

MINUTES OF THE SENATE PUBLIC HEALTH AND WELFARE COMMITTEE

The meeting was called to order by Chairperson Susan Wagle at 1:30 p.m. on March 15, 2004 in Room 231-N of the Capitol.

All members were present except:

Committee staff present:

Ms. Emalene Correll, Legislative Research
Mr. Norm Furse, Revisor of Statutes
Mrs. Diana Lee, Revisor of Statutes
Ms. Margaret Cianciarulo, Committee Secretary

Conferees appearing before the committee:

Mr. Larry Pitman, President and CEO, Kansas Foundation for Medical Care
Ms. Linda Berndt, Executive Vice President, Kansas Health Care Association
Ms. Annice Davis White, CEO, Caring Hearts, LLC
Ms. Debra Zehr, Vice President, Kansas Association of Homes and Services for the Aging
Ms. Phyllis Kelly, Executive Director, Kansas Adult Care Executives Association
Secretary Pamela Johnson-Betts, Kansas Department on Aging
Mr. Greg Wright, Practicing Attorney, Kansas Trial Lawyers Associating, Overland Park, Kansas

Others attending:

Please See Attached List.

Approval of Minutes

Upon calling the meeting to order, the minutes of February 9, 10, 11, and 12 were distributed to each member of the Committee. The Chair asked that the members notify Ms. Cianciarulo if they have comments, however, if none received by the end of the day Friday, March 19, 2004, they would stand approved.

Hearing on **HB2658** - an act concerning adult care homes; relating to informal dispute resolution providing for an independent review panel

The next order of business was a hearing on **HB2658**, an act concerning adult care homes; relating to informal dispute resolution providing for an independent review panel, and called upon Ms. Correll to give an overview of the bill. Her highlights included:

- 1) The bill will create a new law relating to adult care homes and the types of inspection reports and deficiencies that result from regulation of such homes;
- 2) It is important to remember there are two kinds of inspections that are made in adult care homes. One is the inspection which is under the contract of the federal government for medicare certification, so there are two issues here from reading the bill, I am assuming that any type of dispute resolution that would be provided by this bill is suppose to apply to both types of inspections. One part of the state is acting as agent of the federal government and where the state is acting on the states behalf as a licensing agency;
- 3) The bill provides that when a statement of deficiencies is left with an adult care home administrator, that individual within 10 calendar days after receiving may make a written request to the Secretary of Aging for an informal dispute resolution by an independent review panel;
- 4) The bill would allow the administrator to make one request per inspection to dispute any deficiencies with which the Adult care home administrator disagrees;
- 5) Deficiencies are what the inspector finds that did not meet the standards or rules and regs.;

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6) The informal dispute resolution (IDR) can be based on the statement of deficiencies and in any other materials submitted but the department is to provide the administration with face-to-face informal dispute resolution only if requested by the adult care home administrator;

7) Sets out what the written request for an IDR is to include (ex. The specific deficiencies being disputed, a detailed explanation of the basis for dispute and any supporting documentation including any information not available at the time of inspection.);

8) Once a written request for an IDR has been received by the Secretary, he/she is to contact the Center of Medicare and Medicaid Services' (CMS) designated quality improvement organization for Kansas, and that is the Kansas Medical Foundation, and request that the hearing be conducted concerning the disputed deficiency;

9) The bill provides a request for this type of resolution is not to delay the timely correction of any deficiency not in dispute and not cause a delay of any enforcement action on the grounds that the IDR has not been completed before the effective date of the enforcement action;

10) The cost of the panel which would be the Kansas Medical Foundation is to include traveling expense and other expenses of the review to be paid by contractual agreement with the Center for Medicare and Medicaid Designated Quality Improvement Organization for Kansas and the Department of Aging; and

11) Feels there are several questions the committee may want to ask about the bill:

A) Is it intended to apply to inspections related to day care certification and to state licensing?

B) Regarding the ADC administrator that makes the request for an IDR, is there any financial risk there or are all the costs of this dispute resolution process to be paid by the state?

C) Whether or not the federal government would cost share.

The Chair then asked if there were questions of Ms. Correll. Senators Brownlee and Wagle asked questions including: who would pay for the contractual agreement, do we have a fiscal note, and is there any internal disputes going on right now?

The Chair then called on the first proponent, Mr. Larry Pitman, President and CEO of the Kansas Foundation for Medical Care (KFMC), who gave a history of their organization including:

1) Formed to provide a mechanism for physician peer review at time when more and more third-party payers were making claim determinations regarding utilization and quality that impacted the payment decision;

2) Incorporated in 1972 by the Kansas Medical society;

3) Has been designated Quality Improvement Organization (QIO) for Kansas since 1974;

4) A 15-member Board of Directors governs KFMC;

5) Has had several contracts with the Kansas Department of Social and Rehabilitation Services; &

6) Has the experience and ability to oversee the Informal Dispute Resolution (IDR)

A copy of Mr. Pitman's testimony is (Attachment 1) attached hereto and incorporated into the Minutes as referenced.

The second proponent to testify was Ms. Linda Berndt, Executive Vice President, Kansas Health Care Association (KHCA), who stated that they represent nearly 200 nursing and assisted living facilities, including nursing facilities for mental health, long-term care units of hospitals, senior housing and community service providers across the state of Kansas. She stated as the bill is written there is no objective or third-party review (thus their providers rarely use this process) and in addition, many providers fear retribution should they use the current process. Lastly, she stated KHCA would suggest that there are other funding options available including an assessment of the nursing and assisted living facility providers that they would be glad to explore. A copy of her testimony is (Attachment 2) attached hereto and incorporated into the Minutes as referenced.

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The third proponent was Ms. Annice Davis White, CEO of the Caring Heart LLC who stated that their organization was a professional geriatric care management practice located in Overland Park, Kansas. She stated that currently, the Informal Dispute Resolution system as it exists can easily be interpreted as a conflict of interest and offered five points showing why it is important that the informal dispute resolution process be moved to an independent review panel:

- 1) A fair and impartial process is needed;
- 2) Eliminate the conflict of interest that potentially compromises the system;
- 3) The regulatory agency should have an outside review source that analyzes their work;
- 4) Current process exacerbates and burdens an already overloaded bureaucracy;
- 5) Unlimited and unquestionable power and control can only further weaken the entire profession.

A copy of her testimony is ([Attachment 3](#)) attached hereto and incorporated into the Minutes as referenced.

The next to proponent to testify was Ms. Debra Zehr, Vice President, Kansas Association of Homes and Services for the Aging (CAHSA), who stated that their organization represents over 160 not-for-profit long-term health care, housing, and community service providers throughout the state and believes it makes sense to have the IDR process handled in a way that is as independent and objective as possible and this bill would mark a constructive step towards that end. A copy of her testimony is ([Attachment 4](#)) attached hereto and incorporated into the Minutes as referenced.

Ms. Phyllis Kelly, Executive Director of the Kansas Adult Care Executives Association (KACE) was last proponent conferee to testify. She stated KACE represents over 250 adult care home executives in nursing homes and assisted living facilities throughout Kansas and that other state regulatory agencies use an independent review panel when inspection and compliance issues are disputed. Stating oftentimes, federal law requires an independent entity to be used. She cited a memo released from the Centers for Medicare and Medicaid Services (CMS) on June 12, 2003 reiterating that state agencies can use third parties to conduct the IDR and provided guidance to the state agencies when independent panels are used. A copy of her testimony is ([Attachment 5](#)) attached hereto and incorporated into the Minutes as referenced.

The Chair then called on the first opponent, Secretary Pamela Johnson-Betts, Kansas Department on Aging, who stated that the bill would give adult care homes the ability to request from the Secretary of Aging to convene an independent review panel to consider disputes arising from a survey and the original bill was amended to require that the Kansas Department on Aging (KDOA) contract with the CMS quality improvement organization for the purposes of hearing the dispute. She also described the current administrative review process and the information dispute resolution process. And lastly, she offered the department's concerns including: the fiscal cost (the current KDOA budget cannot accommodate the external review process unless the agency is appropriated additional funds. A copy of her testimony and attachments, memos from the Centers for Medicare and Medicaid Services, are ([Attachment 6](#)) attached hereto and incorporated into the Minutes as referenced.

The last opponent was Mr. Greg Wright, a practicing attorney in Overland Park, Kansas, and a member of the Kansas Trial Lawyers Association (KTLA), who stated that nursing facilities already have the right to contest cited deficiencies through:

- 1) A federally-required informal dispute resolution process; and
- 2) The enforcement appeals process

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He also stated it is uncertain and unclear”

- 1) As to how the proposed “independent review panel” will fit into the existing system; and
- 2) Why a new level of “appeal” is needed.

Lastly, he listed KFMC’s concerns including:

- 1) Subsection (d) appears to permit the facility to delay correction of a deficiency simply because it is in a dispute. (This is not safe for residents and it’s probably contrary to federal law);
- 2) The bill does not preclude nursing facility representatives from serving on this “independent” panel (if this is the concern for the industry, then it makes sense to exclude any industry representative from being on the IDR panel);
- 3) Training for the panel members and required minimum qualifications to assure a base of knowledge are absent from the bill;
- 4) Much of the survey content is related to nursing care, yet there is no requirement that the panel include a registered nurse;
- 5) There is no requirement for a consumer representative to serve on the panel;
- 6) Residents do not have an equal opportunity to challenge the surveyor’s failure to cite deficiencies; and
- 7) Safeguards to protect against frivolous and unfounded requests for review are lacking.

A copy of his testimony is ([Attachment 7](#)) attached hereto and incorporated into the Minutes as referenced.

As there was no neutral testimony, the Chair directed the Committee to the one piece of written testimony in opposition to the bill from Ms. Deanne Bacco, Executive Director, Kansas Advocates for Better Care (KABC) who stated that the proposed use of the federally contracted quality improvement organization, Kansas Foundation for Medical Care (KFMC) is an improvement to the original bill but it is not clear:

- 1) What becomes of their recommendation?
- 2) Who has the final decision about disputed deficiencies?
- 3) If the use of KFMC is seen as an improvement to the current system, has the Centers for Medicare and Medicaid Services (CMS) notified this Committee that this proposed review panel not only is allowable by law and regulation, but is also an improvement to the process of dispute resolution?
- 4) For any deficiency that is in dispute, what is the time line for correction? (If a deficiency is found to be incorrectly cited, there would be nothing to correct, however if found to be a substantiated citation, the correction will be very long overdue, to the detriment of the nursing home residents.) She stated there needs to be a safeguard against long-running deficiencies.

A copy of her testimony is ([Attachment 8](#)) attached and incorporated into the Minutes as referenced.

As there was no neutral or written testimony, the Chair asked for questions or comments from the Committee. Senators Salmans, Wagle, and Brungardt and Ms. Correll asked questions of Mr. Buening, Mr. Wright, Mr. Pitman, and Secretary Johnson-Betts ranging from:

- 1) Do you receive requests to review deficiencies from facilities other than those that are federally certified or from other assisted living facilities, and do you have a number as to how many of these in each category?
- 2) It has been noticed that the fire Marshall appears to oppose the bill in the House and that what is presented to us today, his inspections were taken out for this hearing, what keeps him/her from being involved in this process?
- 3) Do you know what other states are doing for the informal dispute regulations and are they set up the way Kansas is or are they approaching it differently, what are they doing if they have a dispute process, and what is happening in other states that don’t and who is reviewing their disputes?

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- 4) How many cases are reviewed by that next tier up and do they then go to the district court or what happens?
- 5) Was the person involved in the survey also one of the people who reviewed it?
- 6) Could Ms. Correl request an updated fiscal with the House amendments?
- 7) Did Mr. Pitman have the estimate on the cost;
- 8) Why aren't your findings irrelevant in this review ?
- 9) Were you contemplating using in-house staff?

Adjournment

As it was going on 2:35 p.m. past Senate session time, the Chair concluded the hearing and the meeting was adjourned.

The next meeting is scheduled for Tuesday, March 16, 2004.

Kansas Foundation for Medical Care, Inc.



Larry W. Pitman, MPA
President and CEO

Senate Public Health and Welfare Committee
March 15, 2004

Testimony: House Bill 2658

Kansas Foundation for Medical Care, Inc.
Larry W. Pitman
President and CEO
785.273.2552

*Senate Public Health & Welfare Committee
Attachment 1
Date: March 15, 2004*

SENATE PUBLIC HEALTH AND WELFARE COMMITTEE
CHAIRPERSON, SENATOR SUSAN WAGLE

Kansas Foundation for Medical Care, Inc. is pleased to support HB 2658. KFMC is the healthcare Quality Improvement Organization for Kansas.

My name is Larry Pitman, and I am the President and CEO of the Kansas Foundation for Medical Care, Inc. (KFMC). KFMC was formed to provide a mechanism for physician peer review at a time when more and more third-party payers were making claim determinations regarding utilization and quality that impacted the payment decision. KFMC was incorporated in 1972 by the Kansas Medical Society.

Kansas Foundation for Medical Care has been the designated Quality Improvement Organization (QIO) for Kansas since 1974. It is a not-for-profit organization that receives funding from the United States Department of Health and Human Services and the Centers for Medicare & Medicaid Services (CMS).

A fifteen-member Board of Directors governs KFMC. Half of the Board members are physicians, and the other half are members of professional organizations and consumers with whom KFMC works. The Board of Directors hires the President/CEO. I also serve as an ex-officio member of the Board. The Board meets six times a year. I have been with KFMC since its inception, and have been the President and CEO for almost 30 years.

The mission of Kansas Foundation for Medical Care is “to facilitate the improvement of healthcare”. Our vision is to be “a recognized leader, partner, and resource to consumers and the healthcare community”.

KFMC has several contracts with the Kansas Department of Social and Rehabilitation Services (SRS) – one of which is the Utilization Review Contract and Quality of Care Oversight Contract. KFMC is also designated as the External Quality Review Organization (EQRO) for the Kansas Medicaid Managed Care Program. Other contracts currently held by KFMC are with: Prison Health Services; the Kansas Insurance Department; the Kansas Department of Human Resources in the area of Workers Compensation Case Review; and the Kansas Department of Health and Environment.

KFMC has the experience and ability to oversee the Informal Dispute Resolution (IDR) process for nursing homes in Kansas. This organization would be the nonbiased, independent body that would establish and organize the IDR process.

As stated in the amendment to House Bill 2658, “The Secretary must contact the Center for Medicare & Medicaid Services’ (CMS) designated quality improvement organization for Kansas and request that it conduct a hearing on the disputed deficiencies.”

It seems extremely important that nursing homes in Kansas have an opportunity to appeal a survey finding to an independent review group. KFMC understands that the finding of the review panel is a recommendation to the Secretary of Aging.

Madam Chairperson, it is our pleasure to support the passage of HB 2658.



KHCA



Kansas Health Care Association

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To: Senate Public Health and Welfare Committee

Re: HB 2658

Date: March 15, 2004

Chairperson Wagle and members of the Committee, thank you for the opportunity to testify before you today in support of HB 2658.

I am Linda Berndt, Executive Vice President of Kansas Health Care Association representing nearly 200 nursing and assisted living facilities including nursing facilities for mental health, long-term care units of hospitals, senior housing and community service providers across the state of Kansas.

The current informal dispute resolution process is not an independent or effective process. Because of its drawbacks relatively few facilities utilize the process. As the process is administered today, the same survey group that writes a deficiency against a facility sits in judgment of the disputed deficiency. There is no objective or third-party review thus our providers rarely use this process. In addition, many providers fear retribution should they use the current process.

Our Association and the members we represent believe a third-party independent review would be better utilized by our members.

In past surveys conducted with facilities across the state they reported:

- Administrators believe it is hard for Survey Regional Managers to be unbiased when the findings of their inspection staff is being questioned.
- Nursing facilities are afraid of retribution from the surveyors on their next visit.
- Administrators feel the current process is not independent and of little value.

We support HB 2658 and would suggest that there are other funding options available including an assessment on the nursing and assisted living facility providers that we would be glad to explore. This is an important piece of legislation that I believe will ultimately improve not only the survey process but relationships between the Department of Aging's survey staff and our profession's personnel.

Thank you for your consideration and support.

I stand for questions.

*Senate Public Health & Welfare Committee
Attachment 2
Date: March 15, 2004*

March 15, 2004
(Oral and Written)

**Testimony Before The Senate Public Health And Welfare Committee
on HB 2658.**

Chairwoman Wagle and Members of the Committee:

I am Annice Davis White CEO of The Caring Heart LLC, a Professional Geriatric Care Management Practice, located in Overland Park, Kansas. I am also a Gerontologist, a licensed Long Term Care Administrator and have been in the field of aging for thirty years. I serve as co-chair of the legislative committee of Kansas Adult Care Executives (KACE).

I am here today as a proponent of HB 2658. Currently, the Informal Dispute Resolution system as it exists can easily be interpreted as a conflict of interest. Whenever a regulatory agency has the power to be the judge, jury and executioner of its recommendations without concern of having its judgment questioned, vetted or overturned there is the prevailing appearance of inequity and unfairness.

I believe the time has come to establish an independent panel to provide a just and fair enforcement and appeals environment. An agency that oversees and has total control over whether a nursing home pays monetary fines, or even continues to exist should not be the same agency or only alternative a nursing home appeals to for justice.

Nursing Home Administrators and the homes they represent are not asking for preferential treatment. However, they do expect fair and impartial evaluations of requests they submit for review. We are experiencing fewer and fewer people choosing nursing home administration as a profession. Further, we are losing many good administrators to other fields of interest simply because of a growing lack of confidence in the current system. Our administrators are feeling trapped in a system that perpetuates edicts and judgments without being able to question the very judgments that generate causes for appeal. Without independent oversight, the net result of an agency that renders unquestionable judgment is often itself questionable.

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Attachment 3
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Finally, it is important that the informal dispute resolution process be moved to an independent review panel for the following reasons:

- A fair and impartial process is needed
- Eliminate the conflict of interest that potentially compromises the system.
- The regulatory agency should have an outside review source that analyzes their work.
- Current process exacerbates and burdens an already overloaded bureaucracy.
- Unlimited and unquestionable power and control can only further weaken the entire profession.

Thank you

**KANSAS ASSOCIATION OF HOMES AND SERVICES
FOR THE AGING**

Testimony in Support of House Bill 2658

To: Susan Wagle, Chair and Members,
Senate Public Health and Welfare Committee
From: Debra Zehr, Vice President
Date: March 15, 2004

Thank you, Madam Chair and Members of the Committee for this opportunity to offer support for House Bill 2658. The Kansas Association of Homes and Services for the Aging represents over 160 not-for-profit long-term health care, housing, and community service providers throughout the state.

House Bill 2658 addresses a concern shared by many of our members. It calls for formation of an independent review panel for processing of state adult care home inspection results with which an administrator disagrees.

Under the current system, KDOA staff members, who are themselves responsible for oversight and administration of the survey process, conduct the review of disputed deficiencies. We believe it makes sense to have this informal dispute resolution process handled in a way that is as independent and objective as possible. This bill would mark a constructive step toward that end.

Thank you for your favorable consideration of House Bill 2658. I would be happy to answer questions.

Senate Public Health + Welfare Committee
Attachment 4
Date: March 15, 2004

Tuesday, February 17, 2004

(Oral and Written Testimony - Proponent)

Testimony before the House Health and Human Services Committee on HB 2658. An Act concerning adult care homes; relating to informal dispute resolution; providing for an independent review panel.

Chairperson Morrison and Members of the Committee:

I am Phyllis Kelly, Executive Director of the Kansas Adult Care Executives Association (KACE). Our association represents over 250 adult care home executives in nursing homes and assisted living facilities throughout Kansas. I appear before you today in support of HB 2658.

The KACE Board of Directors and the KACE Legislative Committee have reviewed the components of HB 2658. Both of these entities concur that the proposed legislation will strengthen the intent, credibility, and fairness of the adult care home informal dispute resolution (IDR) process. Key to the proposed legislation is the use of an independent review panel, selected by the secretary of aging to conduct the IDR. As stated in HB 2658:

- The IDR panels will be conducted in a timely fashion so as not to delay any correction of deficiencies not overturned by the panel;
- Only one request for an informal dispute resolution per inspection may be requested by the administrator;
- A facility may not seek a delay of any enforcement action on the grounds that the informal dispute resolution process has not been completed; and
- All other deficiencies not in dispute must be corrected in the required timeliness prescribed by the regulatory agency.

Other state regulatory agencies use an independent review panel when inspection and compliance issues are disputed. Oftentimes, federal law requires an independent entity to be used. A memo released from the Centers for Medicare and Medicaid Services (CMS) on June 12, 2003 reiterated that state agencies can use third parties to conduct the IDR. This memo further provided guidance to the state agencies when independent panels are used. The use of an independent panel does not mean that the process automatically becomes more formal, less comprehensive, more lenient, or that there will be more conflict. In fact, it usually has the opposite effect because an independent review panel is concerned that its decisions are viewed as fair to all parties and protect the residents of the facility.

In the days of tight budgets, costs of an independent panel have been advanced by some as an issue. Currently, the members of the Board of Adult Care Home Administrators voluntarily serve a two-year term. There is no compensation for their time to participate in Board activities. Subsequently, we are confident that there are consumers and professionals who are very knowledgeable about long-term care in Kansas adult care homes who would be more than willing to donate their time to serve on one of these

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panels.

By the use of an independent review panel, and not its own staff, the regulatory agency cannot be accused of any bias if decisions of the inspectors are not reversed. Informal dispute resolution conducted by an independent review panel gives the inspection process more credibility and less controversy. Our Association would be very willing to work with any entity to address any component of this bill which is viewed as detrimental to quality care in our adult care homes.

We urge your support of HB 2658.



K A N S A S

PAMELA JOHNSON-BETTS, SECRETARY

KATHLEEN SEBELIUS, GOVERNOR

DEPARTMENT ON AGING

Testimony on HB 2658
to
Public Health and Welfare
Presented by Secretary Pamela Johnson-Betts
March 15, 2004

Chairperson Wagle and members of the committee, I am pleased to appear before you today to discuss HB 2658. I am opposed to this legislation for reasons that I will explain.

House Bill 2658 would give adult care homes the ability to request the Secretary of Aging to convene an independent review panel to consider disputes arising from a survey. The original bill was amended to require that the Kansas Department on Aging (KDOA) contract with the CMS quality improvement organization for the purposes of hearing the dispute.

Before discussing the details of this proposed legislation, I would like to describe the current administrative review process and the informal dispute resolution process.

Current Administrative Process

When adult care home inspectors conduct a survey, they prepare a statement of deficiencies report. Depending on the nature of the deficiencies, the Kansas Department on Aging (KDOA) may impose enforcement remedies against the adult care home. Remedies could range from issuing a civil penalty to ordering a ban on new admissions. At the point in which our agency takes action against the adult care home, the facility has the right to file an appeal.

Approximately forty percent of the adult care homes in Kansas are certified by both Medicare and Medicaid. The appeal rights of each facility are provided through federal administrative appeals procedures and the Kansas Administrative Procedures Act. Through the administrative appeals process we ensure all certified and licensed facilities are provided due process of law. The Office of Administrative Hearings in the Kansas Department of Administration conducts all of the KDOA administrative hearings. Federal enforcement actions can be appealed to the US Department of Health and Human Services Departmental Appeals Board.

Current Informal Review Process

The Licensure, Certification and Evaluation Commission (LCE) has used an informal review program since 1991 as an alternative way of resolving disputes. The current process involves two steps. The first review is conducted by the regional managers who supervise the survey staff. By working directly with the care home administrators and the survey staff, the regional manager can get an accurate and timely assessment of survey disputes. The regional manager has the authority to make revisions to the survey report should a facility provide additional

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information demonstrating a cited deficiency should be changed. If the adult care home administrator is not satisfied with regional manager review, the administrator can request a review by LCE management in Topeka.

Proposed External Informal Dispute Resolution Process

The Department on Aging is concerned about HB 2658 in three significant ways.

First, in a letter dated June 12, 2003, CMS advised us that "if any outside entity conducts IDR, the results of the IDR process may serve only as a recommendation to the [Survey Agency] of noncompliance or compliance with the Federal requirements for skilled nursing facilities." See Attachment A. The current KDOA informal review process has been approved by CMS. The process contemplated by HB 2658 would be subject to CMS review and the results of such an outside process could not be binding on the Secretary of Aging.

Second, we are concerned about the fiscal cost. The current internal process is absorbed into the budget of the agency. We conservatively estimate the cost of an external review process to be \$245,000. We cannot guarantee the costs would not increase because we are uncertain as to utilization by the adult care home industry and we cannot predict the exact cost of contracting with Kansas Foundation for Medical Care. The current KDOA budget cannot accommodate the external review process unless the agency is appropriated additional funds.

During the Health & Human Services Committee deliberation, members of the committee suggested that KDOA defray the cost of this bill by using Civil Monetary Penalty (CMP) funds. We collect monetary penalties from facilities that are out of compliance with federal and state law. According to CMS, CMP funds "must be applied to the protection of the health or property of residents of nursing facilities." See Attachment B. We made a verbal inquiry to CMS and were told that external dispute resolution does not meet that criteria.

Lastly, the intent of the IDR process is to be informal. The IDR process is intended to allow providers and the agency to informally review survey findings to provide an opportunity for changes before the formal appeals processes begin.

The Underlying Concern

Adult care homes in Kansas are regulated by the federal and state government. Quite naturally, a degree of tension sometimes exists between the regulator and the regulated. Although prior adversarial relationships may have lent themselves to a sense of distrust, I encourage the industry and have stressed and continue to stress to KDOA staff to build relationships using the current process, which can save the state dollars and objectively offer remedies. We encourage adult care homes to use the current process more frequently. We pledge to maintain open dialogue with the industry, not just for the benefit of survey and facility staff, but for the benefit of adult care home residents. I am committed to our current process and am open to suggestions for its continued improvement.

Thank you for the opportunity to appear before this Committee. I will gladly answer any questions.

Center for Medicaid and State Operations/Survey and Certification Group

Ref: S&C-03-25

DATE: June 12, 2003

FROM: Director
Survey and Certification Group

SUBJECT: Clarification of Issues Related to Informal Dispute Resolution

TO: Survey and Certification Regional Office Management (G-5)
State Survey Agency Directors

This memorandum provides guidance to State Survey Agencies (SAs) regarding the informal dispute resolution (IDR) process. Currently, two SAs in the Centers for Medicare & Medicaid Services (CMS) Region VI have delegated the authority for conducting IDR to an independent third party. Another SA anticipates legislation will be passed this year to remove the IDR process from the SA. States have asked how the establishment of independent IDR impacts the work of SAs and what obligations an IDR process conducted by an outside entity may impose on the survey process.

Under an agreement with CMS, the SA is responsible for all Federal certification decisions. The basis of this conclusion is contained in the 1864 Agreement between the Secretary of Health and Human Services and the State. Article I of that Agreement stipulates that all references in the agreement to the "State" include the SA. Article II stipulates required functions to include the certification of compliance or noncompliance of Medicare skilled nursing facilities. Furthermore, the SA cannot subcontract any of its survey and certification functions without prior written approval of CMS, as stated in Article X of the Agreement.

The IDR process is a survey and certification function. While States are granted some flexibility as to how survey and certification activities are conducted, they must adhere to Federal statutory and regulatory requirements, as well as the State Operations Manual (SOM). For nursing homes, the SOM sets forth procedural requirements for the IDR process in Section 7212. Thus, while other entities outside the SA are allowed to conduct certain survey and certification processes such as IDR, the SA retains final certification authority and responsibility for all Medicare and dually participating providers.

Therefore, if an outside entity conducts IDR, the results of the IDR process may serve only as a recommendation to the SA of noncompliance or compliance with the Federal requirements for skilled nursing facilities.

While SAs may take the opportunity to review the results of IDR to improve the survey process and bring policy issues to the attention of CMS, recommendations from an IDR are not binding on CMS and cannot impede or delay any enforcement proceedings.

We hope this clarification is helpful. For additional questions, please contact Elaine Lew at 410-786-9353 or via email at Elew@cms.hhs.gov.

Effective Date: This policy is effective immediately.

Training: This policy should be shared with all appropriate survey and certification staff, their managers, and the state/regional office training coordinators.

/s/
Steven A. Pelovitz



Ref:S&C-02-42

Date: August 8, 2002

From: Director
Survey and Certification Group
Center for Medicaid and State Operations

Subject: Use of Civil Money Penalty (CMP) Funds by States

To: Associate Regional Administrator
Divisions of Medicaid & State Operations
Regions I – X
State Survey Agency Directors

The purpose of this memorandum is to provide information regarding how states may use CMP funds collected from nursing homes that have been out of compliance with Federal requirements. It has come to our attention that guidance is needed to ensure that states use CMP funds in accordance with the law and in a consistent manner, while maintaining some flexibility in the use of those funds.

Background – States collect CMP funds from Medicaid nursing facilities and from the Medicaid part of dually-participating skilled nursing facilities (SNFs) that have failed to maintain compliance with Federal conditions of participation. These CMP funds are state, not Federal funds. CMP funds collected from Medicare-participating SNFs and the Medicare part of dually-participating SNFs are Federal funds and are returned to the Medicare Trust Fund.

Section 1919(h)(2)(A)(ii) of the Social Security Act (the Act) provides that CMP funds collected by a state as a result of certain actions by nursing facilities or individuals must be applied to the protection of the health or property of residents of nursing facilities that the state or the Secretary finds deficient. These actions include CMPs assessed against:

- (1) A nursing facility that is not in compliance with Federal requirements in sections 1919(b), (c), (d) of the Act;
- (2) An individual who willfully and knowingly certifies a material and false statement in a resident assessment (section 1919(b)(3)(B)(ii)(I) of the Act);
- (3) An individual who willfully and knowingly causes another individual to certify a material and false statement in a resident assessment (section 1919(b)(3)(B)(ii)(II) of the Act); and
- (4) An individual who notifies (or causes to be notified) a nursing facility of the time or date on which a standard survey is scheduled to be conducted (section 1919(g)(2)(A)(i) of the Act).

The Act cites three examples of uses for CMPs:

- (1) Payment for the costs of relocation of residents to other facilities;
- (2) Maintenance of operation of a facility pending correction of deficiencies or closure;
and
- (3) Reimbursement of residents for personal funds lost.

The regulations, at 42 CFR 488.442(g), contain similar language, with some very minor wording changes that make it clear that the costs of relocation of residents to other facilities are for state costs. The regulations also indicate that the personal funds lost at a facility are the result of actions by the facility or by individuals used by the facility to provide services to residents. Section 7534B of the State Operations Manual (SOM) contains similar language, but specifies that the funds must be used to protect the health or property of residents of deficient facilities.

In the preamble to the final enforcement regulations published on November 10, 1994, we indicated that the law suggests that CMP revenues be applied to administrative expenses rather than direct care costs, although it is clear that states have broad latitude to determine which of these types of expenses best meet the needs of their residents (page 56210 of the Federal Register, Volume 59, No. 217). Further, the preamble is very clear that the Act permits each state to implement its own procedures with respect to the use of CMPs. Our previous direction to CMS regional offices has been that the specified uses of CMP funds in the Act and section 488.442(g) are not exhaustive, that states need flexibility in determining the appropriate use of funds, and that regional offices have some oversight responsibility. Beyond this, we have not provided general guidance to all states and regional offices on what is considered appropriate use of these funds within the scope of the law and regulations. Due to the lack of guidance, a number of states have been reluctant to use a majority of the money. As a result, some states have a significant amount of money on deposit and this amount is continuously growing.

Flexibility in Use of CMP Funds -- While the Act provides states with much flexibility to be creative in the use of CMP funds, this flexibility is limited by the requirement that CMP funds are to be focused on facilities that have been found to be deficient. However, the law does not specify when a facility must have been determined to be deficient to qualify for benefits under a state project funded by CMPs. Most nursing facilities have had one or more deficiencies either recently or in the past. Rather than setting forth rigid criteria on when it is that a facility must have been deficient to be an eligible target for the application of CMP revenues, we believe that the best course is to offer states maximum flexibility to make this determination. Apart from this, we believe that projects funded by CMP collections should be limited to funding on hand and should be relatively short-term projects.

Each state is responsible for ensuring that CMP funds are applied in accordance with the law. Regional oversight should be general in nature, responding to questions from states or commenting on the occasional project proposal submitted for regional office input, but there is no requirement that a regional office review and approve each state project before it is implemented.

Appropriate CMP Fund Use --As we stated in the preamble to the 1994 final enforcement regulations, CMP revenues should be spent on administrative expenses, rather than direct care costs, as applied to deficient facilities. If the purpose of the state project is related to deficient practice, the CMP funds could be used to prevent continued noncompliance by nursing facilities through educational or other means. For example, to address particular areas of noncompliance, a state could develop videos, pamphlets, or other publications providing best practices, with these educational materials being distributed to all deficient nursing facilities. Other uses could include, for example, the development of public service announcements on issues directly related to the identified deficient area, and employment of consultants to provide expert training to deficient facilities. North Carolina and other states have issued grants to several nursing facilities to fund Eden Alternative Projects, which provide training and other services necessary to support the use of animals in nursing facilities for therapeutic purposes. Because CMP funds collected by a state are state funds, the state may use the money for any project that directly benefits facility residents, in accordance with section 1919(h)(2)(A)(ii) of the Act, including funding an increase in ombudsman services.

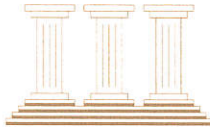
Inappropriate CMP Fund Use – We believe that it is not appropriate for states to use CMP funds for a loan to a deficient facility that is having financial difficulty meeting payroll or paying vendors. As pointed out in the preamble, if the CMP is used by the facility to correct the noncompliance that led to its imposition, it is, in effect, not a remedy.

If you believe that a state is not spending collected CMPs in accordance with the law or regulations, or not at all, you should refer this matter to your regional office account representative so that he or she may discuss this matter with the state.

Effective Date: This guidance is effective on the date of issuance.

Training: This policy should be shared with all survey and certification staff, surveyors, their managers and the state/regional training coordinator.

/s/
Steven A. Pelovitz



KANSAS TRIAL LAWYERS ASSOCIATION

Lawyers Representing Consumers

TO: Members of the Senate Public Health and Welfare Committee
FROM: Greg Wright
Kansas Trial Lawyers Association
RE: HB 2658
DATE: March 15, 2004

Chairman Wagle and members of the Senate Public Health and Welfare Committee; thank you for the opportunity to appear before you today. I am Greg Wright, a practicing attorney from Overland Park. I am here on behalf of the Kansas Trial Lawyers Association in opposition to HB 2658.

The Kansas Trial Lawyers Association opposes HB 2658. The federal and state nursing home inspection/survey system exists to protect the health, safety and welfare of residents of nursing facilities, and to assure contractor compliance with Medicare and Medicaid regulations. Taxpayers already pay for a large part of nursing home care and for the survey system to assure that the care meets minimum standards.

The survey system was the subject of a Legislative Post Audit Study within the past several years and found to be reasonably adequate. Nursing facilities already have the right to contest cited deficiencies through: 1) a federally-required informal dispute resolution process; and 2) the enforcement appeals process.

It is uncertain and unclear as to how the proposed "independent review panel" will fit into the existing system. According to testimony presented by the Kansas Department on Aging before the House Health and Human Services Committee, the existing IDR process has resulted in approximately a 20% or higher success rate for facilities challenging cited deficiencies. The nursing home industry often disputes the validity of the survey system, but a regulated industry is often at odds with its regulatory authority. It is unclear why a new level of "appeal" is needed, unless the primary concern of the program is industry satisfaction. Additionally, the bill will permit the facilities to have two separate IDR opportunities. The Kansas Department on Aging is required to provide the current IDR by federal statutes.

KTLA is concerned about the fiscal note for this bill; facilities will no doubt be eager to utilize any opportunity to dispute citations. In order to perform adequately the panel would need to review in detail surveyor findings and facility evidence, which will take significant time, and add

Terry Humphrey, Executive Director

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to costs. The bill makes KDOA fund the panel work. According to KDOA some surveyor positions are presently not filled, in part, due to the state's inability to offer competitive salaries for nurse surveyors. Perhaps the money would be spent better elsewhere.

The current version of the bill requires the Secretary of the Department on Aging to use the designated quality improvement organization for Kansas to conduct the IDR hearing. The Kansas Foundation for Medical Care (KFMC) is currently the designated quality improvement organization for Kansas. KFMC also provides consultation services to nursing homes in Kansas. The KFMC website states that 57 nursing homes in the state receive consulting services from KFMC. Having KFMC conduct the IDR appears to put the IDR process in the hands of an organization that contracts with the industry to provide consulting services on quality improvement. It is possible that KFMC could be reviewing its own suggestions to facilities that have been found to be deficient.

In addition to the above comments, we have the following concerns about the bill:

- Subsection (d) appears to permit the facility to delay correction of a deficiency simply because it is in dispute. This is not safe for residents and it is probably contrary to federal law;
- The bill does not preclude nursing facility representatives from serving on this "independent" panel (if bias is the concern of the industry, then it makes sense to exclude any industry representative from being on the IDR panel);
- Training for the panel members and required minimum qualifications to assure a base of knowledge are absent from the bill;
- Much of the survey content is related to nursing care, yet there is no requirement that the panel include a registered nurse;
- There is no requirement for a consumer representative to serve on the panel;
- Residents do not have an equal opportunity to challenge the surveyor's failure to cite deficiencies;
- Safeguards to protect against frivolous and unfounded requests for review are lacking; and,
- The panel is permitted to consider information brought to light after the survey, which will open up entirely new lines of inquiry and may necessitate further survey activity to confirm. .

Protection of the interests and rights of consumers and residents of nursing facility care should and must be paramount to the protection of the self-interest of the nursing home industry. Thank you for the opportunity to express KTLA's concerns about this bill. KTLA respectfully urges you to oppose HB 2658. I would be happy to answer any questions that you may have.



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EXECUTIVE DIRECTOR
Deanne Bacco

Promoting Quality Long-term Care since 1975

House Bill 2658
an act relating to revising the procedure
for informal dispute resolution (IDR)
of nursing home inspection deficiency reports;
providing for an independent review panel.
March 15, 2004

**Honorable Chairman Wagle and
Senate Public Health and Welfare Committee Members:**

Kansas Advocates for Better Care (KABC) opposes HB 2658.

- The proposed use of the federally contracted quality improvement organization, Kansas Foundation for Medical Care (KFMC), is an improvement to the original bill but it is not clear what becomes of their recommendation; who has the final decision about disputed deficiencies? Since the Kansas Department of Aging (KDOA) is the contracted inspection entity, it should have final decision-making responsibilities.
- If the use of KFMC is seen as an improvement to the current system, has the Centers for Medicare and Medicaid Services (CMS) notified this Committee that this proposed review panel not only is allowable by law and regulation but is also an improvement to the process of dispute resolution?
- The bill states, in part (d), that "A request for informal dispute resolution shall not delay the timely correction of any deficiency not in dispute." However, for any deficiency that is in dispute, what is the timeline for correction? In the event that any deficiency is found to be incorrectly cited, there would be nothing to correct. However, in the event that the deficiency is found to be a substantiated citation, the correction will be very long overdue, to the detriment of the nursing home residents. There needs to be a safeguard against long-running deficiencies.
- The current IDR system has adequately demonstrated that disputes with deficiencies does indeed result in overturn of some deficiencies, without repercussions ("bad" inspection reports on the next survey) to the nursing homes seeking the IDR.

Thank you for this opportunity to provide comments on HB 2658. We urge the Committee to carefully consider the details of carrying out any change being proposed by this bill.

Deanne Bacco, Executive Director

Senate Public Health & Welfare Committee
Attachment 8
Date: March 15, 2004