

CONNECTICUT ASSOCIATION OF HEALTH CARE FACILITIES, INC.

February 11, 2010

Written testimony of Chris Wright, President of the Connecticut Association of Health Care Facilities (CAHCF), Inc., before the Appropriations Committee in Opposition to Governor Rell's SFY 2011 Midterm Budget Adjustment Recommendation

Good afternoon Senator Harp, Representative Geragosian and to the members of the Appropriations Committee. My name is Chris Wright. I am President of the Connecticut Association of Health Care Facilities (CAHCF), our state's 110-member trade association of proprietary and-not-for profit skilled nursing facilities. I appreciate this opportunity to submit written testimony for today's public hearing record.

While the longstanding Medicaid budget shortfalls and inadequacy of Connecticut's Medicaid funding system for nursing homes remain the central area of concern, I will address my written remarks first to the Governor's recommended SFY 2011 Midterm Budget Adjustment, insofar as it proposes no changes to the underlying two-year budget in the area of nursing home Medicaid rates. As members of the Appropriations Committee know, the adopted SFY 2010-2011 Connecticut State Budget included almost \$300 million in reductions for Connecticut's nursing homes. Approximately, \$180 million in reductions will be experienced beginning July 1, 2010. There has been no rate increase since 2007.

Last November, on the heels of the very deep cuts to Connecticut nursing homes, Governor Rell proposed an additional two-percent reduction in the last state budget deficit mitigation plan---this at a time when millions in Medicare cuts to Connecticut nursing homes were being experienced, and still further cuts proposed by Congress under the now-stalled federal healthcare reform legislation. For the quality of care that would be undermined, and for the further nursing homes jobs that would have been lost, the Connecticut General Assembly rejected these ill-advised additional cuts. But the underlying reductions in the adopted two-year budget still stand.

Connecticut nursing homes remain in a period of financial instability. One need look no further than the well publicized bankruptcies and receiverships for the evidence. Or perhaps look to the five homes that have closed in the last two years. Or look to the dozens more at the doorsteps of our state government seeking interim rate and hardship rate relief from the Medicaid program.

To protect our 110 member facilities, our residents and employees, CAHCF filed a lawsuit against the Governor on January 28, 2010 in federal court, charging that the state's system for paying Medicaid-participating nursing homes violates federal law. The annual Medicaid budget shortfalls and inadequacy of Connecticut's Medicaid funding system for nursing homes have been well-documented. With the filing of this lawsuit our association has said that the system is broken and unlawful.

Our lawsuit boils down to this: Connecticut's Medicaid rate-setting system violates very clear rules found in federal law. The federal law that Connecticut ignores requires that payments to Connecticut nursing facilities be consistent with efficiency, economy, quality and equality of access to care. However, by using payment methodologies that bear no relationship to the cost of care, Connecticut guarantees that the requirements of federal law will not be met.

There is no evidence that Connecticut sets federally required payment rates to nursing facilities on an objective, reasonable and principled basis. Indeed, for years, various state-sponsored studies have found that the reimbursement system does not "adequately reflect the actual costs of wages, benefits and staffing." In addition, the state's payment system constitutes a taking of private property without just compensation in violation of the United States Constitution and the Connecticut Constitution.

Our member facilities have a fundamental right to be justly compensated for the quality services they provide. Once more, the longstanding Medicaid funding shortfall and its unfair consequences are well-documented as private payers, Medicare beneficiaries, and nursing homes have been forced to subsidize the state's failure to pay its legitimate fair share of these costs. In shifting the financial burden away from itself, Connecticut has achieved a considerable benefit by not paying the full costs, while imposing those costs, like a stealth tax, on a shrinking group of nursing home residents and their families, on our employees and on our facilities. Once again, this is not just our position. State-sponsored studies have come to the same conclusion for many years.

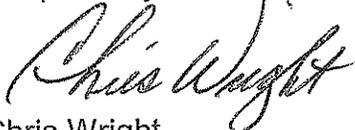
Our lawsuit exposes this policy as an unfair and unlawful tax on a few to subsidize Medicaid costs that ought to be, but are not, paid by the state. Once again, this policy is driven by budget considerations rather than the needs of our residents, our employees or our facilities.

Our lawsuit records this history in great detail, from the state's yearly decisions to override the requirements of the state's statutorily based rate system in favor of an inadequate and arbitrary formula tied solely to the annual appropriations bill and budget implementation legislation. A copy of the Complaint is attached to this testimony along with a Frequently Asked Questions (FAQ) document.

As has recently occurred in California and Washington State, CAHCF has filed its lawsuit as a last resort to compel the state to comply with federal law so that Connecticut can have a system of nursing facility reimbursement that justly reconciles the cost of providing care to our state's most vulnerable and the rates Connecticut pays to provide that care. Though it is regrettable that we must resort to these means, it is clear to us that Connecticut is poised to continue on its unlawful path, unless the state is compelled to do the right, and lawful, thing by the United States District Court.

I thank the Appropriations Committee for its leadership on behalf of Connecticut's elderly and most vulnerable residents. CAHCF is committed to working with the Connecticut General Assembly during its upcoming session, as well as with Governor Rell, in an effort to fix the State's Medicaid payment system for nursing facilities. However, the filing of litigation was necessary to ensure that if these legislative efforts fail, CAHCF's members will receive the full protection afforded by federal law.

Respectfully submitted,



Chris Wright
CAHCF President

Frequently Asked Questions:
Connecticut Association of Health Care Facilities, Inc. v. Rell

- 1. Why has the Connecticut Association of Health Care Facilities, Inc. (CAHCF) filed a federal lawsuit on behalf of its members against the Governor of Connecticut, M. Jodi Rell?**

CAHCF believes that Connecticut's payment methodology for Medicaid-participating nursing facilities is broken—so broken that it violates federal law. CAHCF has filed its lawsuit in the United States District Court for the District of Connecticut as a last resort to compel the State to comply with federal law.

- 2. What is the lawsuit's principal legal argument?**

CAHCF's principal legal argument is that Connecticut's payment system for Medicaid-participating nursing facilities conflicts with federal law. The United States Constitution instructs that when state law conflicts with federal law, federal law controls. Federal law requires States to assure that their Medicaid payments are consistent with efficiency, economy, quality of care, and equality of access. However, Connecticut uses a methodology that sets payment rates based solely on state budgetary concerns, regardless of whether the amount spent—or the process used to determine the amount to be spent—assures that payments are consistent with efficiency, economy, quality of care, and equality of access. Therefore, the United States Constitution instructs that Connecticut's conflicting payment methodology is null and void.

- 3. Does CAHCF's lawsuit seek to break new legal ground?**

No. CAHCF's principal legal argument is similar to that used by Medicaid providers in California and Washington State. Like Connecticut, California and Washington State recently cut Medicaid payment rates based solely on state budgetary concerns. Federal courts at both the trial and appellate levels have issued orders stopping those rate cuts after finding that they conflicted with federal law.

- 4. Why now?**

As explained in detail by CAHCF's Complaint for Declaratory and Injunctive Relief, studies performed by the State itself have confirmed that Connecticut's payment methodology for Medicaid-participating nursing facilities is broken. CAHCF has done everything in its power to effect change legislatively, to no avail. Therefore, CAHCF has filed its lawsuit as a last resort to compel the State to comply with federal law.

- 5. What makes nursing facilities so special that CAHCF thinks its members deserve higher Medicaid payments?**

Nursing facilities care for the most frail and elderly members of our society. However, the long-term care industry in Connecticut is in a state of crisis, as reflected by the wave

of bankruptcies and state receiverships over the last several years, as well as the skyrocketing number of nursing facilities that have been forced to ask the State for emergency rate increases to stave off bankruptcy and/or state receivership.

Furthermore, it is a fundamental American value that when a government purchases goods and services, it should have to pay a fair price. At a minimum, that price should cover the reasonable cost of providing the goods and services. Connecticut's Medicaid program, however, has long paid most nursing facilities less than the reasonable cost of providing care to Medicaid beneficiaries. That fact was recently acknowledged by the Supreme Court of Connecticut, which issued a ruling in 2009 (*St. Joseph's Living Center, Inc. v. Town of Windham*) recognizing that Connecticut's Medicaid payments do not fully compensate most nursing facilities for actual patient care costs. This funding gap, the Supreme Court of Connecticut explained, relieves the State of having to shoulder the entire financial burden of caring for the indigent elderly. Instead, nursing facilities must try to make up for the Medicaid funding gap by, among other things, increasing the rates charged to private individuals and private insurance. Those nursing facilities that are unable to do so struggle financially, as reflected by the wave of bankruptcies and state receiverships over the last several years, as well as the skyrocketing number of nursing facilities that have been forced to ask the State for emergency rate increases to stave off bankruptcy and/or state receivership.

6. Why does CAHCF's lawsuit name only Governor Rell as a defendant? Does CAHCF have something against Governor Rell personally?

No. Governor Rell is named as the sole defendant because she is the State's chief executive officer. Therefore, she is legally responsible for the official actions taken not only by her, but by subordinate state officials as well. Naming a State's chief executive officer as the defendant is a well-established practice in federal lawsuits of this kind because neither a State's sovereign immunity nor the United States Constitution preclude a lawsuit in federal court that seeks to stop ongoing violations of federal law.

7. What relief does CAHCF's lawsuit seek?

CAHCF's lawsuit does not seek money damages from the State or from Governor Rell. Instead, CAHCF's lawsuit asks the court to issue an injunction that, among other things, requires Governor Rell to comply with federal law by assuring that Medicaid payments to nursing facilities are consistent with efficiency, economy, quality of care, and equality of access. For example, after years of underpayment, most nursing facilities were scheduled to receive a significant increase in their payment rates due to a longstanding state statutory requirement that payment rates be adjusted periodically so that changing conditions impacting the cost of providing nursing facility services are taken into account during the process of establishing nursing facility payments. However, based solely on state budgetary considerations, legislation recently signed by Governor Rell eliminated the scheduled adjustments and froze most nursing facilities' payment rates at their already-depressed levels until July 1, 2011.

8. Is CAHCF's lawsuit related to the lawsuit challenging Connecticut's decision to cut Medicaid services for certain non-citizens?

No. The lawsuit challenging Connecticut's decision to cut Medicaid services for certain non-citizens (*Pham v. Starkowski*) is a separate lawsuit pending in state court that raises constitutional issues that are different from those raised by CAHCF's lawsuit in federal court. The two lawsuits share one common attribute, however: both raise legal questions related to Connecticut Public Act 09-5, September Special Session, 2009, which implements Medicaid-related aspects of the state budget for state fiscal years 2010 and 2011.

9. What is the timeframe for action by the court in CAHCF's lawsuit and what happens next?

CAHCF's Complaint for Declaratory and Injunctive Relief was filed on January 28, 2010. It typically takes the court up to 24 hours to assign a docket number, assign a judge, and issue a summons. Once served, Governor Rell will have 21 days to file a formal response to CAHCF's complaint in the form of an answer or a motion to dismiss.

10. Will CAHCF's lawsuit be the only avenue used to fix the State's payment system for Medicaid-participating nursing facilities?

No. CAHCF will continue to work with the General Assembly during its upcoming session, as well as Governor Rell, in an effort to fix the State's Medicaid payment system for nursing facilities. However, the filing of litigation was necessary to ensure that if these legislative efforts fail, CAHCF's members will receive the full protection afforded by federal law.

11. Is CAHCF's lawsuit in any way related to recommendations contained in the Long-Term Care Plan or other recommendations to create a balance of long-term care services between institutional and community-based settings?

No. Those recommendations are about providing care in the most appropriate care setting and are not related to the payment methodology for long-term care services provided in institutional settings.

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