



To: Senator Richard Hilderbrand, Chair and Members, Senate Public Health and Welfare Committee

Date: March 29, 2021

### **Testimony in Opposition to Senate Bill 303**

LeadingAge Kansas is the state association for not-for-profit and faith-based aging services. We have 160 member organizations across Kansas, which include not-for-profit nursing homes, retirement communities, hospital long-term care units, assisted living, homes plus, senior housing, low-income housing, home health agencies, home and community-based service programs, PACE and Meals on Wheels. Our members serve more than 25,000 older Kansans each day and employ more than 20,000 people across the state.

Heartbreaking is not an adequate word for what nursing home residents have suffered after a year in isolation. Not a day has gone by in the pandemic that we have not heard from a nursing home provider, telling us about the cruelty of resident isolation, and asking when CMS would let it end. Never did we imagine that a year would go by without an answer.

We respect and agree with the intentions behind Senate Bill 303. However, the reality that our providers must operate under means that we must strongly oppose its passage. Complying with SB 303 would force our county-owned nursing homes to violate federal nursing home regulations, and no county-owned nursing home could survive the devastating penalties that would result from it.

The resident visitation restrictions addressed in this bill are regulatory requirements from the Centers for Medicare and Medicaid Services. Nursing homes must follow those requirements exactly, and failure to do so results in hundreds of thousands of dollars in fines, loss of Medicare and Medicaid funding, de-licensure and closure. This is not a "what if" situation. The visitation rules from CMS are very clearly laid out, as are the federal enforcement penalties that come with non-compliance.

### **Residents Cannot Waive Nursing Home Regulations**

While nursing home residents are greatly affected by federal CMS regulations, they have no legal standing to waive them. If that was the case, nursing home residents would enter a

nursing home with boxes of waivers the nursing home wanted them to sign. The regulations apply to nursing home operators receiving Medicaid and Medicare dollars, not residents themselves. Even if a resident was somehow considered a regulated entity, such entity does not have the option to waive the regulations that apply to it.

### **History of Lockdown Orders and Visitation Guidance**

On March 13, 2020 the Centers for Medicaid and Medicare Services ordered nursing homes into lockdown, turning away all visitors and non-essential workers. CMS also ordered all communal dining and activities be stopped and physical distancing between residents enforced. In many instances this meant confining residents to their rooms. Throughout the pandemic “compassionate care” visits have been allowed. Even then, physical touching and room visits were strongly discouraged by CMS.

On May 1, 2020 CMS indicated that some nursing homes may be able to open for limited visitation as their states began to re-open. On September 7, 2020 CMS released more re-opening guidance that encouraged outdoor visits whenever possible. Indoor visits were allowed if (1) there were no new COVID-19 infections in the last 14 days and the facility was not in the process of outbreak testing and (2) the county positivity rate was less than 10%. During the summer many homes moved to outdoor visitation opportunities, and some were able to meet the threshold for indoor visitation as well. However, with autumn came colder weather and an explosion of COVID-19 infections and county positivity rates. By the end of the year very few nursing homes were able to open for outdoor or indoor resident visits. It has only been in the last month that vaccinations have increased enough, and county positivity rates have decreased enough, for nursing homes to open their doors once again.

After a lot of pushing by nursing homes and resident advocates, CMS finally released new visitation guidance on March 10, 2021 creating more options for resident visits, and for the first time in a year, allowing residents to hug their loved ones. The newest federal visitation rules still encourage outdoor visitation, and in general social distancing and masking are still required. However, indoor visits are now allowed except under some narrow circumstances. Fully vaccinated residents may also choose to have physical contact with their visitors while wearing a mask and practicing hand hygiene before and after.

While in-person visitation has remained limited throughout this pandemic, nursing homes worked very hard to keep residents connected to their loved ones any way they could. They purchased tablets for zoom calls, built special rooms for indoor visits, put up plexiglass dividers, and outfitted their outdoor spaces to accommodate as many visits as possible outdoors. Window visits happened everywhere and car parades for holidays and birthday celebrations were common. None of these things were a replacement for physical touch and proximity, but our providers did what they could to reduce resident isolation.

### **Federal Enforcement Against Nursing Homes**

Medicaid and Medicare pay for the vast majority of nursing home care in our country, and in Kansas. Nursing homes that receive Medicaid and Medicare funding must comply, to the letter, with federal regulations that come attached to the money. The Centers for Medicare and Medicaid Services (CMS) is the agency in charge of creating and enforcing those regulations for nursing homes. CMS contracts with the Kansas Department for Aging and Disability Services to conduct inspections of nursing homes to determine whether the home is following all regulatory requirements. Any regulatory non-compliance found during the inspection is called a deficiency. All deficiencies must be resolved by the adult care home within a certain amount of time through a “plan of correction.” If the home receives a high severity level deficiency, it is also subject to fines of up to \$10,000 per day, denial of payment for Medicaid and Medicare services, and a ban on new admissions to the home. An adult care home with continued non-compliance will have its license revoked and be forced to shut down. However, the loss of Medicaid and Medicare dollars will have closed the nursing home long before their de-licensing process is finished. The memos from CMS that outline visitation guidelines are known as “sub-regulatory guidance” and they hold the same force and effect as any other federal regulation. Failure to follow these memos exactly will result in survey deficiencies for nursing homes and all of the penalties described above.

Senate Bill 303 would be devastating for our county-owned nursing homes because it forces them to violate CMS regulatory requirements. Our county owned nursing homes cannot survive hundreds of thousands in penalties and the loss of Medicaid funding. They certainly cannot continue to operate once their non-compliance reaches the stage of de-licensure.

### **The Effect of CMS Penalties and Nursing Home Closures on Rural Kansas**

Kansas has a surprising number of county-owned adult care homes and hospital long term care units. Ownership details are sometimes hard to sort out, but our research turned up 32 counties that could fall under SB 303. They represent the most rural of our already rural state. Below is our (hopefully complete) list of affected counties:

Atchison	Haskell	Rice
Barber	Jefferson	Rooks
Cheyenne	Kearny	Scott
Clark	Logan	Sheridan
Coffey	Ness	Smith
Decatur	Norton	Stanton
Dickinson	Marion	Stevens
Ford	Meade	Trego
Gove	Mitchell	Wallace
Greeley	Phillips	Wichita
Harper	Rawlins	

### **The Social Cost of Rural Nursing Home Closures**

When a nursing home in a rural area closes it can be devastating for residents and their families. The next closest provider is likely many miles away. It means further isolation of seniors because they must leave a community they are deeply connected to, their family and friends are much less available, and it is less likely someone will be there to advocate for the resident's needs. It is especially hard on an elderly spouse who cannot drive longer distances, and must rely on others to take them to the nursing home for visits. Rural nursing homes hold a special place in their communities. They are social hubs that encourage family relationships, community connection and service to others.

### **The Economic Cost of Rural Nursing Home Closures**

As employers and taxpayers, rural nursing homes are economic drivers in their communities. For rural areas, the loss of their community nursing home can be devastating for the local economy as well as the quality of life for seniors and families. The cost of closure for a county-owned rural nursing home is steepest of all. Unfortunately, we have a real-life example of what the effects of SB 303 would lead to in 32 counties across the state.

In 2017 Trego Manor, a nursing home owned by Trego County, closed. Like many rural nursing homes, it was a small facility that struggled to make ends meet and to provide the best possible care to local seniors. The nursing home eventually started struggling with federal inspections, and after a very distressing abuse incident, CMS hit them with \$230,000 in fines. Seeing no way to save the situation, Trego County decided to close the home, hoping to avoid the CMS fines in the process. They lost the fight, and Trego taxpayers were forced to hand over \$230,000 in penalties to the federal government. According to an article in the Hays Daily News, the entire cost of closing the nursing home, paying off bills and retiring debt cost the county an extra \$2 million.

The story of Trego Manor is a good illustration of what will happen to dozens of other county-owned nursing homes forced into federal regulatory violations by SB 303. Spread the Trego experience over 32 counties and we'd see \$64 million in costs. Add in the economic losses from those home closures, and Senate Bill 303 could easily force over \$100 million in losses onto rural taxpayers in Kansas.

For the survival of our county-owned nursing homes, for the sake of their residents and families, for the economic and social health of rural communities and for the wallets of rural taxpayers, we ask the Committee to vote No on Senate Bill 303.