



March 18, 2003

Representative Suzanne Jeskewitz  
Co-Chair, Joint Legislative Audit Committee  
314 North Capitol  
P.O. Box 8952  
Madison, WI 53708

Dear Representative Jeskewitz:

At the conclusion of our February 19<sup>th</sup> meeting to discuss the LAB audit of nursing home and assisted living facility regulations, you kindly offered us the opportunity to compile a list of suggested statutory changes which we believe would improve the quality of care in our state's nursing homes and assisted living facilities. Our response will focus first on the LAB recommendations contained in Legislative Audit Bureau Report 02-21, "Regulation of Nursing Homes and Assisted Living Facilities," and secondly on suggested revisions to Chapter 50, Wis. Stats., the Uniform Licensure statute.

**Response to the LAB Recommendations in LAB Report 02-21**

**Support:** 60 Day Timeframe for Provider Appeals (Page 62 of the report): Expanding the timeframe to file appeals from 10 days after receiving a statement of deficiency or a forfeiture assessment to 60 days is consistent with the federal appeals process and will save needless administrative expenses.

**Support with Modifications:** Improvements in the Informal Dispute Resolution (IDR) Process (Pages 59-61): Any efforts which would improve the timeliness of the IDR decision-making process warrant our support. Our concern is who is making these decisions. Under the current system, state survey agency supervisors in the Bureau of Quality Assurance (BQA) review the decisions of their peers in other parts of the state. We support Recommendation #210 of Department of Health and Human Services 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 either the state survey agency or to a nursing facility. Alternatively, if a truly independent process is not implemented at this time, the Department of Health and Family Services (DHFS) should assign staff to administer the IDR process who do not directly supervise or oversee BQA surveyors or BQA regional operations.

**Oppose:** Diversion of Assisted Living Facility (ALF) Forfeitures to the DHFS (Page 46): We simply object to providing a perverse incentive to the DHFS to fund its internal operations by maximizing the assessment of forfeitures.

**Oppose: Restrict Nursing Home Admissions** (Page 50): This remedy only should be imposed for serious violations of state code or statutes. Its imposition could be particularly devastating for prospective residents seeking admission to the facility of their choice if that facility becomes subject to this restriction, especially in a rural setting where the next closest facility might be 50 miles from home and family. In addition, you heard the administrator of Park Manor in Park Falls state five serious violations cited against that facility were later overturned upon appeal. To impose an admissions prohibition upon a facility without enabling that facility to exercise its full due process rights is simply unjust.

**No Position: Assisted Living Survey Revisions** (Page 37): The BQA already has implemented most of these suggested changes. They have hired eight registered nurses solely to survey assisted living facilities and they have invoked an internal directive to survey each of the over 2,000 ALFs at least once every 24 months.

**Written Procedures for ALF Forfeitures** (Page 46): The BQA has indicated they intend(ed) to implement such written procedures as of 3/1/03.

#### **Other Suggested Revisions to Chapter 50, Wis. Stats.**

- **Require BQA surveyors to issue either a state or a federal citation, but not both, for the same deficient practice.**
  - 1) Medicaid- and Medicare-certified nursing homes in Wisconsin are subject to both state and federal regulations and enforcement systems. BQA surveyors enforce both systems. In many instances, this results in a "double jeopardy" situation where a single deficient practice receives both a federal and a state citation and the corresponding penalty each invokes. The current system is both duplicative and punitive.
  - 2) Since the state is obligated to enforce federal requirements, we suggest Chapter 50 be amended to require BQA surveyors to issue a state citation only if an applicable federal citation is not available. This proposed change would ensure that all deficient practices would be adequately and appropriately addressed without needlessly imposing a "double jeopardy" penalty on the offending facility.
  - 3) The federal enforcement system has a wide array of remedies/penalties, including temporary management, denial of payment for new admissions, denial of Medicaid/Medicare payments, state monitoring, directed plans of correction, directed in-service training, closure of a facility/transfer of residents, termination of Medicaid/Medicare provider agreement, and civil monetary penalties ranging from \$50 - \$10,000 per day. There are ample tools under the federal system to compel compliance.
  - 4) The federal enforcement system is less reliant on the civil monetary penalty remedy than the state system is on the forfeiture remedy. The difference in approach is significant since the DHFS found in an internal review it conducted late last year that 50.9% of the state's nursing homes are at "financial risk." Placing a monetary penalty on a facility at financial risk would seem to be at odds with the intended goal of any enforcement system: To ensure quality care.
  - 5) Because there would be significantly fewer state citations issued if this proposed change were enacted into law, there would be significantly fewer forfeitures assessed. This should quickly

eliminate both the current forfeiture assessment review backlog and delays in forfeiture assessment reviews in the future. Indeed, this suggested change could result in the elimination of at least one of the three current forfeiture specialist positions and the corresponding savings that cut would generate.

- **Amend state law to: 1) Permit state forfeiture assessments to be deposited either in the Medicaid Trust Fund or some other fund created to subsidize quality improvement projects; and 2) Permit the BQA to direct a facility to expend a dollar amount equal to the forfeiture assessment the BQA would have imposed on internal quality improvement projects.**
  - 1) We are unaware of any empirical evidence which proves that the assessment of forfeitures and the imposition of other punitive measures are effective tools to compel or entice compliance. Indeed, this approach would appear to be counterproductive for facilities at financial risk.
  - 2) The Wisconsin system is even more perplexing because all forfeiture assessments by law must be deposited in the Common School Fund and cannot be used to improve quality or address the deficient practices which yielded the forfeitures. However, it would appear a constitutional amendment would be required to implement this proposed change.
  - 3) One option to avoid the constitutional pitfall may be simply to change the statutory penalty from a forfeiture to a civil monetary penalty or some other similar designation.
  - 4) The imposition of a forfeiture is purely punitive; it does nothing to improve quality and it is questionable whether it effectively compels compliance.
  - 5) The goal of this proposal is to permit facilities with deficient practices to utilize their limited resources to address those deficiencies rather than simply toss those scarce dollars into the state school fund.
  - 6) The need for this proposed change would be less significant if the "double jeopardy" proposal described above were adopted.
- **Modify statutory requirements to eliminate the need to file separate appeals for both the state citation(s) and the forfeiture assessment(s).**
  - 1) Under the current system, a facility first receives a state deficiency/citation. Weeks, months, or in some cases, years later, they will receive a forfeiture assessment for that citation. Under current law, a facility must appeal both the issuance of the citation and the assessment of the forfeiture.
  - 2) A facility might be of the belief a citation is not worth the time or money to appeal, that is until the forfeiture assessment arrives. Since the citation and the forfeiture assessment don't arrive simultaneously, or even close to it, the facility is forced to decide whether to appeal a citation without having all the facts available. To protect themselves, some believe facilities are forced to appeal all citations even if their original instincts, that the citation is not significant enough to appeal, were correct. This adds needless costs to both the provider and the state because both are forced into the appeals process. On the other hand, if a provider decides not to appeal a citation and later is hit with a hefty forfeiture assessment, they no longer have the ability to appeal the original citation.

- 3) Filing a single appeal after receipt of both the citation and the forfeiture assessment will protect a provider's due process rights while reducing state and provider costs for appeals that ultimately prove to be unnecessary.

We appreciate the opportunity you provided us to comment on both the Legislative Audit Bureau report on long-term care provider regulations and on other changes we believe could improve quality care in our nursing homes and assisted living facilities. If you should have any questions concerning these comments, please do not hesitate to contact any one of us.

Sincerely,



**Tom Ramsey**  
Director of Government Relations  
Wisconsin Association of  
Homes and Services for  
the Aging (WAHSA)



**Jim McGinn**  
Director of Government Relations  
Wisconsin Health Care  
Association (WHCA)



**Forbes McIntosh**  
Broydrick and Associates

cc: Karen Asbjornson  
Senator Carol Roessler's office

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

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February 19, 2004

To: State Representative Jean Hundertmark, Chair  
Members, Assembly Aging and Long-Term Care Committee

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

Subject: Support for Assembly Bill 842 Relating to the Regulation of Nursing Homes

The Wisconsin Association of Homes and Services for the Aging (WAHSA) is a statewide membership organization of 193 not-for-profit corporations principally serving the elderly and persons with a disability. WAHSA members own/operate 185 not-for-profit nursing homes, including 47 county-operated facilities, 19 facilities for the developmentally disabled (FDD), 72 community-based residential facilities (CBRF), 50 residential care apartment complexes (RCAC), 13 HUD Section 202 Supportive Housing for the Elderly apartment complexes, and 98 independent living/elderly apartment complexes. WAHSA members offer over 300 community service programs ranging from home care, hospice, Alzheimer's support and child and adult day care to Meals on Wheels. Our members employ over 38,000 dedicated caregivers and support staff.

At the outset, we would like to thank Representative Mark Pettis and Representative Kitty Rhoades not only for introducing Assembly Bill 842 but also for their participation in the countless hours of negotiations and give-and-take that ultimately resulted in the legislation you have before you today. AB 842 is the culmination of 10 months of language development and negotiations. Our thanks also go to Department of Health and Family Services (DHFS) Secretary Helene Nelson for her desire to "get something done" on this issue and especially to Linda Dawson, the deputy chief legal counsel of the DHFS Office of Legal Counsel, who served as the Department's chief negotiator. AB 842 is the product of a compromise struck by the DHFS, representatives of the nursing home industry, and Representatives Pettis and Rhoades and WAHSA members believe it is a workable compromise which is worthy of your support.

**AB 842 SUMMARY**

The following are the key provisions of the bill:

- The DHFS is under contract with the federal Centers for Medicare and Medicaid Services (CMS) to survey federally certified Wisconsin nursing homes and to enforce federal nursing home



regulations. At the same time, the DHFS is responsible for surveying all nursing home licensed under Chapter 50, Wis. Stats., and for the enforcement of state nursing home regulations. WAHSA members believe the most significant provision in AB 842 is Section 6 of the bill, which prohibits the DHFS from issuing a notice of violation of state regulations for any act or omission by a nursing home which is in violation of both state and federal regulations. In other words, if an act or omission by a nursing home violates both federal and state law, a citation only can be issued for the violation of federal law, which is required under the provisions of the CMS contract.

- AB 842 permits a nursing home to request a hearing for an appeal of a DHFS finding that the facility violated a state requirement within 60 days after receipt of a notice of violation. Such an appeal request must be filed within 10 days under current law. A similar 60-day response time is applied to appealing a forfeiture assessment.
- AB 842 would significantly reduce the amount of forfeiture assessments for violations of state regulations. Such forfeitures currently are deposited and will continue to be deposited into the state school fund. However, AB 842 would permit a penalty assessment to be imposed on top of the state forfeiture for violations of state law. When combined, the monetary penalty under AB 842 could be greater than under current law. The major difference is the penalty assessment would not be deposited into the state school fund but rather would be deposited into a newly-created "nursing home improvement grants" fund.
- The bill requires the DHFS to impose a forfeiture and a penalty assessment within 120 days of notifying a nursing home of a violation or it loses the authority to impose that forfeiture/penalty assessment.
- Under current law, the DHFS may issue a conditional license to a nursing home, which revokes any outstanding license held by the facility, if a state Class "A" or a state Class "B" violation continues to exist at the facility. Under AB 842, another condition is added: The DHFS may issue a conditional license to a nursing home where a federal violation continues to exist that constitutes immediate jeopardy, high risk of death, substantial harm, or actual harm not involving immediate jeopardy to a resident, or that directly threatens a resident.
- Under current law, the DHFS may suspend new admissions to a nursing home if the facility receives notices of a state Class "A" violation or 3 or more state Class "B" violations in the previous 12 months or the facility received notices of a state Class "A" violation or three or more state Class "B" violations in any 12-month period during the three years immediately preceding the previous 12 months. AB 842 expands the standard for suspension of new admissions to a nursing home which has received notices for the following violation(s): 1) Immediate jeopardy or high risk of death or substantial harm to a resident; 2) A state Class "A" violation; or 3) Three or more state Class "B" violations or situations that either constitute actual harm not involving immediate jeopardy to a resident or directly threaten a resident. These circumstances must have occurred in the previous 15 months, rather than 12 months, and in any 15-month period (rather than 12 month period) during the three years immediately preceding the previous 15 months (rather than 12 months).
- The DHFS shall promulgate rules that specify the eligibility criteria and the application procedures for receipt of a nursing home quality improvement grant. Those proposed rules shall be submitted to the Legislative Council no later than the first day of the 13<sup>th</sup> month beginning after this bill's effective date.

## **ARGUMENTS IN SUPPORT OF AB 842**

- The bill is intended to improve the quality of care in Wisconsin nursing homes by focusing regulatory attention on compliance rather than punishment, especially monetary penalties. The primary difference between the federal and state regulatory and enforcement systems is the federal system applies sanctions only after a facility fails to come into compliance with federal requirements. Their focus is on compliance. The state regulatory system also focuses on compliance but is more punitive in nature because sanctions are imposed even if compliance is achieved.
- The key provision of this bill prohibits the DHFS from issuing a state citation when it already has issued a federal citation for the same act or omission. What is the need for this dual punishment? How does issuing a state violation with corresponding sanctions, when federal violations/sanctions already have been issued or compliance already has been achieved, enhance the quality of care in a nursing home? If this system were applied to speeding tickets, speeding on the Capitol Square would result in tickets from the Madison Police Department, the Dane County Sheriff's Department and maybe even the Capitol Police.
- Some have argued AB 842 "deregulates" nursing homes or weakens state regulations. That simply is not the case. If an act or omission of a nursing home violates state law but not federal law, the full force of state regulations are available to hold that provider accountable. On the other side of the coin, no one has ever argued federal regulations are lax. Violations will not "slip through the cracks"; our state's most vulnerable residents will be amply protected. What this bill does is simply require compliance without hitting a facility with a state/federal "double whammy" for the same act or omission.
- The federal enforcement system has a wide array of remedies/penalties, including temporary management, denial of payments for new admissions, denial of Medicare/Medicaid payments, state monitoring, directed plans of correction, directed in-service training, closure of a facility/transfer of residents, termination of the Medicaid/Medicare provider agreement, and civil monetary penalties ranging from \$50-\$10,000/day. There are ample tools under federal law to compel compliance.
- Most nursing home citations are federal citations. According to Report 02-21 published in December 2002 by the Legislative Audit Bureau (LAB), entitled "Regulation of Nursing Homes and Assisted Living Facilities," 2,766 federal citations were issued in FY 2000-01 as compared to 470 state citations. AB 842 will not dramatically alter the current system.
- Although the federal system does not rely on monetary sanctions to the same extent the state does, when the federal government believes a monetary sanction (known as "civil monetary penalties, or CMPs) should be imposed, it is imposed. According to the 2002 LAB evaluation, 83 CMPs were imposed between 1997 and 2001, totaling \$1.2 million in penalties. By contrast, the state assessed 855 forfeitures during the same timeperiod for a total of \$6.5 million in penalties. Curiously, though the state issued ten times as many monetary penalties from 1997-2001, the average federal CMP was \$14,236, compared to the average state forfeiture of \$7,655.
- We had asked the Department in October how prevalent is the issuance of a federal citation and a state citation for the same violation. We have yet to receive a response to that request.
- The DHFS did an internal review of the fiscal condition of Wisconsin nursing homes in late 2002. According to that analysis, 193 of the 379 facilities reviewed, or 50.9%, were at "financial risk,"

either because they were operating at a net loss and/or had negative working capital. Piling a state forfeiture on a nursing home with a shaky financial structure, especially when compliance already has been achieved, is truly piling on.

- Nursing home operators for years have questioned the wisdom of assessing forfeitures against those who have violated state nursing home regulations but depositing those funds into the state school fund rather than in a fund which could be tapped for nursing home quality improvement projects. AB 842 will make that needed change.
- Some have argued the creation of a nursing home improvement grants program is the most important provision in this bill but the fund itself will be miniscule because state forfeitures will be assessed so infrequently under AB 842. We concur with the assessment that the nursing home quality improvement grants fund will not be flush with cash but we maintain that is not a bad thing. We would much prefer a facility which is in violation of state regulations use (or be required to use) their own resources to bring the facility back into compliance. Quality care is best served by using the resources at hand to rectify the problem, not by shipping those limited dollars elsewhere, even to a depository as noble in intent as the nursing home quality improvement grants fund.
- **We do offer this suggestion to those who wish to bolster the nursing home quality improvement grants fund: Deposit all federal civil monetary penalties into the fund. As noted above, \$1.2 million in civil monetary penalties were issued between FY 1997 and 2001.**
- Some have argued the nursing home quality improvement grants only should be awarded to facilities with excellent performance records. We believe that makes little sense: Those funds, as limited as they may be, should be used to help struggling facilities achieve compliance. We concur with Representative Rhoades' analogy: You don't hire a tutor for the class valedictorian.
- Unlike some opponents of this bill, WAHSA members are unaware of any empirical evidence which proves that the assessment of forfeitures and the imposition of other punitive measures are effective tools in compelling or enticing compliance. Indeed, this approach would appear to be counterproductive for facilities at financial risk. And if the assessment and collection of forfeitures is so needed to deter noncompliance, why did the DHFS Bureau of Quality Assurance leave the two forfeiture specialist positions vacant for four months at the end of the year 2000? Compliance and improved quality should be the goal, not punishment.

Thank you for this opportunity to comment on AB 842.

February 24, 2004



02-24-04

## Nursing Homes and Assisted Living

DHFS - Bureau of Quality Assurance

- Sue Schraeder resigned from position.
- Smikka Santala, Administrator, presented testimony. Also submitted written.
- Cris Ros-Dukler is the New Dir. of the Bureau of Quality Assurance.
- Jeskowitz: getting anywhere with fed laws?

HFS: not making much progress. Still working w/ MN on this.

Feds told them that they could make changes for MA population only.

Given that there are so few MA, it would not be beneficial to implement.

CMS also said it would take an act of Congress to make changes.

Dorling: Does MA cover assisted living?

HFS: Room + Bld is not covered.

Dorling: Any movement to re-look @ this issue?

HFS: Concern - while it would give us add'l MA fund resources, ~~we~~ also would come many fed regulations - like those on nursing homes. would have to be carefully thought out. As mentioned, we have auth. to do it.

- Otis Woods, HFS sat w/ Sinnika when she testified on nursing home oversight info.
- She congratulated Dept. on great progress and she recognized that they followed ~~thru~~ through on suggestions provided by the Committee + LIAB.

John Sauer

WS ASSOC. of Homes + Services for the Aging

- Registered in favor
- Submitted written testimony.



WISCONSIN STATE LEGISLATURE  
**Joint Audit Committee**

Committee Co-Chairs:  
State Senator Carol Roessler  
State Representative Suzanne Jeskewitz

July 1, 2004

Ms. Helene Nelson, Secretary  
Department of Health and Family Services  
1 West Wilson Street, Room 650  
Madison, Wisconsin 53703

Dear Ms. Nelson:

We would like to commend and thank the Department of Health and Family Services' Bureau of Quality Assurance (BQA) for the aggressive manner in which it has worked to improve its approach to the regulation of assisted living facilities. The testimony offered by Ms. Sinikka Santala at the Joint Legislative Audit Committee hearing on June 24 was encouraging and impressive. The Department clearly took seriously the concerns outlined in the Legislative Audit Bureau's evaluation of the regulation of assisted living facilities and nursing homes (report 02-21).

According to the testimony we received, the Department has made measurable progress to decrease the number of outstanding complaints, increase the number of facilities surveyed, and cite more violations based on quality of care and not "paperwork." This progress is an excellent demonstration of what can be done when we work collaboratively. Through your effective follow-through, the Department has helped to ensure that citizens in Wisconsin's assisted living facilities are being heard, responded to, and protected. We also congratulate BQA on receiving a national "Best Practice" award for the development and implementation of its enforcement manual. Through its responsiveness to problems and diligence in seeking solutions, BQA has been appropriately recognized as a national leader in the regulation of assisted living facilities.

We are encouraged by all that BQA has accomplished thus far and look forward to continued improvements in the regulation of assisted living facilities in Wisconsin. Thank you for your receptiveness to the concerns noted in the audit, your attentiveness to the comments made at the February 2003 hearing of the Joint Legislative Audit Committee, and your commitment to provide safe environments for assisted living facility residents.

Sincerely,

Senator Carol A. Roessler, Co-chair  
Joint Legislative Audit Committee

Representative Suzanne Jeskewitz, Co-chair  
Joint Legislative Audit Committee

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cc: Ms. Sinikka Santala  
Department of Health and Family Services

Ms. Cris Ros-Dukler  
Department of Health and Family Services

Ms. Janice Mueller  
State Auditor