



# WHCA / WiCAL

*The following memorandum addresses questions, concerns, and misinformation that have been communicated with respect to the intent and effect of AB-302/SB-212, "The Strengthening Our Nursing Homes Act."*

**MYTH: The bills will reduce or weaken state regulation and compliance requirements for Wisconsin nursing homes.**

**FACT:** This bill does not, nor is Wisconsin Health Care Association/Wisconsin Center for Assisted Living (WHCA/WiCAL) or Wisconsin Association of Homes and Services for the Aging (WAHSA) advocating for, repeal of any nursing home compliance regulation or expectation. This bill simply eliminates the potential for facilities being assessed for a double penalty for a single incident of alleged non-compliance. The bill, in fact, expands the authority of the Wisconsin Department of Health Services by allowing the Department to cite federal deficiencies, as well as state citations, as grounds for state licensure actions, such as suspension or revocation of license, suspension of admissions, and conditional/probationary licensure. As noted in the testimony that the Department submitted at the October 13th public hearing on the bill, "The Department will also be able to consider substantial or repeated violations of federal nursing home regulation in determining whether to issue a probationary license, transfer the ownership of a facility, place a monitor of the facility, appoint a receiver, or take over operations of a nursing home."

**MYTH: By extending the time for a facility to appeal a state violation, the bill will allow facilities to delay the implementation of action to correct deficiencies that are cited.**

**FACT:** The bill merely extends from 10 to 60 days the time in which a facility has to file an administrative appeal to contest a state deficiency or forfeiture. It does not in any way affect current law, under s. 50.04(4)(c)1 & 2, Wis. Stats, which requires a facility to submit a plan of correction to DHS within 10 days of receipt of a notice of violation, and promptly correct the situation or face additional penalties. Failure to do so would result in additional penalties. Under both state and federal law, a plan of correction must be filed irrespective of whether the facility takes exception to the citation. Filing an appeal does not in any way affect or delay a facility's legal obligation to implement the corrective action required and approved/directed by DHS.

Federal law affords nursing homes 60 days to request an appeal of a federal deficiency. This legislation brings Wisconsin law in synch with federal law and is responsive to a specific recommendation made to the Legislature by the Legislative Audit Bureau in 2002.

"Extending the time to request an appeal to 60 days would parallel the federal appeals process. Since the majority of existing appeals are closed before they are heard but entail administrative costs for providers, the Department, and DOA Division of Hearings and Appeals, we recommend the Legislature modify ch.50, Wis. States., to create a 60-day time frame for providers to file appeals after receiving statements of deficiency for state violations." Page, 63; Legislative Audit Bureau. "Regulation of Nursing Homes and Assisted Living Facilities." 02-21. December 2002.

**MYTH: The bill violates Wisconsin constitutional requirements by requiring that Civil Monetary Penalties imposed under federal law be used to support quality improvement for nursing home residents rather than being deposited in the school fund.**

**FACT:** In a Wisconsin Legislative Council Memorandum from October 18, 2011, Deputy Director Laura Rose offers the following constitutional interpretation: "federal civil monetary penalties that are assessed for violations of federal nursing homes laws and regulations are **required by federal law** to be used for nursing home quality improvement activities, and are not required to be deposited into the common school fund. ... Because these federal forfeitures are collected by the CMS, and required by federal law to be expended for specific purposes, their allocation for these purposes in Assembly Bill 302 is not likely to violate the provisions of art. X, s. 2, of the Wisconsin Constitution."

This legislation will have no impact on how federal fines are collected and allocated. They have been not and will not be collected or imposed by the state, therefore the state constitution will continue to have no jurisdiction on placement of this money into a separate fund. “A portion of the funds is returned to States for use in activities for the protection and benefit of nursing home residents. By law, CMP funds cannot be used for any other purposes by States.” CMS S&C 11-12-NH, *See also*, Section 1919(h)(2)(A)(ii) of the Social Security Act (the Act), and 42 C.F.R. §488.442(g).

**MYTH: The bill will reduce the potential that nursing homes will be held accountable for actions and incidents that put residents and safety at risk?**

FACT: The scope and severity of penalties that may be imposed under federal law will continue to hold nursing home facilities accountable. The federal enforcement remedies/sanctions that address these violations include a directed plan of correction, state monitor, directed in-service training, denial of payment for new admissions, denial of payment for all Medicaid/Medicare residents, temporary management, termination from the Medicaid and/or Medicare programs, and civil monetary penalties (CMP) ranging from \$50 to \$10,000 per day or from \$1,000 to \$10,000 per instance of noncompliance. The state agency may impose any one or more of the above sanctions to address a finding of non-compliance with federal standards.

*A legislative memorandum from Wisconsin Education Media and Technology Association, dated October 18, 2011, offered a series of comments on this legislation that necessitate the following responses.*

**ASSERTION: “We find it troubling that proceeds received by the state pursuant to federal regulatory violations would be diverted from the Common School Fund under this proposal and that this may violate the state constitution.”**

RESPONSE: As was noted above, the October 18, 2011 Legislative Council Memo on Federal Nursing Home Forfeitures and the Common School Fund stated that federal regulations direct how nursing home CMPs are collected by the federal CMS and how those funds are used and “are not required to be deposited in the common school fund.

**ASSERTION: “Not collecting fines under state law, while placing these federal fines and forfeitures into a separate fund is akin to a raid on the segregated, constitutionally-established Common School Fund.”**

RESPONSE: According to the DHS fiscal note submitted on the bill, “School fund revenues would decrease as DHS would assess fewer forfeitures due to the ban on issuing a federal and state citation for the same facts.” How the reduction in fines assessed can possibly be characterized as a raid is beyond comprehension; you can’t raid a fund of funds it never collected. As noted in the Legislative Council memorandum above, this is not a constitutional violation, and as is noted in federal regulations, “By law, CMP funds cannot be used for any other purposes by States, including being deposited into the common school fund.” This legislation does not take any existing resources from the \$840 million Common School Fund, it limits future contributions to the fund as a result of fewer state forfeitures. Therefore, as fewer nursing home fines and forfeitures will be deposited into the fund, **interest earnings** on the principal will ultimately be reduced. However, because other fine and forfeiture revenues will continue to be deposited in the Common School Fund, library aids will continue to increase.

**WHCA/WiCAL and WASHA believe school libraries should be adequately funded but not on the backs of frail elderly and disabled nursing home residents. SB 212/AB 302 are not the appropriate vehicles to address the adequacy of school library aids.**