

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

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September 10, 2009

To: Representative Peggy Krusick, Chair  
Members, Assembly Aging and Long-Term Care Committee

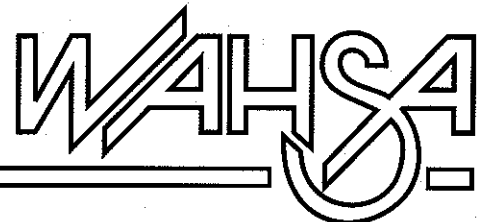
From: John Sauer, Executive Director  
Tom Ramsey, Director of Government Relations

Subject: **WAHSA Opposition to 2009 Assembly Bill 389**

The Wisconsin Association of Homes and Services for the Aging (WAHSA) is a statewide membership association of 184 *not-for-profit* long-term care organizations. For purposes of AB 389, WAHSA members own, operate and/or sponsor 183 not-for-profit nursing homes, including 41 county-operated and 7 municipally-operated facilities. In addition, WAHSA members operate 77 community-based residential facilities (CBRF), 63 residential care apartment complexes (RCAC), 113 senior apartment complexes/retirement homes for the aged, as well as over 300 community service programs ranging from Alzheimer's support, child and adult day care, home care and hospice to Meals on Wheels. WAHSA members employ over 38,000 dedicated staff who provide care and services to over 48,000 residents/tenants/clients. WAHSA members are a key component of the Wisconsin nursing home sector which collectively contributes approximately \$5.2 billion annually to the State's economy through job creation, tax revenue, and purchased goods and services.

**WAHSA members oppose AB 389 because it denies them their due process rights, because it could unduly mislead those it seeks to inform, and because it focuses staff time on paper reproduction rather than improved resident care.**

AB 389 requires a nursing home which receives a State Class "A" notice of violation (NOV) or a federal statement of deficiency (SOD) indicating a finding of "Immediate Jeopardy" (IJ) to provide 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 must include a copy of the Class "A" NOV and/or the IJ SOD, as well as the anonymous identifier used to identify the resident in the NOV/SOD and the address, telephone number, and e-mail 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, the DQA will provide them with the final disposition of the Class "A"/IJ allegations once the appeals process runs its course.



A Class "A" violation under s. 50.04(4)(b) is defined as "a violation of this subchapter or of the rules promulgated thereunder which creates a condition or occurrence relating to the operation and maintenance of a nursing home presenting a substantial probability that death or serious mental or physical harm to a resident will result therefrom." Under s. 50.04(4)(c)1, "the situation, condition or practice constituting a Class "A" violation shall be abated or eliminated immediately, unless a fixed period of time, as determined by the department and specified in the notice of violation, is required for correction." (emphasis added). If the Class "A" violation is not abated or eliminated within the specified period of time, "the department shall maintain an action in circuit court for injunction or other process against the licensee, owner, operator, administrator or representative of the facility to restrain and enjoin violation of applicable rules, regulations and statutes." A Class "A" violation may be subject to a forfeiture of not more than \$10,000 for each violation.

Under federal code, an "immediate jeopardy to resident health or safety" is a "deficient practice caused or is likely to cause serious injury, serious harm, serious impairment or death AND there is a reasonable degree of predictability of a similar situation occurring in the future. Immediate corrective action is needed." If there is a finding of "immediate jeopardy to resident health or safety," the State must either terminate the facility's Medicaid/Medicare provider agreement within 23 calendar days of the last date of the survey or appoint a temporary manager to remove the IJ. In addition, the facility also could face civil money penalties (CMP) of between \$3,050 and \$10,000 for each day the facility was in violation.

Stated simply, a Class "A" NOV or a SOD with a finding of "immediate jeopardy" are serious nursing home violations which must be addressed immediately and may subject a facility to significant penalties.

Representative Krusick last year convened a work group of consumers, advocates, providers and representatives of the DHS and the Board on Aging and Long-Term Care to discuss the issue of notification of serious violations as well as other issues which were raised in the July 26-28, 2008 *Milwaukee Journal Sentinel* series Unsafe Haven: A Watchdog Report on Troubled Nursing Homes. The work group met on August 28, 2008. The discussion revolved around whether current nursing home notification requirements were adequate. Representatives of the DQA distributed the attached memo "Applicable Requirements for Communication Between Nursing Home Personnel and Residents/Families/Legal Representatives." That memo indicates that under 42 CFR 483.10(b)(11)(A)-(C), in the event of an accident involving a nursing home resident that could result in physician intervention, a significant change in the resident's physical, mental or psychosocial status, or a need to alter the resident's treatment significantly, a facility must IMMEDIATELY inform the resident, notify any legal representative or interested family member, and consult with the family's physician. In addition, DHS 132.60(3)(a) requires that a resident's physician, guardian, if any, and any other responsible person designated in writing by the resident or guardian to be notified must be notified by the facility PROMPTLY of any significant accident, injury, or adverse change in the resident's condition. Finally, federal regulations under 42 CFR 483.10(g) give each nursing home resident 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.

**WAHSA members believe that the current federal and state notification requirements outlined in the attached DQA memo provide a resident, the resident's legal representative, if any, and any designated family members with sufficient and timely notification of any adverse circumstances impacting that resident. The real issue, therefore, must not be the notification of an adverse circumstance; it must be who to blame for that adverse circumstance.**

AB 389 requires notification of a Class "A" NOV or a SOD with an IJ finding within 15 days after receipt of the violation notice. **What the bill chooses to ignore is the facility's due process rights.**

The first step in the nursing home due process system is the Informal Dispute Resolution (IDR), an abbreviated review of the federal SOD or state NOV. IDRs are conducted by the Michigan Peer Review Organization (MPRO), a third-party contractor with the DHS. A facility has 10 days after the receipt of a NOV/SOD to request an IDR and to submit supporting materials challenging the survey findings to MPRO. If a facility chooses to "IDR" a violation, MPRO schedules either a "desk review" of the challenge or conducts the review by phone. MPRO must submit its recommendations on the IDR to the DQA no later than 21 days from the facility's original receipt of the SOD/NOV.

Facilities also have the right to appeal a federal remedy (i.e., civil money penalties, denial of payments for new admissions, etc.) to the Centers for Medicare and Medicaid Services (CMS) no later than 60 days after the imposition of the remedy. The final resolution in this case could take several months. In addition, facilities can challenge state citations. In that case, the facility has 10 days after the receipt of the NOV to request a hearing with the Division of Hearings and Appeals. Statutes require the hearing to be conducted within 30 days of the request but usually this hearing is put on hold pending the issuance of a forfeiture for the violation. The receipt of that forfeiture could come months after the NOV has been received; there have been circumstances where the forfeiture was received over 2 years after the NOV was received. If the facility chooses to appeal the forfeiture, a case conference generally is scheduled with the DHS Office of Legal Counsel to either narrow the issues or find a solution. If neither is forthcoming, an administrative hearing on the forfeiture and the NOV is generally the final step in the process. Typically, the time between the issuance of the NOV and the final appeals disposition is over one year.

**By requiring the notification of a Class "A" or IJ finding within 15 days of the receipt of the violation, AB 389 denies nursing home providers their due process rights.** The Class "A" NOV or IJ finding are allegations of violations; as noted above, they can be challenged and they can be changed. AB 389 ignores those rights and requires the notification in spite of them. **It equates to an arrested man being required to admit guilt before the trial and the jury's verdict.** And while it's unfair to the provider, the AB 389 notification requirement could be terribly misleading to the resident and family members if the Class "A" and/or IJ violations were

later reduced (it's highly unlikely, but still possible, that such serious violations would be dropped or overturned). How, then, has this information been of benefit to them?

WAHSA members also object to the 15-day notification timeframe under AB 389 because it places the emphasis on paper pushing rather than resident care. As noted above, facilities with these serious violations facing them are under the gun to come into compliance. They don't have time to make copies of NOV/SODs, which could be as many as 200 pages in length; they're doing everything in their power to correct the deficiencies that were cited. And if the violation is in the area of infection control or other areas that could potentially impact every resident of the facility, the paper reproduction burden could be daunting because every resident and their legal representative would be required to be notified. **The question is whether staff time is better spent bringing the facility back into compliance or reproducing and redacting allegations of violations. WAHSA members believe it's in the residents' best interest to rectify the facility's care problems before undertaking any other actions.**

Thank you for this opportunity to provide testimony on AB 389.

## **Applicable Requirements for Communication Between Nursing Home Personnel and Residents/Families/Legal Representatives**

### **Federal Rules**

#### **42 CFR 483.10**

**F157.** A facility must immediately inform the resident; consult with the resident's physician; and if known, notify the resident's legal representative or an interested family member when there is—

- (A) An accident involving the resident which results in injury and has the potential for requiring physician intervention;
- (B) A significant change in the resident's physical, mental, or psychosocial status (i.e., a deterioration in health, mental, or psychosocial status in either life-threatening conditions or clinical complications);
- (C) A need to alter treatment significantly (i.e., a need to discontinue an existing form of treatment due to adverse consequences, or to commence a new form of treatment)...

**F154.** The resident has the right to be fully informed in language that he or she can understand of his or her total health status, including but not limited to, his or her medical condition.

The resident has the right to be fully informed in advance about care and treatment and of any changes in that care or treatment that may affect the resident's well-being.

**F168.** A resident has the right to: Receive information from agencies acting as client advocates, and be afforded the opportunity to contact these agencies.

### **State Law Requirements**

**s. 50.09(1)(n).** Every resident in a nursing home or community based residential facility shall...have the right to...(n) Be fully informed of the resident's treatment and care and participate in the planning of the resident's treatment and care.

### **Nursing Home Administrative Code Requirements**

**HFS 132.60(3)(a).** A resident's physician, guardian, if any, and any other responsible person designated in writing by the resident or guardian to be notified shall be notified promptly of any significant accident, injury, or adverse change in the resident's condition.

**HFS 132.60(3)(b).** A resident's guardian and any other person designated in writing by the resident or guardian shall be notified promptly of any significant non-medical change in the resident's status, including financial situation, any plan to discharge the resident, or any plan to transfer the resident within the facility or to another facility.