



WISCONSIN LEGISLATURE

P.O. BOX 8952 • MADISON, WI 53708

August 28, 2003

Secretary Helene Nelson
Department of Health & Family Services
1 W. Wilson Street, Room 650
Madison, WI 53702

Dear Secretary Nelson,

A mutual constituent of ours recently brought to our attention a disturbing situation that occurred in a nursing home in our district. The encounter between the nursing home resident and a Department of Health and Family Services' surveyor raised a number of questions concerning the infringement of nursing home resident rights.

Direct care staff at the facility was providing care to a facility resident in the privacy of the resident's room. The type of care being provided necessitated the resident removing her clothes. The caregiving was being witnessed by a surveyor from the DHFS Bureau of Quality Assurance. The resident was understandably uncomfortable with a stranger being in the room (the BQA surveyor) and asked the surveyor to leave. The surveyor responded it was the legal responsibility of a surveyor to witness such caregiving and continued to do so, refusing to leave the room. The resident later wrote a letter objecting to this "intrusion" to the BQA and a copy of that letter has been forwarded to our offices.

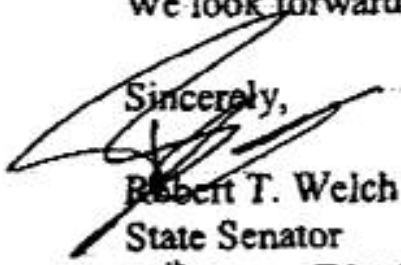
To clarify nursing home residents' rights to privacy, we requested a Legislative Council opinion on this matter. We have enclosed a copy for your review. According to our interpretation of the Wisconsin State Statutes and the Administrative Code and the opinion of our Legislative Council, "persons not directly involved in the resident's care shall require the resident's permission to authorize their presence". There appear to be only limited exceptions to this requirement including an exception for correctional clients and those situations where a resident may be unable to give consent.

Given the review of the relevant state statutes and administrative code, it concerns us that BQA surveyors, seemingly acting within their responsibilities of assuring quality care, would, without a suspicion of poor care or mistreatment, violate the privacy rights of vulnerable nursing home residents by refusing to leave the room at the request of a resident and by taking random photographs of residents. These actions seem beyond the scope of the law.

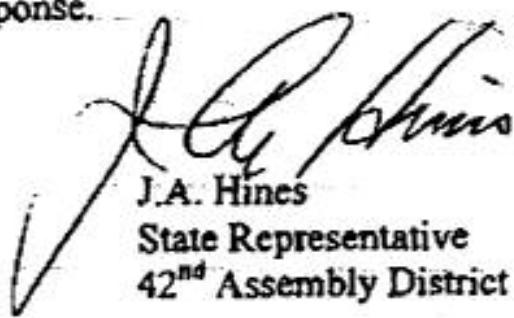
Clearly we agree that nursing homes must provide a safe and healthy environment for residents. The DHFS is charged with an important role in protecting residents. In situations where there is an allegation of poor care or mistreatment, certainly we need to investigate and take necessary action. However, without an allegation or suspicion, the supervision and observation of care should not be unduly invasive or offensive to those living in the nursing homes. We need to be reasonable and respectful.

We look forward to your response.

Sincerely,



Robert T. Welch
State Senator
14th Senate District



J.A. Hines
State Representative
42nd Assembly District

RTW/af



WISCONSIN LEGISLATIVE COUNCIL

Terry C. Anderson, Director
Laura D. Rose, Deputy Director

TO: SENATOR ROBERT WELCH AND REPRESENTATIVE J.A. HINES

FROM: Mary Offerdahl, Staff Attorney *MO*

RE: Nursing Home Resident's Privacy Right to Refuse a State Surveyor's Care Observation

DATE: August 11, 2003

This memorandum responds to your joint letter, dated July 23, 2003, which requests answers to four questions relating to a nursing home resident's privacy right to refuse care observation by a surveyor employed with the Department of Health and Family Services (DHFS) Bureau of Quality Assurance (BQA). The memorandum begins with a background section that briefly describes the relevant fact situation, as well as the legal requirement for consent and two possible exceptions to that requirement. It then answers each of the four questions in your letter.

BACKGROUND

Nursing Home Resident Fact Situation in Your Letter

The fact situation described by your letter is summarized below:

Direct care staff at a local nursing home was providing care to a resident in the privacy of the resident's room, and asked the resident to disrobe. A DHFS BQA surveyor was witnessing the care in accordance with statutory requirements to enforce regulations and standards for the welfare of residents in a nursing home. However, the resident was uncomfortable with the stranger (the BQA surveyor) in their room and asked the surveyor to leave. The surveyor refused to do.

Legal Requirement for Consent

As you pointed out in your letter, s. 50.09 (1) (f) 2., Stats., provides for a nursing home resident's right to privacy concerning health care and includes the following consent requirement: "Persons not *directly* involved in the resident's care shall require the resident's permission to authorize their presence." [Emphasis added.] The Wisconsin Administrative Code, at s. HFS 132.31 (1) (f) 2.,

codifies the requirement that persons not directly involved in the resident's care shall require the resident's permission to authorize their presence.

At the federal level, 42 C.F.R. s. 483.10 (e) (1) states that a resident of a long term care facility has the right to personal privacy, which includes "accommodations, medical treatment, written and telephone communications, personal care, visits, and meeting of family and resident groups." The Centers for Medicare and Medicaid Services (CMS) State Operations Manual provides guidance that DHFS BQA surveyors follow when conducting surveys of nursing homes. Under ch. 2 of the CMS State Operations Manual, ss. 2700 to 2736 set forth procedures governing the survey process. Section 2713 (B) includes a statement that a surveyor should respect an individual's refusal to be observed, as follows:

A surveyor is not to touch or examine a patient by themselves. However, in certain circumstances it is permissible and necessary to determine the physical condition of residents. For example, if the surveyor believes that blankets or clothing are hiding bedsores, bruises, or incontinence, they may remove the coverings and make a determination based on observation. A surveyor should request that a staff member of the facility interact with the individual as necessary. *The health and dignity of the resident is always of paramount concern. A surveyor should respect an individual's refusal to be observed.* [Emphasis added.]

Two Possible Exceptions to the Legal Requirement for Consent

There are two possible exceptions to the legal requirement that persons not directly involved in the resident's care shall require the resident's permission to authorize their presence.

Wisconsin Statutory Exception for Correctional Clients

A Wisconsin statutory exception to rights listed under s. 50.09, Stats., is found at sub. (5), which permits the Department of Corrections to determine rights applicable to a nursing home resident who is a "correctional client" in the legal custody of the Department of Corrections.

Federal Survey Procedures Imply Exception When Resident Unable to Give Consent

As a practical matter, a resident that is unresponsive or legally incompetent may be unable to give consent to care observation. In such a case, a court might well uphold reasonable guidelines constituting an exception to the statutory consent requirement, such as those set forth under Appendix P to the CMS State Operations Manual, entitled "Survey Protocol for Long Term Care Facilities," under Task 5C ("Resident Review") at the top of page P-36, as follows:

If the resident is unable to give consent (e.g., is unresponsive, incompetent), and a legal surrogate (family member who can act on the resident's behalf or legal representative as provided by State law) is present, ask this individual to give consent. You may make an observation of a resident's rectal or genital area (and for females, the breast area)

without a resident's or legal surrogate's consent, under the following conditions:

1. You determine that there is a strong possibility that the resident is receiving less than adequate care which can only be confirmed by direct observation;
2. The resident is unable to give clear consent; *and*
3. A legal surrogate is not present in the facility. [Emphasis added.]

When asked to verify that this exception requires all three of the above conditions to be met, as implied by the use of the word "and" at the end of the second condition, a DHFS Long Term Care Program Analyst responded: "CMS interprets this to mean that a [qualified] surveyor has the right to observe care whenever s/he believes it is necessary to confirm a suspicion that poor care has been given. The operative condition is that there must be a compelling reason for the surveyor to make that observation."

However, when the writer of this memorandum contacted CMS, both officials with whom she spoke disagreed with the interpretation given by the DHFS Long Term Care Program Analyst, stating that a resident can refuse to give permission for a surveyor's care observation, and that a surveyor should comply with a nursing home resident's privacy right to refuse care observation.

1. DOES THE CONSENT REQUIREMENT IN s. 50.09 (1) (f) 2., STATS., AND s. HFS 132.31 (1) (f) 2., WIS. ADM. CODE, APPLY TO BOA SURVEYORS?

Yes, BQA surveyors are among those persons who are not considered *directly* involved in the care of a nursing home resident. Therefore, they are required to have a resident's permission for care observation in the resident's room, unless one or both of the exceptions apply that are described in the background section for when a resident is in the legal custody of the Department of Corrections or unable to give consent.

2. DO THE GENERAL RESIDENT RIGHTS PROVISIONS UNDER s. 50.09, STATS., AND s. HFS 132.31, WIS. ADM. CODE, APPLY TO BOA SURVEYORS?

Yes, these provisions apply to BQA surveyors, unless one or both of the exceptions apply that are described in the background section for when a resident is in the legal custody of the Department of Corrections or unable to give consent.

3. IN REVIEWING THE FACT SITUATION, IS IT YOUR LEGAL INTERPRETATION THAT THE BOA SURVEYOR SHOULD HAVE LEFT THE ROOM WHEN REQUESTED TO DO SO BY THE NURSING HOME RESIDENT?

In reviewing the fact situation described in the background section, I interpret the law as requiring a BQA surveyor to comply with a nursing home resident's request that the surveyor leave their room, with a possible exception for a resident in the legal custody of the Department of Corrections.

4. FINALLY, IF THE SURVEYOR ACTED IMPROPERLY AND SHOULD HAVE LEFT THE ROOM, DOES THE RESIDENT WHO REQUESTED THE SURVEYOR TO DO SO HAVE AN INDEPENDENT CAUSE OF ACTION AGAINST THE DHFS UNDER s. 50.10 (1) (a), STATS.?

Section 50.10 (1), Stats., states as follows:

Any person residing in a nursing home has an independent cause of action to correct conditions in the nursing home or acts or omissions by the nursing home *or by the department*, that:

(a) The person alleges violate this subchapter or rules promulgated under this subchapter; and

(b) The person alleges are foreseeably related to impairing the person's health, safety, personal care, *rights* or welfare. [Emphasis added.]

The conditions under both pars. (a) and (b) of s. 51.10 (1), Stats., must be met, and may well be met, by a nursing home resident alleging violation of their personal privacy right to refuse care observation by a BQA surveyor not directly involved in their care. Note that, under s. 51.10 (2), Stats., actions brought under this section are for mandamus against the department or for injunctive relief against either the nursing home or the department. It does not appear that a nursing home resident can look to this statutory provision for a cause of action for monetary damages.

If you have any questions, please feel free to contact me directly at the Legislative Council staff offices.

MO:ksm

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