



To: Representative Fred Patton, Chair and Members, House Judiciary Committee
From: Rachel Monger, President/CEO
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Testimony in Opposition to House Bill 2246

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, home 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.

The Role of Assisted Living in Long Term Care

Assisted living first appeared in the U.S. in the early 1980s and has grown exponentially as an affordable residential option between independent living and nursing home care. Assisted living is meant for older people who need some assistance in their daily lives, but do not need the higher level of health care and daily support provided in a nursing home. The most common assistance offered in assisted living is medication management and help with some basic activities such as bathing or dressing. Assisted living also will supply housekeeping, laundry and meal services. Another reason for the popularity of assisted living is the cost. The monthly cost of assisted living is usually half that of a nursing home, sometimes even less. Costs are lower in assisted living because it does not provide anywhere near the level of staffing, services or care as a nursing home.

Assisted living facilities were never intended to be used as nursing homes and Kansas law is even written to prevent that from happening. KAR 26-41-200(a) states in part:

...the administrator or operator shall ensure that any resident who has one or more of the following conditions is not admitted or retained unless the negotiated service agreement includes services sufficient to meet the needs of the resident:

- (1) Incontinence, if the resident cannot or will not participate in management of the problem;
- (2) immobility, if the resident is totally dependent on another person's assistance to exit the building;
- (3) any ongoing condition requiring two or more persons to physically assist the resident;
- (4) any ongoing, skilled nursing intervention needed 24 hours a day; or
- (5) any behavioral symptom that exceeds manageability.

Assisted Living Facilities Are Not Nursing Homes or Residential Landlords

We have seen proponents of HB 2246 argue that nursing home residents have discharge appeal rights and tenants have protections under landlord tenant laws and therefore the same should be given to assisted living residents. However, assisted living and other residential care settings are not at all equivalent to landlords or nursing home operators.

Landlords: The difference between an assisted living and a landlord are obvious – landlords are not legally responsible for the daily health and welfare of their tenants. Delaying an eviction while legal issues are worked out in court does not endanger anyone’s life and does not force the landlord into violating laws and regulations central to their existence.

Nursing Homes: The nursing home issue is a little more complex. The involuntary discharge appeal rights of nursing home residents is set out in federal law. The primary reason behind the discharge appeal right is related to federal regulations surrounding nursing home admissions and care. Under federal regulation, when a nursing home admits a resident they are agreeing to care for that resident in every way, and if the resident’s care needs change the nursing home must provide services to meet those needs with very few exceptions. Federal regulators believe the appeal process is necessary because if challenged, the nursing home must justify why they should be exempt from the requirement to meet all resident care needs.

Assisted Living: Under Kansas regulation, the care and services to be provided by an assisted living is set out in a document called the negotiated services agreement (NSA). The NSA provides a detailed description of the services to be provided to the resident, their frequency and the cost of each service. If a resident’s care needs change or intensify the facility is not required to meet those needs if they fall outside of the NSA. An assisted living may choose to establish a new NSA with the resident if the facility determines that their needs can still be met. If the facility cannot meet the resident’s needs the resident must be discharged to another setting. This is very different from a nursing home which is required to meet all resident care needs no matter how great or complex.

The Dangers of House Bill 2246

HB 2246 would require a residential care facility to retain and care for a resident while their discharge appeal is pending. The appeal could take weeks if the resident schedules an administrative hearing with the State. It could take months if the resident does not like the administrative decision and exercises their right to further appeal it to an agency head and then to court for judicial review. Seriously harmful things can happen to a resident in far less than a few weeks if the facility is not able to properly meet their needs.

Forcing an assisted living facility to retain a resident whose needs it cannot meet has wide-ranging and seriously negative effects on the health and safety of residents, and the continued affordability and operations of residential care settings.

Consequences of forcing an assisted living facility to retain a resident for whom they cannot properly care:

- **Endangers the health and safety of the resident in need of more care and supervision**
Just because a resident may not want to transition to a higher level of care does not mean that the assisted living facility is capable of providing the care they need to maintain the resident's health and safety. Assisted living does not have the medical staff, nursing staff or even physical environment to address higher level health and behavioral needs of residents.
- **Endangers the health and safety of other residents and staff in the facility**
A common reason behind involuntary discharges is behavioral health needs of a resident that extend beyond what can be offered at the assisted living facility. As dementia symptoms progress, the sufferer may display physically, sexually and/or verbally aggressive behaviors toward others. The sufferer may also become easily disoriented and confused about their surroundings, leading them to wander into others' living areas. Most assisted living settings do not have the staff or physical environment to provide the protections and supervision necessary to keep residents safe from each other in those situations. These situations easily lead to resident harm.
- **Sharp increase in assisted living cost for all assisted living residents**
If assisted living is to be forced to provide nursing home level care they will be forced to charge like a nursing home. Bills may actually be higher than a nursing home because Medicaid and Medicare do not contribute to assisted living board and care charges. We believe that Kansans want to preserve an array of affordable choices for seniors who need some help but are not at the point of needing nursing home care. It is the exact reason assisted living and other residential care options were invented and continue to increase in popularity.
- **Less flexibility and more selective criteria for assisted living applicants**
If assisted living facilities know that they may be forced to provide nursing home level services to a resident they will immediately start a vigorous screening process at the front end to minimize their risk of admitting less healthy and potential higher needs individuals. They will also create far stricter resident criteria for those they will admit and make discharge decisions far more quickly. It will force many seniors to go to low quality assisted living facilities who do not care about meeting any resident's needs or they will be shut out of the market altogether.
- **Neglect and abuse lawsuits against staff and operators of the facility**
Under Kansas laws and regulations, assisted living and other resident care settings are responsible for the health and welfare of their residents. That is why the law requires facilities to discharge residents whose needs they cannot meet. HB 2246 puts providers in an impossible situation. When the facility cannot meet a resident's needs and their health and safety are affected, the facility becomes vulnerable to civil claims, regulatory punishments and a ruined reputation in their community.

Concerns with Specific Sections of HB 2246

Requirements Prior to Issuing 30 Day Notice of Involuntary Discharge

- We strongly disagree with forcing a facility to issue a preliminary version of an involuntary discharge to the resident, then require a resident and family conference be held at an indeterminate date, attempt to resolve the reason for discharge when services needs go beyond

the scope of the negotiated services agreement, and get permission from the resident's physician to proceed with discharge.

- The reasons for discharge may not have risen to an emergency status yet, but the involuntary discharge is being sought due to an inability to meet the residents' needs and/or dangers to the resident and those around them. For the safety of all involved and fairness for operators there must not be inordinate delays and unnecessary government obstacles just to issue a notice of involuntary discharge.
- There is no statute or regulation that requires an assisted living setting to take action to avoid a transfer or discharge. Resident care services are governed by contract. By existing regulation, when an assisted living issues an involuntary discharge notice it is because the facility cannot meet the resident's needs, the resident is a danger to themselves or others, or there's a technical reason like facility closure or the resident has failed to pay their bill. Nearly any action that an assisted living could take to avoid discharge would also require the assisted living facility to renegotiate a service agreement, alter their scope of services and/or change resident criteria policies. We strongly disagree with any involuntary discharge notice or other regulatory change that creates such an obligation for facilities.
- We strongly disagree with the requirement that a discharge plan be subject to approval by the resident's physician. As already stated, resident care services are governed by a contract between the facility and resident. The resident's physician does not, and should not, have the authority to contravene that contract and force the facility to provide services to the resident outside of the negotiated services agreement and facility policies.

Requirements Prior to Issuing Emergency Notice of Involuntary Discharge

- It is incredibly dangerous to require approval in writing from the Secretary of KDADS prior to issuing a discharge notice in an emergency situation.
- It is incredibly dangerous to require the state of Kansas and the Secretary of KDADS to substitute their judgement for that of health care professionals in determining whether a resident has an emergent health care need or is endangering other residents and staff.
- It is incredibly dangerous to require our health care professionals to determine exactly when a situation turns from emergency to imminent injury or death for residents in order to justify bypassing KDADS and State of Kansas requirements.
- We strongly disagree with forcing a provider to hold a unit available for a resident while their emergency discharge appeal is pending. Under this requirement, the government will force providers to sustain serious financial losses with no legal avenue to recoup losses when the resident appeal is unsuccessful. Even if a legal obligation was created for the unsuccessful resident to pay for the time their unit was held, it is the experience of providers and many other businesses that collecting on legally obligated payments is often very difficult, if not impossible,

to do. This is especially true when serving clients in the Medicaid program or discharging a resident for failure to pay.

- We have concerns with the requirement to deliver a discharge notice prior to or within 48 hours of an emergency involuntary discharge. Existing state and federal regulations do not require emergency notice to be delivered within a set period, other than “as soon as practicable.” Emergency conditions and the individual situations behind them are infinite and unpredictable. There will be many circumstances when a facility cannot possibly meet the 48 hour notice deadline, especially when needing prior approval from the Secretary of KDADS, and it is unfair to hold the facility to such a legal requirement.

Administrative Hearing

- We strongly disagree with allowing an assisted living resident to continue to reside in the facility until the involuntary discharge appeal has been resolved. Forcing an assisted living facility to retain a resident whose needs it has already determined it cannot meet has wide-ranging and seriously negative effects on the health and safety of residents, and the continued affordability and operations of residential care settings.
- The 44 day timeline outlined in HB 2246 is too long for a resident to remain in the facility pending a 30 day notice of discharge. The 44 day timeline contemplated in the bill also does not address the several layers of appeal that the resident may be entitled to if they disagree with the original Office of Administration decision. This would entitle the resident to remain at the facility far longer than 44 days.
- We have serious concerns about hinging any timeliness requirements on the quick action of a state agency. Government agencies have very limited resources, and in our experience timeliness requirements in statute and regulation are often violated by the government itself with no manner of enforcement or recourse available to those affected. The inevitable delays that will accompany state agency approvals will then unnecessarily delay the issuance of an involuntary discharge notice and exacerbate the danger to residents and facilities.

We respectfully request that the committee vote no on HB 2246.