

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

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March 3, 2010

To: Senator Tim Carpenter, Chair  
Members, Senate Public Health, Senior Issues, Long-Term Care and Job Creation Committee

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

Subject: 2009 Senate Bill 538

The Wisconsin Association of Homes and Services for the Aging (WAHSA) is a statewide membership association of 200 not-for-profit long-term care organizations which own, operate and/or sponsor 189 nursing homes, 38 of which are county-owned and operated, as well as 136 assisted living facilities and 113 senior apartment complexes. WAHSA members employ over 38,000 dedicated staff that provides care and services to over 48,000 frail elderly and persons with a disability.

**WAHSA members oppose SB 538 and urge members of the Committee to oppose the bill as well.**

**SB 538** would **require a nursing home** which receives either a state Class “A” notice of violation (NOV) or a federal statement of deficiency (SOD) indicating a finding of “immediate jeopardy” (IJ) (the most serious state and federal nursing home violations) **to provide a written notice to each resident** identified in the NOV/SOD, as well as to the resident’s legal representative, if any, within 15 days of the receipt of the violation notice. The written notice to the resident must include a copy of the NOV/SOD, as well as the anonymous identifier used to identify the resident in the NOV/SOD, and the address, telephone number, and email address of the regional office of the Department of Health Services (DHS) Division of Quality Assurance (DQA) in the region where the facility is located. Upon the request of the resident and/or his/her legal representative, SB 538 would require the DQA to provide the resident and/or their legal representative with the final disposition of the Class “A”/IJ **allegations** once the appeals process runs its course. Failure by a nursing home to provide this information is a Class “C” violation, which under s. 50.04(5)(a)3 may subject the facility to a forfeiture of not more than \$500. However, under Section 3 of SB 538, the forfeiture level for this particular Class “C” violation would change to not more than \$2,500.



**Rationale:** WAHSA members oppose SB 538 for the following reasons:

- **SB 538 denies nursing facilities their due process rights.** The “written notice requirement” under **this legislation is based on allegations of violations, not on adjudicated findings of violations.** Nursing facilities have the right to challenge the findings of a DQA nursing home survey initially through an informal dispute resolution (IDR) process and, if dissatisfied with that finding, through a formal appeals process (see the attached overview of the IDR/appeals process). The Class “A” or IJ **allegations** which trigger the written resident notice requirement under SB 538 could be reduced to a level below a Class “A” or IJ or even reversed at either the IDR or appeals level, yet those decisions, which would eliminate the need for a written notice, are not taken into account under this legislation.
- Current federal and state notification requirements provide a nursing home resident, the resident’s legal representative, if any, and any designated family member with sufficient and timely notification of any significant changes of condition or adverse circumstances affecting the resident. At the September 10, 2009 hearing of the Assembly Aging and Long-Term Care Committee on 2009 Assembly Bill 389, the companion bill to SB 538, the DQA provided committee members with a memo “Applicable Requirements for Communication Between Nursing Home Personnel and Residents/Families/Legal Representatives.” That memo listed the following federal/state codes/statutes which require nursing facilities to either “immediately” or “promptly” notify a resident and the resident’s legal representative, personal physician, and designated family member(s) of any significant accident, injury, or adverse change in the resident’s condition: F-Tags 154, 157 and 168 under 42CFR483.10, s. 50.09(1)(n), Wis. Stats., and DHS 132.60(3)(a) and (3)(b), Wis. Adm. Code (a copy of the DQA memo is attached). **SB 538 is unnecessary if its goal is prompt notification of significant changes in a resident’s condition; if the goal is a proliferation of litigation, that’s another question.** NOTE: A January 28, 2010 executive session of the Assembly Aging and Long-Term Care Committee was scheduled to vote on AB 389; the executive session was postponed and has not been rescheduled.
- **There is an inconsistency in the issuance of IJ citations throughout the country.** According to survey information compiled by the federal Centers for Medicare and Medicaid Services (CMS), only Alaska, Oklahoma, and New Mexico had a higher percentage of nursing homes receiving IJ citations last year than Wisconsin. In 2009, 7.67% of Wisconsin nursing homes received IJ citations while seven states (Iowa, Maine, Massachusetts, Delaware, Nebraska, North Dakota and Hawaii) and the District of Columbia issued no IJ citations. (See the attached *OSCAR Table Number 5: Percent of Facilities with “Immediate Jeopardy” Citations By HCFA Region, State, and Type of Ownership*, dated 12/09). **SB 538 holds Wisconsin nursing facilities to a standard that is being applied inconsistently throughout the country, unless one believes care provided in Iowa and D.C. nursing homes is significantly better than that being provided in Wisconsin nursing homes.**

- **Survey results, which would indicate whether a facility received either a Class “A” NOV or a federal IJ finding, are required under both federal and state law to be accessible and available.** Under 42CFR483.10(g)(1), a nursing home resident has the right to “examine the results of the most recent survey of the facility conducted by Federal or State surveyors and any plan of correction in effect with respect to the facility. The facility must make the results available for examination in a place readily accessible to residents, and must post a notice of their availability.” S. 50.04(3)(c), Wis. Stats., requires each nursing home administrator to retain a copy of the most recent biennial report prepared by the DHS and to post “in a place readily visible to residents and visitors, such as the lobby or reception area of the facility, a notice stating that a copy of the report is available for public inspection on request to the administrator.” The DHS biennial report lists all conditions and practices in which a facility has not been in compliance with applicable standards within the last 2 years and whether a violation is corrected, contested or subject to an approved plan of correction.
- **Under SB 538, the maximum forfeiture of \$2,500 for failure to provide a written notice of a serious violation could in some instances exceed the forfeiture for the serious violation itself.** The \$2,500 forfeiture for violation of the written notice requirement under SB 538 equates to a State Class “B” violation, even though Section 3 of the bill describes the failure to provide the required written notification as a Class “C” violation. A Class “B” violation is defined under s. 50.04(4)(b)2 as a violation “which creates a condition or occurrence relating to the operation and maintenance of a nursing home directly threatening to the health, safety or welfare of a resident.” Simply stated, failing to notify a resident that a facility has received a NOV/SOD which the facility disagrees with and intends to challenge does not meet the level of “directly threatening the health, safety or welfare” of that resident.
- **Nursing homes view the requirements under SB 538 as a denial of their due process rights and a needless diversion of staff time away from caregiving. If the written notice provision under this legislation is as important as its supporters maintain it is, WAHSA members respectfully suggest the duty to notify residents of these allegations be given to the DQA, which both has made these allegations and compiles the materials in question.**

Thank you for this opportunity to comment on SB 538.

**OSCAR Table Number 5**  
**Percent of Facilities with 'Immediate Jeopardy' Citations**  
**By HCFA Region, State, and Type of Ownership**

		FOR-PROFIT	GOVERNMENT	NON-PROFIT	
<b>HCFA Region</b>	<b>State</b>				<b>State Total</b>
<b>Region I</b>	Connecticut	1.06%	0.00%	2.04%	1.25%
	Maine	0.00%	0.00%	0.00%	0.00%
	Massachusetts	0.00%	0.00%	0.00%	0.00%
	New Hampshire	2.44%	0.00%	0.00%	1.25%
	Rhode Island	4.41%		0.00%	3.49%
	Vermont	0.00%	0.00%	7.69%	2.50%
			<b>0.85%</b>	<b>0.00%</b>	<b>0.77%</b>
<b>Region II</b>	New Jersey	5.44%	8.70%	4.08%	5.28%
	New York	2.17%	9.30%	2.18%	2.66%
		<b>3.57%</b>	<b>9.09%</b>	<b>2.68%</b>	<b>3.60%</b>
<b>Region III</b>	Delaware	0.00%	0.00%	0.00%	0.00%
	District of Columbia	0.00%	0.00%	0.00%	0.00%
	Maryland	1.36%	0.00%	2.60%	1.73%
	Pennsylvania	0.00%	0.00%	0.31%	0.14%
	Virginia	2.66%	0.00%	2.44%	2.49%
	West Virginia	1.14%	0.00%	0.00%	0.78%
		<b>0.99%</b>	<b>0.00%</b>	<b>0.94%</b>	<b>0.92%</b>
<b>Region IV</b>	Alabama	1.67%	0.00%	0.00%	1.30%
	Florida	0.83%	0.00%	0.00%	0.59%
	Georgia	1.27%	0.00%	1.92%	1.39%
	Kentucky	5.34%	0.00%	1.33%	4.18%
	Mississippi	2.88%	3.70%	2.78%	2.97%
	North Carolina	1.27%	0.00%	1.03%	1.18%
	South Carolina	3.79%	11.11%	0.00%	3.95%
	Tennessee	4.13%	0.00%	1.67%	3.46%

**Source: OSCAR File as of 12 2009**

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HCFA Region	State				State Total
		<b>2.28%</b>	<b>2.38%</b>	<b>0.98%</b>	<b>1.98%</b>
<b>Region V</b>	Illinois	2.34%	3.57%	0.95%	2.02%
	Indiana	1.75%	0.00%	0.70%	1.39%
	Michigan	4.03%	0.00%	1.05%	3.04%
	Minnesota	3.77%	2.27%	3.83%	3.64%
	Ohio	1.64%	0.00%	0.50%	1.35%
	Wisconsin	6.06%	8.62%	9.63%	7.67%
		<b>2.64%</b>	<b>3.33%</b>	<b>2.65%</b>	<b>2.69%</b>
<b>Region VI</b>	Arkansas	2.62%	0.00%	3.45%	2.61%
	Louisiana	3.33%	5.88%	1.82%	3.19%
	New Mexico	8.51%	0.00%	11.11%	8.57%
	Oklahoma	8.86%	27.27%	8.82%	9.49%
	Texas	4.05%	3.45%	2.68%	3.86%
		<b>4.69%</b>	<b>6.94%</b>	<b>3.86%</b>	<b>4.65%</b>
<b>Region VII</b>	Iowa	0.00%	0.00%	0.00%	0.00%
	Kansas	1.20%	0.00%	3.08%	1.76%
	Missouri	4.76%	5.71%	3.31%	4.48%
	Nebraska	0.00%	0.00%	0.00%	0.00%
		<b>2.20%</b>	<b>1.33%</b>	<b>1.56%</b>	<b>1.90%</b>
<b>Region VIII</b>	Colorado	2.05%	0.00%	6.67%	2.86%
	Montana	0.00%	0.00%	2.70%	1.11%
	North Dakota	0.00%	0.00%	0.00%	0.00%
	South Dakota	2.70%	0.00%	1.49%	1.83%
	Utah	1.27%	0.00%	0.00%	1.04%

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		FOR-PROFIT	GOVERNMENT	NON-PROFIT	
HCFA Region	State				State Total
	Wyoming	0.00%	5.88%	0.00%	2.63%
		<b>1.56%</b>	<b>1.61%</b>	<b>2.04%</b>	<b>1.75%</b>
<i>Region IX</i>	Arizona	1.90%	0.00%	0.00%	1.48%
	California	3.37%	2.17%	1.01%	2.96%
	Hawaii	0.00%	0.00%	0.00%	0.00%
	Nevada	5.56%	0.00%	0.00%	4.08%
		<b>3.24%</b>	<b>1.56%</b>	<b>0.82%</b>	<b>2.76%</b>
<i>Region X</i>	Alaska	33.33%	0.00%	16.67%	13.33%
	Idaho	9.62%	7.14%	0.00%	7.59%
	Oregon	5.45%	0.00%	0.00%	4.38%
	Washington	1.78%	0.00%	0.00%	1.29%
		<b>4.49%</b>	<b>2.33%</b>	<b>1.15%</b>	<b>3.66%</b>
		<b>2.76%</b>	<b>2.91%</b>	<b>1.84%</b>	<b>2.53%</b>

*Source: OSCAR File as of 12 2009*