

The Connecticut Association of Not-for-profit Providers for the Aging

Testimony presented to the Public Health Committee

Regarding

Senate Bill 845, An Act Concerning Oversight of Nursing Homes

March 6, 2009

CANPFA members serve thousands of people every day through mission-driven, not-for-profit organizations dedicated to providing the services people need, when they need them, in the place they call home. Our members offer the continuum of aging services: assisted living residences, continuing care retirement communities, residential care homes, nursing homes, home and community-based services, and senior housing.

Good morning Senator Harris, Representative Ritter, and members of the Committee. My name is Mag Morelli and I am the President of the Connecticut Association of Not-for-profit Providers for the Aging (CANPFA), an organization of over 150 non-profit providers of aging services. CANPFA represents forty-eight not-for-profit nursing homes. I am pleased to be here today to provide comment and additional written testimony on **Senate Bill 845, An Act Concerning Oversight of Nursing Homes**.

CANPFA understands the concern regarding the financial condition of our state's nursing homes. In fact, we should all be concerned. Our state's nursing homes are struggling to maintain operations as they care for an increasingly high level of acuity resident with increasingly inadequate Medicaid rates of reimbursement.

As an association, CANPFA would like to be helpful in developing an effective method of monitoring the financial health of our nursing homes. We have listed below our recommendations on the principles that we recommend be incorporated into such a process. We have taken into consideration the need to avoid additional costs or financial burden to either the state or the nursing homes, and we believe that this can be done by using the financial data that is already being submitted to the state by the nursing homes.

We also have submitted specific comments on this particular bill as well as House Bill 6400 and Substitute Senate Bill 450, two other nursing home oversight bills proposed this session. We would like to acknowledge the effort that has been made by those proposing these bills to recognize several of the concerns raised by CANPFA last session. We are eager to continue to work with all interested parties on this important piece of legislation.

In general our recommendations include the following principles:

- That the state utilize information that is already provided to the Department of Social Services and the Department of Public Health as the starting point for improving oversight. There is a wealth of financial information that is currently provided to the state annually in the nursing home cost reports and these reports should be utilized first before additional reporting requirements are mandated.
- That state agencies be held accountable for the oversight functions they are expected to perform. Guidance from the Legislature on oversight priorities may be extremely helpful in improving the current oversight and accomplishing the Legislature's goals.
- That the *Nursing Home Advisory Committee* be activated and utilized to advise, guide and coordinate the oversight functions carried out by the various state agencies and that representatives from the nursing home field remain on the committee.
- That we not create an additional, unnecessary state audit. The Department of Social Services currently audits the cost reports of all nursing homes, but not in a timely fashion. We recommend that the cost report audit function be done on a timely basis so as to identify both reporting errors and financial issues of concern much sooner.

We have four fundamental concerns with the financial oversight bills:

1. The Nursing Home Financial Advisory Committee should include nursing home representatives.

Section 4 of Bill 845 and Section 2 of Bills 6400 and 450 propose to amend Conn. Gen. stat. § 17b-339 by deleting the requirement that one representative of nonprofit nursing homes and one representative of for-profit nursing homes serve on the Nursing Home Financial Advisory Committee.

- We face challenging times ahead for our state and for this industry. Collaboration between regulators and nursing home industry representatives has proven effective before and is essential now. Industry representatives bring valuable expertise that can be extremely helpful to the Committee. This is not the time to eliminate them from this important function.

2. The Department of Social Services can improve financial oversight by conducting cost report audits on a timely basis and by using the wealth of information available through cost reports to monitor nursing home financial health.

Section 5 of Bill 845 and Section 3 of Bills 6400 and 450 require that nursing homes obtain an annual financial audit of its operations and submit the audit report to DSS. In addition, these sections permit DSS to require submission of quarterly accounts payable reports. If these reports indicate that the facility may be experiencing financial distress, then DSS can require the facility to submit additional financial information. Further

reporting is necessary if the facility has undergone an “adverse change in financial condition.”

- The not-for-profit nursing homes undergo an annual independent financial audit and therefore his provision would not necessarily be onerous to these facilities. However, there are for-profit homes concerned about the added expense of an annual independent audit.
- The criteria for determining an adverse change in financial condition is reasonable, but we must draw attention to the fact that the third condition, “a high proportion of accounts receivable more than ninety days old,” would most likely be due to the large portion of your Medicaid applications to the Department of Social Services that are held as pending. The increasing number of pending Medicaid applications is a source of great financial stress for all nursing homes and should be addressed by the Legislature.
- We have some concerns as to the extent that any additional financial reports would be subject to freedom of information statutes.

RECOMMENDATION: In order to facilitate a timely and efficient method of monitoring the financial health of nursing homes, we recommend that the improved monitoring of financial health be done through an annual review of key indicators that can be derived from the Medicaid costs reports already submitted annually by each nursing home. Key indicators could include revenues, accounts receivable and accounts payable information that can be analyzed and trended and an annual basis. (NOTE: *The annual cost reports currently submitted by each nursing home provide a wealth of information.* We believe that the state needs only to require that DSS audit these cost reports in a timely manner and instruct the DSS auditors to review the financial information that is provided in addition to cost information.)

3. Financial viability of nursing homes is not enhanced by the imposition of arbitrary caps on rent and indebtedness.

Section 8 of Bill 845 and Section 6 of Bills 6400 and 450 require the Commissioner of Social Services, in consultation with the Banking Commissioner and the Executive Director of the Connecticut Health and Educational Facilities Authority, to establish “reasonable rates of indebtedness and reasonable real property lease payments” for nursing homes. They further prohibit nursing home from increasing lease payments or indebtedness beyond such “reasonable rates” unless approved by the Commissioner of Social Services. In addition, they dictate that loan proceeds in which a nursing home has pledged, granted a lien or otherwise encumbered assets “shall be used solely for the purpose of operating such nursing facility or providing improvements to the nursing home facility unless approved by the Commissioner of Social Services.” Failure to comply can result in disciplinary action before the Department of Public Health and civil penalties.

- While most CANPFA members own their facilities and do not pay rent, some CANPFA members do make lease payments. CANPFA is therefore concerned about the proposed imposition of a cap on rent paid by a nursing home because both the rent cap and the loan cap extend beyond regulation of Medicaid costs. They regulate private contracts – even for those facilities that do not participate in Medicaid.
- **CANPFA strongly opposes the cap on indebtedness.** First and foremost, imposition of a cap will not ensure financial viability; in fact, these provisions could stifle expansion, reorganization and renovation of quality facilities by limiting their ability to borrow under circumstances when taking on additional indebtedness would not jeopardize the facility’s financial health. Second, the standard used both for the rent and indebtedness cap– establishment of “reasonable rates” -- is vague and arbitrary.” What are “reasonable rates of indebtedness”? No standards are established for determining these rates. The proposed legislation simply provides no guidance. Rather, the bills delegate legislative function to regulatory agencies with no articulated legislative policy or primary standards or principles to which they must conform. There could be a claim under well-established case law in Connecticut that this constitutes an unconstitutional delegation of legislative authority. See State v. Stoddard, 126 Conn. 623 (1940); Mitchell v. King, 169 Conn. 140 (1975) and Town of Milford v. SCA Services of Connecticut, Inc., 174 Conn. 146 (1977).
- Even more troubling for CANPFA members are the provisions that limit use of loan proceeds. These provisions are unacceptable. They could negatively affect many CANPFA members that provide services along the continuum. It is possible that a non-profit organization with housing and/or other services might seek financing for general campus improvements or expansions that include the nursing home. This provision effectively would prohibit the member from spending loan proceeds on anything but the nursing home segment of the continuum and may also preclude refinancing – use of loan proceeds to pay off a prior loan does not appear to be a permitted use.
- Finally, while these bills establish a process for obtaining approval to exceed caps and to use loan proceeds for other purposes related to the facility, the process vests the Commissioner with unfettered discretion. In the case of rent and indebtedness caps, the Commissioner may approve the request “only if the commissioner determines that such request will not materially adversely affect the financial viability of the facility or the quality of patient care.” There are no articulated standards defining what it means to “materially adversely affect” financial viability or patient care. Moreover, there is no right to appeal a determination.

4. The definition of “severe financial distress” is overly broad and based on the criteria listed; most nursing homes in the state would qualify for receivership.

Section 15 of Bill 845 and Section 13 of Bills 6400 and 450 address imposition of receiverships in the event that a facility is in “severe financial distress.”

- First, we believe that the definition of “severe financial distress” is much too broad, vague and subjective. In Bill 6400, it is also unclear as to whether all six criteria must be reached in order to be considered in distress or if just one will trigger the determination. However, Bills 845 and 450 separate the criteria with “or,” signifying that any one could trigger receivership. For example, “minimal equity or reserves for more than one fiscal year” alone would constitute “severe financial distress” and lead to imposition of a receivership.
- Second, we also object to the expansion of authority that empowers the state to appoint a receiver not only for the nursing home, but also for various other legal entities associated with that nursing home, including any owner of real property where the nursing home is located. This is of great concern because many non-profit nursing homes are affiliated with larger sponsoring entities such as churches, fraternal organizations, and trusts which would possibly be subject to state receivership based upon the financial condition of the nursing home.

Other Items:

- **CON for Transfer of Ownership or Control.** Bill 845, Section 3 and Bills 6400 and 450, Section 1 require CON approval when a facility “transfers all or part of its ownership or control.” The only objection we have to this proposed, additional CON requirement is a practical one. The requirement would add to transaction costs because facilities may need to engage legal counsel and/or consultants for the CON process. Moreover, it could delay transactions; currently, it often takes 4 to 6 months to secure CON approval, but such a delay could seriously hamper nursing home sales, which often must occur quickly, particularly in distressed situations. A corporate restructuring could also trigger this new CON provision. For example, if a health care system that includes a non-profit nursing home went through a corporate reorganization that changes the sole member of the nursing home entity, then CON approval would be necessary.

RECOMMENDATION: If this was not the intent, then we suggest that this provision be limited to facility sales, or that an expedited process be established for partial transfers of ownership due to restructuring.

- **Caps on Related Party Management Fees.** Bill 845, Section 6 and Bills 6400 and 450, Section 4 impose caps on management fees paid to related parties. DSS already limits the extent to which it will recognize management fees for purposes of Medicaid rates. However, this section goes well beyond caps on

costs covered by Medicaid rates. It attempts to regulate private contracts through an overall cap on management fees that can be charged. While the section is limited to related party management contracts, it raises concerns as to whether it unlawfully interferes with contracts. Moreover, the definition of "related party" is overly broad, and as such would cover a wide range of relationships (including mere "business associations.").

- **DPH Subpoena Authority.** Section 12 of Bill 845 and Section 10 of Bills 6400 and 450 propose to amend Conn. Gen. Stat. § 19a-498 to permit the Department of Public Health to issue subpoenas and order the production of books, records or other documents in an inquiry, investigation or hearing. While CANPFA recognizes that DPH has broad investigative authority over licensed health care institutions that includes the ability to initiate formal enforcement proceedings when warranted by statute, we are nonetheless concerned about this proposed revision. It is so broadly written that it could result in DPH overstepping its authority into financial investigations, or using these more formal investigative tools in situations where they are neither necessary nor appropriate.

Thank you for this opportunity to comment and please contact me if you have any questions regarding this testimony.

Mag Morelli, President

CANPFA

1340 Worthington Ridge, Berlin, CT 06037

(860) 828-2903 fax (860) 828-8694, mmorelli@canpfa.org