

Testimony to the State Commission on Patient Safety

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Good day. I'd like to thank the commission for the opportunity to provide information to you today on a critical patient safety issue for residents of long term care facilities. My name is Kate White and am the Executive Director of Elder Law of Michigan, Inc., a private non-profit (501 c3) organization. Our mission is to promote and protect the rights of seniors in Michigan through information, advocacy and legal advice. Our organization was home to the Michigan Office of the State Long Term Care Ombudsman from 2001-2003. It was while working with the Ombudsman's Program that I became aware of a basic and critical need for improved temperature control in Michigan's nursing homes.

The Problem

The problem is easily stated: it's too hot during the summer in too many Michigan nursing homes for residents, visitors, and caregivers. Interior temperatures in nursing homes rising into the high 80s, 90s, and higher are not infrequent occurrences during Michigan summers.

These temperatures create genuine health risks to frail and elderly residents who frequently have compromised temperature regulation processes. They also create basic comfort issues for residents and visitors, as well as productivity and additional workload issues for caregiving staff.

The Current Law Concerning Nursing Home Temperatures:

The current federal regulation that addresses temperatures in Medicare and Medicaid-certified nursing homes, [42 CFR 483.15(h)(6)], requires that: "The facility must provide...Comfortable and safe temperature levels. Facilities initially certified after October 1, 1990 must maintain a temperature range of 71-81 degrees F ..."

The only specific nursing home temperature standard currently in state law is a 72 degree F *minimum* temperature standard set forth in the Michigan Administrative Code, R325.21320(2). Additional "state rules" that specify the 71-81 degree standard for nursing home rooms are included in the "Minimum Design Standards for Health Care Facilities in Michigan" that were published in 1998 and adopted by the state in MCL 333.20145 by '02 Act 683. However, these Minimum Design Standards are only applicable to facilities that are planning "construction, additions, and modernizations...with a capital expenditure of \$1,000,000.00 or more". These standards do not apply retroactively to existing homes that don't undergo renovations reaching this threshold amount

In short, *there is no specific maximum temperature standard in existing federal or state law that applies to the majority of Michigan's older nursing homes.* This is a problem that we hope the commission will address before we experience another summer in Michigan.

What We Would Like you to Consider:

We seek your support to pass the original version of HB 5537. HB 5537 is currently in its 3 draft and has passed the state house. Strong leadership by this commission in partnership with the Granholm administration could do much to improve the quality of lives of some of Michigan's most vulnerable residents. The bill applies the federal 71-81 degree range to all areas accessible to "residents, employees, *and* visitors" to all nursing homes in this state. This limits the application of the mandated range to areas where all three of these categories of

people may ordinarily be. We did not intend for these limits to apply to nursing homes' kitchens, laundry rooms, furnace rooms, or storage areas that aren't generally accessible to residents or. If an area is ordinarily used only by employees (i.e.: the kitchen, laundry, furnace room), the temperature limitations would not apply---presumably kitchen, laundry, and boiler maintenance employees signed up for work hot duty environments.

Rationales and Concerns:

Residents comfort and health during Michigan's hot summer months should not be adversely affected by a placement choice that may not have been made by them at all, and that many are not free to easily change. Nursing home residents, for a number of reasons, really aren't free to take the business of their care to another provider who has air-conditioned; the "market" for nursing home care hasn't seemed to really work to prompt this sort of improvement.

There is an enforcement issue. Surveyors have tended to focus on the "safe" prong of the federal regulation's general temperature requirement, to the general exclusion of the "comfortable" requirement. Some surveyors and many providers argue that many older residents will say that they are perfectly comfortable with higher temperatures than most people would tolerate. They can point to residents who choose to wear sweaters when temperatures are into the 80s and higher.

Their point is well taken, but only to a limited extent. Because of diminished circulatory functions and also because of cognitive impairments that impact their awareness, many older people do prefer warmer room temperatures than you or I would find comfortable. This may justify room temperatures that are at the high end of the 71-81 degree range, but residents become noticeably more listless and inactive at higher temperatures.

Most residents can be kept comfortable within the 71-81 degree range, hence its

adoption as the standard for new nursing home construction and renovation. Some providers will argue that getting 2-4 resident/roommates to agree on one temperature setting for their comfort will be difficult. This may be so, but no one suggests that other places of public accommodation should not be temperature controlled for this reason. No hotel or hospital decides to leave their facilities without air conditioning in order to spare their guests some debate among themselves about whether their shared room is too hot or too cold.

Previous Efforts to Address This Issue:

The MDCIS's Bureau of Health Systems, now MDCH, published guidance to nursing homes in 2000 and again in 2002 on how to deal with high room temperatures in the absence of effective air-conditioning. Shortened to its essence, they recommend that residents have access to fans, that they are kept hydrated, and that heightened attention be focused on indicators of heat-related injuries. The mere existence of this alert is evidence that too many Michigan nursing homes remain operating too often with inadequate temperature controls.

What capacity do nursing homes in the state have to control temperatures in warm weather? Simply put, we don't really know. Because air-conditioning systems are not required in older homes, the existence or functionality of these systems has not been a regular point of scrutiny by the MDCH and, hence, they have no records of which homes are air-conditioned and which are not.

Most nursing homes in Michigan were initially certified before the 10/1/1990 date that trips the existing federal 71-81 degree standard. Most of Michigan's nursing homes were built during the 1960s and early 1970s and were either not equipped with air-conditioning or were only partially air-conditioned (typically hallways, common dining and day rooms, and the administrative offices). Some have been retrofitted with partial or complete air-conditioning systems in these areas, but many remain either only partially cooled and a smaller number remain that are not cooled at all.

There is no comprehensive listing or description of the air-conditioning systems maintained by MDCIS or by the provider groups. The question "Is this home air-conditioned?" would often not be accurately answered by a "yes" or "no" response. The complete answer for many homes would be "partially"; some areas are cooled while most resident rooms are not.

While determining of the scope of the problem is an important to solving it, it is plain that homes that serve our state's frailest and elderly need to meet temperature standards that are taken for granted in nearly any other place of public accommodation. Few of us would spend even a short amount time on hot summer days or nights in shopping malls, restaurants, hotels, physicians' offices, or hospitals if they featured interior temperatures in the high 80s, 90s, or higher. There are, in fact, correctional facilities in Michigan with better hot weather temperature control mechanisms than some nursing homes. The frail and elderly certainly deserve a day-to-day living environment that meets contemporary standards for safety and comfort. Michigan needs to adopt this standard for all of its nursing homes.

I have attached some additional documents that I think you will find of interest on this topic. Thank you for your time and generous consideration. I'm happy to answer any questions you may have and I can be reached at kwhite@elderslaw.org or 517.485.9164 ex. 236.

Frequently Asked Questions About HB 5537, Legislation Establishing Safe Temperature Standards for Michigan Nursing Homes

Q: How does this get paid for?

A: To begin with, not all nursing homes will have to do anything more than they already are to meet the proposed temperature standard. About half of the state's nursing homes are already able to meet the proposed temperature standard without additional equipment procurement or improvements. About half of the state's nursing homes will need some equipment enhancements.

Industry representatives have said that, from their surveys of their members, the cost of meeting the proposed temperature standard will total about \$75 million dollars for those homes that cannot currently meet the standard. This figure is the estimated one-time cost of procuring the necessary equipment to meet the standard, and can be spread over the 3-year compliance period allowed by the HB5537. There will, of course, be on-going costs for electricity and maintenance to operate the systems during periods of hot weather, but objections to the standard have focused entirely upon the procurement costs, rather than operating expenses that are spread over time. There are suggested options for financing the needed cooling equipment without creating additional expenditure burdens for the Michigan Medicaid Program.

One option would be to use of a portion of existing "tenure payments" (also known as the "return on current asset value" component) of nursing homes' current reimbursements for this purpose. According to officials at the Michigan Dept. of Community Health, the state currently makes "tenure payments" totaling \$33 million dollars each year to the state's 429 nursing homes. These payments are made in lieu of payments for capital depreciation expenses and are intended, but are not required, to be applied to capital expenses.

If a portion of these funds were directed over a period of several years (i.e.: during the phase-in period that the proposed standard already includes) to the capital improvements needed to meet the proposed temperature standard, no new additional state funds would be required.

It should be made clear that these tenure payments are not made for specific items of reimbursement; the nursing homes receive these payments without incurring specific expenses and may do with the funds as they see fit. The intent of the payments is to provide funds for capital improvements and replacement, to incentivize stable ownership, and avoid repeated state expenditures for depreciation expense claims that would otherwise be made by successive owners of these facilities. Some homes currently do use these monies for capital improvements and replacement; others treat them as their investment return or profit.

An issue with the use of these monies may be the difficulty in aggregating these funds for use by those facilities in need of equipment upgrades to meet the proposed temperature standard. Presently, all homes receive these payments which vary in amount based on the length of facility ownership (i.e.: "tenure") and the facility's current asset value. The average of these annual payments is approximately \$77,000/yr. (\$33million/429 nursing homes). Some homes receive considerably more, and others less, depending upon how long their ownership has been in place and their current asset values.

Two problems with this arise: Requiring those facilities that need additional HVAC equipment to procure it from tenure payment funds which each facility is currently getting, may mean that some facilities are unable to procure the needed additional equipment to meet the standard in a timely manner. Additionally, some homes that need additional equipment to meet the proposed standard may have other competing, pressing capital improvement/replacement projects planned for these same funds. Aggregating tenure payments from all facilities, and applying those aggregated funds in the short term—not in perpetuity---to this need is potentially possible, though it will be strenuously objected to by those facilities that essentially become "donors" to facilities that have not had the foresight upgrade their facilities' HVAC systems or that have had unstable, or profit-minded managements. At a minimum, changes to the State Medicaid Plan with the federal government would likely be needed to fund the needed improvements in this manner.

Another other revenue/expenditure-neutral manner for funding improvements needed to meet the proposed temperature standard would be to direct the use of a portion of the new Quality Assurance Assessment Program (QAAP) funds to this specific purpose.

Medicaid reimbursements to nursing home providers have been dramatically increased recently (a net increase of approximately 12%) by the application of a provider bed tax that has netted substantial reimbursement gains from the federal government. These additional Medicaid funds have been paid to the nursing homes without any specification about how these funds are to be used. It will be claimed by industry representatives that the QAAP monies are already spoken for, or that these reimbursement increases compensate for previously forgone inflationary adjustments. These latter claims are belied by the underlying truth that average nursing home reimbursements for variable costs have doubled since 1994. Some homes have made plans to increase employee wages and benefits with a portion of these funds, a purpose that the proponents of HB5537 cannot object to. Some have other plans for these funds which are not related to improving the quality of care provided to residents.

It seems reasonable that a small fraction of future Quality Assurance Assessment Program payments be directed to basic infrastructure

improvements, such as enhanced HVAC systems, that demonstrably improve the quality of residents' lives in these facilities.

There is some concern by officials at MDCH that, apart from these possible funding streams, facilities whose current asset values are below certain specified maximums may make needed improvements near the tail end of the compliance period, and will then simply "plant cost-certify" these expenditures under existing Medicaid provisions. This "plant cost certification" process would make those nursing homes eligible for additional immediate reimbursements for the expenses needed to meet the proposed temperature standard. These reimbursement demands could create a potential "surge" on the state's Medicaid program funds that could increase the state's overall Medicaid burden that would not be revenue/expenditure neutral.

Regardless of funding mechanism chosen, then, it'll be necessary to manage and sequence the process of upgrading those facilities that need additional equipment in a way that achieves the standards in a timely manner and spreads the burden of these costs fairly and in a predictable manner.

Current Nursing Home Temperature Standards in Michigan

The current federal regulation on NH temperature regulation:

[42 CFR 483.15h(6)] requires that:

"The facility must provide...Comfortable and safe temperature levels. *Facilities initially certified after October 1, 1990 must maintain a temperature range of 71-81 degrees F ...*"

Current state law temperature standards: A *minimum* temperature standard of 72 degrees F is required in nursing homes by the Michigan Administrative Code, R325.21320(2).

There is currently no specific maximum permissible temperature standard that applies to most of Michigan's nursing homes (those certified before 10/1/90) in either state or federal law or regulation...

There are other "state rules", namely the "Minimum Design Standards for Health Care Facilities in Michigan", (published in 1998 and adopted by the state in MCL 333.20145 by '02 Act 683), that specify the same 71-81 degree temperature limits as the federal regulation, but *this rule only applies to nursing homes that are planning "construction, additions, modernizations with a capital expenditure of \$1,000,000.00 or more". There is no retroactive application of these standards to existing facilities that are not doing construction or renovations of this magnitude.*

The absence of an applicable state or federal maximum temperature standard for most of Michigan's nursing homes, the vast majority of which were constructed and certified prior to 10/1/90, is the problem Elder Law of Michigan, Inc. wants to address with HB 5537.

HB 5537 applies the federal 71-81 degree range to all areas accessible to "residents, employees, *and* visitors". This limits the application of the mandated range to areas where all three of these categories of people may ordinarily be. This standard is not intended to apply to nursing homes' kitchens, laundry rooms, furnace rooms, or storage areas that aren't generally accessible to residents or visitors. If an area is ordinarily used only by employees (i.e.: the kitchen, laundry, furnace room), the temperature limitations in this bill would not apply to these areas (presumably kitchen, laundry, and boiler maintenance employees signed up for hot duty environments).