Medicaid reimbursement system and a perilous 2003-05 budget awaiting them, nursing homes simply can't afford to pay forfeitures to the state school fund at a time when their scarce resources are desperately needed to improve care at their facilities.

Resource Allocation Inefficiencies

We've discussed the inefficient use of scarce resources in a nursing home survey system which treats the good provider the same as the poor-performing provider. What we would like to see, and what the LAB report did not include, is what percentage of BQA surveyor resources were spent at what percentage of facilities. Were the dollars fairly evenly spent on a per facility basis or was a large percentage of those scarce surveyor dollars being spent on relatively few facilities?

Other Responses to the Report

- 1) On Page 4 of the report, the LAB states that 92.7% of the federal nursing home citations that were issued against Wisconsin nursing homes from FY 1997-98 through FY 2000-01 identified a "potentially" harmful situation "before any residents were harmed." Another way of stating this is only 7.3% of the citations issued during that time period were for situations that resulted in harm to residents, a figure that still is unacceptably high but indicative of the fact that the vast majority of citations are issued for situations where a resident was not harmed.

- 2) On Page 5, the LAB report states that the increases in the number of complaints against ALFs, the rate at which complaints are substantiated, and the relative infrequency of ALF inspections suggest that in contrast to nursing home regulation, the regulatory system for ALFs has reached a critical juncture. Once again, this assumes the nursing home regulatory system ensures quality, an assumption we do not accept. In addition, it seems to imply that compliance can be assured by "the numbers," i.e., the number of complaints and the number of inspections. Numbers can't define or determine quality; they don't tell how a resident is doing. What needs to be determined is the outcome of the care that a given resident is receiving and numbers alone can't tell that story.
- 3) If the assessment and collection of forfeitures is so needed to deter noncompliance, why did the BQA leave the forfeiture specialist positions vacant in 2000-01?
- 4) Table 20 on Page 58 of the report indicates 50.5% of the IDR decisions resulted in no change in the citation. Stated differently, the IDR process resulted in a change in the original citation 49.5% of the time. In school, that would be an "F."
- 5) In Appendix 4, the LAB determined there is no statistically significant relationship between the percentage of allowable costs reimbursed and a number of factors identified as being related to a nursing home's ability to provide quality care. That would be a logical conclusion since establishing any statistically significant relationship must be difficult when only 9.9% of the state's nursing homes were fully reimbursed for their allowable Medicaid costs in FY 2000-01, as noted on page 4-2 of Appendix 4 of the LAB report.

Appendix 4 concludes by stating that data indicate that homes with more serious citations were generally reimbursed a higher percentage of their allowable Medicaid costs, indicating that the percentage of allowable costs reimbursed may not be the most important factor in determining whether a facility is able to provide the level of care that remains in compliance with federal regulations. Might the problem be that, for some of the 9.9% of facilities fully reimbursed for their Medicaid costs, they are able to comply with federal regulations but, for whatever reasons, have chosen not to? Or that they are fully reimbursed for their Medicaid costs but they need to spend more to ensure quality and they are either unwilling or unable to procure those additional funds? In these rare cases, full reimbursement for incurred MA costs is not the issue.

For the vast majority of homes, the issue is how long can they continue to expend more revenues than Medicaid reimburses them. They are doing so now primarily by adjusting the rates they charge their private payors to subsidize that Medicaid underfunding. The question is: Is it fair to place that burden on private citizens paying for their own care and how much longer can those individuals continue to subsidize MA nursing home underfunding until they can provide that subsidy no longer? And when that time comes, what then of quality?

PARK MANOR, LTD.

250 LAWRENCE AVENUE • PARK FALLS • WI 54552
PHONE: 715-762-2449 • FAX: 715-762-3321

Joint Legislative Audit Committee **- *Hearing Comments* -** **By: *Debora B. Klatkiewicz***

Regulation of Nursing Homes and Assisted Living

The Legislative Audit Bureau

First I would like to thank the Legislative Audit Bureau analysts for their time and efforts in preparing this evaluation. From my initial contact with Kate Wade, the Program Evaluation Director, and other members of the Bureau I was impressed with the energy and intelligence with which this evaluation was "attacked". Nursing Home regulation is a complex issue; dealing with the multiple variables that health care provided to vulnerable individuals creates. As I told Ms. Wade, understanding the entire process is like "trying to get a handle on oil". The Bureau has collected a wealth of information and data from a variety of sources, including providers and the Department of Health and Family Services (DHFS) that may be the most comprehensive "library" available regarding regulation of nursing homes available and a source of further reports as well. Additionally, in the process of collecting the information and interviewing a wide variety of both facility and DHFS sources, the analysts now have a solid basis for understanding the process and further applying their evaluation skills to those reports.

Comparison of the Regulation of Nursing Homes and Assisted Living Facilities

Caution should be taken in evaluating and responding to the comparison of nursing home and assisted living facility regulatory surveys. In suggesting and requesting this audit, it was not the intention that the nursing home survey process be held as a "gold standard" for assisted living. Rather, it was hoped that the problems in the current nursing home survey process be explored and analyzed. These problems do not relate to the regulations themselves, but rather to the ENFORCEMENT of the regulations.

There are vast differences between the nursing home and assisted living. The "stark" contrast between the nursing home and assisted living regulation and enforcement process is directly related to the "stark" contrast in the residents and their needs in the two living situations. Please do not attempt to mirror assisted living regulation to the nursing home model. I will defer to my colleagues in assisted living to address this issue.

Nursing Home Care in the State of Wisconsin

It is time to proclaim the excellent status of nursing home care in the State of Wisconsin. Wisconsin has long held nursing homes to a high standard of care through the efforts of the providers and the Department of Health and Family Services. Regulation and surveillance of the

quality of care provided in facilities are part of this equation. State regulations in Wisconsin predate the federal regulations. The introduction of the OBRA federal regulations in 1987 has further improved not only the way nursing home care is provided, but also how we all look at residents of nursing homes. As the quality improves, the "envelope" of legitimate deficiencies becomes smaller and smaller.

It is clearly time all of us – the facilities, the Department, and the Legislature – take credit for and tout the high quality of care provided in Wisconsin nursing homes; not continue to "buy into" the notion of other external agencies and individuals that numbers of deficiencies equate to quality care. The Department has been told by the Centers for Medicare and Medicaid Services that Wisconsin is an "outlier" in lower numbers of deficiencies when compared with other states. This is because the quality of care in Wisconsin is HIGHER!

Recommendations

The Evaluation brings to light several areas that could be further explored. To that end, and to further utilize the extensive information gathered by the Legislative Audit Bureau, I recommend the following additional reports be pursued. As the majority of the background information has already been gathered, this would substantially reduce the cost to investigate and evaluate these issues.

1. Consistency of enforcement activities among the DHFS regional offices:

The audit report as well as information routinely provided by DHFS indicates wide differences in the numbers and severity of deficiencies from region to region that is generally attributed to inconsistencies in citing. Representatives of corporately owned facilities reported to the Legislative Audit Bureau specific examples of situations where a facility in one region was cited for something NOT similarly cited in a facility in another region.

2. Dual enforcement of both state and federal regulations creating two separate written violations or deficiencies with applicable penalties for one alleged deficient practice, or "double jeopardy":

In the survey that Park Manor received in March 2001, there were five situations in which this occurred. In each case, there was an allegation of deficient practice cited and written under a federal violation tag with IDENTICAL language cited and written under a state violation tag. The language is literally "cut and pasted" on two different statements of deficiencies. For example one double jeopardy situation involved notification of the physician. The nurse surveyor alleged that the nurse(s) caring for a resident had not notified the physician of changes in condition. Two deficiencies (one state and one federal) were written despite the fact that the physician and family had been notified of the resident's change in condition, developed a treatment plan, with advanced directives (i.e., what the resident and legal decision maker wanted to occur) in place. In fact, the physician and family member both testified to this in the state appeals in which Park Manor ultimately prevailed. In the real world this would be similar to a motorist

being ticketed for speeding by both local and county law enforcement for the same offense.

3. Sources of Complaint Surveys:

As noted in the report the Department generally investigates all complaints, regardless of the source of the complaint. The facility is not told the source of the complaint, although most administrators would admit that given the way the complaint survey unfolds, i.e. the areas investigated and types of information requested, generally a source can be surmised or at least suspected. Quite often the complaints are from disgruntled employees who somehow feel that their employment difficulties mirror the quality of care in facilities or who simply want to "get even". There should be a better mechanism for the Department to analyze these types of complaints and save valuable time and resources. Areas that the Legislative Audit Bureau could look at would include sources of complaints correlated with the validity of the complaint. Types of complaint surveys that often indicate a disgruntled employee as a potential source are staffing hour complaints, personnel policy and hiring practice complaints, and complaints that are so broad based that only an individual working at the facility could have that knowledge.

4. Accuracy of alleged deficiencies:

The Department manages the Informal Dispute Resolution Process (IDR) that was mandated in 1995 as part of federal enforcement guidelines. Outcomes of IDR as listed in Table 20 of the report indicate that only 50.5% of initial deficiencies remain unchanged after the IDR decisions are made. Looking further at Table 20, the accuracy of alleged deficiencies is DECREASING. It is difficult for facilities to believe what the Department is alleging to be deficient given these numbers. Using an elementary grading system 50.5% is an "F".

In the past, representatives of the Department have spoken publicly of the potential for use of IDR results as a quality assurance mechanism. It is time for this to be analyzed. Wasting time and money on inaccurate deficiencies is counter-productive for nursing homes as well as the Department. This is a particularly onerous chore for facilities. We receive the alleged deficiency, must write a plan of correction AND correct the allegation while simultaneously attempting to use the IDR process to prove that the allegation is unjustified. The IDR timeframe is such that results of the IDR are not known until after the corrections are in place. In other words, we are guilty until proven innocent and often "correct" issues that are not deficient.

5. Collaboration between the Department of Health and Family Services and Nursing Homes:

It is clear from the evaluation and the regulatory mandate for enforcement that surveyors from the department spend an incredible amount of time in facilities (an average of 4.4 surveys per facility per year) with teams that are comprised of a wide variety of professionals. In making the observations and investigations that result in the citation of

alleged deficiencies, these teams also see the positive aspects of nursing home care. They observe practices that "work", trials that do not "work", and efforts of nursing home staff across the gamut of care provided.

The Legislative Audit Bureau and perhaps the Department could evaluate how this information could be best shared with facilities. This knowledge needs to be shared with all providers. Perhaps a survey task could be added to the process whereby the survey team shares their positive observations with the facility. This could take the form of a brief (one hour) review of good practices, sharing of forms and policies, etc. that work and so forth.

This is really not a new concept. At one time, whether it was mandated or not, the survey teams routinely shared information with facility staff. They also shared positive comments about facility care in the exit interview.

6. Park Manor

In October 2001, I spoke before this committee regarding the need for this evaluation of nursing home regulation. At that time I shared a portion of the "Park Manor Story", i.e. the horrors that occurred during and following the March 2001 survey at the facility. Our state appeal hearings were then in progress, appealing the five State code allegations of deficiencies cited.

March 22, 2002 Park Manor received notice from the State of Wisconsin Division of Hearings and Appeals of the order for REVERSAL of all five of these state allegations. The forfeitures levied as a result of these deficiencies were also removed. This was extremely welcome news to the facility, but came at a substantial cost. For this phase of appeals alone, Park Manor has calculated that it spent more than \$362,365 in legal fees, staff time, and other expenses. More than \$200,000 of this amount was in attorney's fees alone and the Administrative Law Judge did rule that we could be reimbursed for our these fees under the Wisconsin Medicaid rate methodology. Unfortunately, the problem with the complicated rate reimbursement mechanism is that in a case of this magnitude, any nursing home will be forced to absorb a substantial portion of the costs. Factors include the limits on the attorney's hourly rates, Park Manor's Medicaid utilization rate (normally about 82-84%), the inherent Medicaid reimbursement caps, and the great expense incurred in one calendar year. We are currently pursuing every avenue that we can conjure to be made whole.

Park Manor also filed for federal appeals at the time of the survey. These appeals are still pending and we are scheduled for our federal hearing on February 25, 2003 in Milwaukee. At this time we are appealing the five remaining federal deficiencies.

Please note that Park Manor was cited for 29 combined alleged state and federal deficiencies in the original annual survey in March 2001. The Revisit survey in June 2001 garnered an additional 6 alleged federal violations for a total of 35 alleged deficiencies. At this time through IDR results, state appeals, and the summary dismissal of many federal

violations by the Federal Administrative Law Judge, we are now looking at five alleged federal deficiencies that are left, or an overall **REDUCTION OF 30 allegations of violations or 85.7%!**

The total cost to date for the facility has been extraordinary. Currently we have a total of **\$339,878.92** in legal and consultant fees, not including the December 2002 billing.

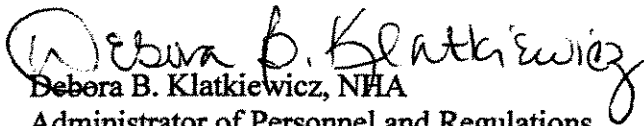
It is unclear what the cost to the State of Wisconsin is regarding this debacle. If the state expenses (including excessive – and apparently unproductive surveyor time, Department attorney and legal assistant time, hearing time, the time of the ALJ and court reporter, and associated expenses) were ONLY half again as much as Park Manor has spent, we are looking at approximately \$679,000 in expenses to total over a million dollars. This is a total waste of time, effort, and badly needed resources.

I request that the Legislative Audit Bureau complete a thorough evaluation of what occurred in this instance. The analysts already have all of the information and rulings from Park Manor's state appeals, gathered in their investigative process for this report. As the federal appeals hearing is looming, there will be closure on this event in the near future. In any case, Park Manor has clearly prevailed in the appeal process already. It is clear to any observer that something went very wrong in this survey.

However, I firmly believe that the only aberration in this process is that Park Manor "went to the mat" in order to pursue this appeal and salvage its reputation as a quality provider of long-term care. I believe this survey was representative of what is occurring in facilities throughout the state. While other facilities may not have to deal with the sheer magnitude of numbers of alleged deficiencies that Park Manor has, any unwarranted and unnecessary time attempting to fight these allegations is time away from the care of the residents. The appeals process is under-utilized by facilities primarily due to the fear of retribution by the Department; extensive cost (obviously) associated with the process; and the intricate, flawed, and intrinsically unfair process to recoup costs even when a facility prevails. If surveys were fairly and consistently conducted, with deficiencies based upon the regulatory guidelines (and not interpretation and second-guessing by surveyors), the state could potentially save millions of dollars in the Medicaid budget.

Thank you very much for your consideration of my requests. I would be happy to provide additional information or answer any questions regarding any of these issues.

Respectfully submitted,


Debora B. Klatkiewicz, NHA
Administrator of Personnel and Regulations



STATE OF WISCONSIN
BOARD ON AGING AND LONG TERM CARE
1402 Pankratz Street, Suite 111
Madison, WI 53704-4001
Ombudsman Helpline (800) 815-0015
Medigap Helpline (800) 242-1060
Fax (608) 246-7001
<http://longtermcare.state.wi.us>

BOARD OF DIRECTORS
C. Charles Arndt
Jennifer Clements
Shoua Lee
Eugene Lehrmann
Ruth Ann Strozinsky
Margaret Tollaksen
Louise Abrahams Yaffe

EXECUTIVE DIRECTOR
George F. Potaracke

**A Proposal for Extending Long Term Care Ombudsman Program Services
To Residents of Residential Care Apartment Complexes**

Dating from the time when the concept of Residential Care Apartment Complexes (RCACs) was first placed in Wisconsin statutes, there has been some degree of general support for the idea of affording residents of these facilities the benefit of Long Term Care Ombudsman services. Prior Legislatures have considered this proposal and rejected it, stating that the primary reason for not expanding the advocacy services of the Ombudsman to RCACs was fiscal in nature.

The Board on Aging and Long Term Care has received numerous contacts from residents of these facilities seeking advocacy assistance over the course of the past several years, and complaints lodged with the DHFS office in charge of registering and certifying RCACs have been steadily increasing. The department is unable, by statute and as a function of resources, to attend to these complaints in the same way as complaints against nursing homes or CBRFs are handled. It is apparent that there are many RCAC residents who would benefit greatly from having Ombudsman services made available to them.

The number of facilities has been growing at a rapid rate since RCACs were first created as a distinct provider type. [See Att. 1 & 2] From a starting point of 21 facilities registered or certified during the first year (1997) to a current complement of 128 complexes (as of July 2002), the increase in the availability of this sort of living arrangement for the elderly is a logical response to growing demand created by an aging population and pressures exerted by declining capacity of other provider types. Perhaps surprisingly, the distribution of these facilities is not focused exclusively in the Milwaukee region. [See Att. 3] While there are more facilities in the Southeast corner of the state (40 of the total 128), there are 28 facilities in the Northeast (Green Bay/Fox Valley) region, 25 in the Southern (Madison) region, and 23 in the Western (Eau Claire) region. Even the far north is represented with a total of 12 facilities in that area. The total number of facilities in each of the regions is generally consistent with the distribution of the general population and it does not appear to be the case that local economic or other factors will slow the growth trend any time soon.

There are a total of 5,369 apartments spread across Wisconsin, the majority of which (perhaps 90%) are believed to be single-occupancy units. According to estimates from the DHFS regulators, there may be as many as 5,800 total residents of RCAC assisted living apartments in Wisconsin as of 30 Aug 2002.

The Long Term Care Ombudsman Program has, since it was evaluated by the Institute of Medicine in a 1995 study entitled Real People, Real Problems, consistently asserted that the optimum ratio of Ombudsmen to potential clients was 1 : 2,000. Using this figure, an additional 3.0 FTE would be needed statewide to permit the staff of the Program to adequately serve the current RCAC population.

At a projected cost per FTE of \$50,000 per year to account for salary, fringe benefit, and office expenses, at least \$150,000 will be required annually to support the extension of the Long Term Care Ombudsman Program into the realm of Residential Care Apartment Complexes.

To fully fund this proposal, a per unit, per year fee would be assessed on all registered and certified RCACs. This fee, initially set at \$28 per unit, would be collected by DHFS from all RCAC facilities and transferred to BOALTC.

Total biennial cost of this program expansion would be \$300,000 PR.

This proposal has been requested, and is supported by the Statewide Long-Term Care Council, the Coalition of Wisconsin Aging Groups, and AARP of Wisconsin.