

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

---

204 South Hamilton Street • Madison, WI 53703 • 608-255-7060 • FAX 608-255-7064 • [www.wahsa.org](http://www.wahsa.org)

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