



# WHCA / WiCAL

Wisconsin Health Care Association

Wisconsin Center for Assisted Living

To: Representative Peggy Krusick, Chair, and Members of the Assembly Aging and Long Term Care Committee

From: WHCA/WiCAL, Brian Purtell and Jim McGinn

**Re: 2009 AB 389**

Date: September 9, 2009

On behalf of the nursing home members of the Wisconsin Health Care Association (WHCA), the following comments are provided to the proposed 2009 AB 389. The WHCA opposes this bill for multiple reasons, chief among these is the fact that the actions it mandates will do nothing to promote or enhance the quality of care and services provided by Wisconsin's nursing homes. Moreover, the resources that will be expended to meet the bill's expectations will divert already strained staff and resources from resident care.

**Notice of allegations is required prior to opportunity for facility to contest and exercise due process rights:**

The obligation to provide copies of the SOD to residents alleged to be impacted by an Immediate Jeopardy (IJ) deficiency or Class A citation within 15 days of receipt of the allegation is a requirement would obligate such notice without the facility even having an opportunity to refute the allegation. Facilities would not even be able to conduct an Informal Dispute Resolution (IDR), much less a federal or state appeal for an allegation that is disputed, prior to having to provide a copy of and SOD that may contain allegations strongly contested by the facility.

SODs are drafted to support the alleged deficiency, and they are not intended, nor are they drafted, as a balanced depiction of the situation. Further, errors and omissions are made by surveyors, many of which would be modified or eliminated via IDR or administrative appeal. However, in many instances and appeal or IDR may not be pursued because need to allocate facility resources internally, as enforcement regulations compel facilities to focus on satisfying that corrections have been made in order to prevent or cease the imposition of significant penalties.

Compelling a facility to send countless SODs, for which they may strongly contest in whole or in part is counter to the basic notions of due process. The facility reputation and standing will be harmed, and residents/families may be needlessly concerned about

an allegation that may later prove to have been erroneously cited or containing incomplete or inaccurate information.

A likely, but unintended consequence of this bill is that facilities would be compelled to expend resources toward challenging every misstatement or allegations for which they disagree, thus increasing costs to both the providers and the regulators. Further, the already contentious survey process will be further strained by compelling facilities to provide copies of notices for which they disagree.

Compounding the problem further is the fact that IJ allegations can be issued for “the potential” for harm, i.e. alleged non-compliance *could have* lead to harm, but did not occur. Compelling a facility to provide notice to a resident/family, possibly months after the fact, that they were listed within the examples of individual who “might” have been harmed will not serve any purpose and raises the real possibility of causing needless fear or anguish. If for example, a facility was cited for alleged non-compliance related to a facility’s response to a gastroenteritis outbreak, the SOD would likely indicate that most or all residents were exposed to the *potential* for harm, regardless of how many or few actually experienced symptoms. Under the bill, it appears that all residents would be required to receive a copy of the SOD.

**Regulations currently require extensive notification and/or communication which addresses circumstances better than what AB 389 seeks to address:**

The notice requirements contained within AB 389 are duplicative of the existing notification and communication requirements.

Replete through the state and federal regulations, *see*, Wis. Stats Ch. 50, Wis. Admin. Code DHS 132, 42 C.F.R. 483, are reporting/notification expectations by nursing homes, including, but not limited to:

- A facility must immediately notify the resident; consult with the resident’s physician, and legal representative/family member when there is:
  - An accident involving the resident which results in injury;
  - A significant change in the resident’s physical, mental, or psychosocial status;
  - A need to alter treatment significantly.
- Residents have the right to be fully informed of their health status, including but not limited to their medical condition. This further includes the right to be fully informed in advance about care and treatment and any changes that may affect the resident’s well being.
- Conduct care planning sessions with resident and family/representative involvement on an ongoing basis, to discuss such changes or to update a resident’s care plan.
- Facilities investigate and report to the DQA, within 24 hours, any allegations involving possible abuse, neglect, misappropriation of property, or injuries of unknown sources.
- Any survey allegation involving possible Substandard Quality of Care (SQC) requires the facility to provide DQA with the names and contact information for the attending physicians of residents possibly impacted. DQA then provides notice to these physicians.

- Unexpected deaths must be reported to the coroner.
- Adhere to the adult-at-risk reporting requirements if any physical or financial exploitation is suspected.

If the purpose of AB 389 is to provide residents and families with information to allow their enhanced dialog with the facility to address care or service concerns, the provision of survey information comes long after expected notification and communications have already occurred. If however, the purpose is to assign blame as to non-compliance, then surely, the facility should be afforded the full opportunity to contest the allegations before being compelled to provide such notice.

**All survey results, including IJ and Class A violations, must be posted and are accessible to the public:**

Similarly, the state and federal regulations mandate that nursing homes to post survey results and advocacy contact information. Furthermore, there are expanding consumer information resources that report facility compliance history and performance.

- Survey results must be posted in a prominent place within the facility for anyone to review. In addition, CMS continues to enhance its Nursing Home Compare website, which predominantly focus on survey information.
- The Consumer Information Report must be provided to anyone considering placement at a facility or who simply requests the report.
- Notices are required to be provided and posted that residents have the right to receive information from agencies acting as client advocates and be afforded the opportunity to contact these agencies. Residents and their families are provided and encouraged to make contact with advocacy agencies, e.g. the Ombudsman Program, should they have concerns that cannot or have not been addressed by facility personnel.

**Pragmatic, Logistical, and Privacy Issues:**

There are pragmatic, logistical and privacy concerns for the expectations contained within the bill which requires the nursing home, within 15 days, to provide notice that includes (1) the copy of the SOD, (2) the anonymous identifier used to designate the resident in the SOD, and (3) the contact information for the regional survey office.

This will compel a facility to send multiple versions of what can be a lengthy document that is already posted for review, and available upon request. In some cases, such as an infection control allegation, this may need to go to every resident that was at the facility during the period of alleged non-compliance. As discussed previously, there is already an obligation to notify residents/representatives of changes, accidents, etc. This bill would essentially require further notification of information already possessed and available to residents and their representatives.

To disseminate the anonymous resident identifier along with the SOD will further create a potential privacy issue, as each resident will have to receive a different version, with all the other residents identified being redacted (see attachment as example). While nursing homes are diligent with respect to their privacy and confidentiality obligations, the paperwork required to complete the expected task, coming during the same window in which facilities are expected to be conducting corrective efforts, completing Plans of Corrections, and possibly preparing for IDR/appeal, exposes facilities and residents to needless opportunities for data breaches.

**Conclusion:**

The above are significant issues and basis for opposition to this bill, but as importantly, the proposed requirements will do nothing to further quality improvement. Compelling facilities to undertake significant workload, at a time when resources are scarce and staff should be completing the tasks of addressing the alleged non-compliance, will actually take away from quality efforts. There are already lines of communications that are either required or conducted in the normal course that provides residents and families with opportunities to discuss what may have occurred and what steps the facilities have taken to address issues and concerns. Sending documents that are (1) intended for certification and licensing purposes, (2) possibly months after the fact, and (3) not fully representative of the complete picture, does nothing to towards quality care and will serve only to harm facilities and possibly the residents/family.

For the reasons articulated above, the WHCA requires that the committee members oppose AB 389.

