House
Legislative
Analysis
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ELDERLY CARE AMENDMENTS

House Bill 5689 as enrolled
Public Act 437 of 2000
Second Analysis (1-17-01)

Sponsor: Rep. Randy Richardville
House Committee: Senior Health, Security and Retirement
Senate Committee: Health Policy

THE APPARENT PROBLEM:

Several issues related to care for elderly and frail residents of nursing homes and homes for the aged have been raised, including the use of bed rails in nursing homes, the provision of flu shots to residents, allowing residents to remain in homes for the aged even after they require a higher level of care than the home is licensed to provide, and the appointment of temporary managers and advisors in nursing homes with low rates of regulatory compliance.

• Hospital-type beds that are used in nursing homes typically are equipped with side rails (or bed rails, as they are often called). The use of bed rails in nursing homes is fraught with controversy. Though ostensibly used to keep frail or disabled patients from falling out of bed, these devices are blamed for several deaths in Michigan nursing homes and nationwide. A February 8, 2000 *Detroit Free Press* article reported that at least five Michigan nursing home residents died in incidents involving bed rails during the previous year. Studies by the U.S. Food and Drug Administration and by the federal Consumer Products Safety Commission cite more than 200 bed rail deaths nationwide since 1985, and federal officials believe that many incidents go unreported. Injuries and deaths have occurred when people become trapped or entangled in the rails, or between the mattress and the rails, or when they fall over the rails when attempting to get out of bed.

The federal Health Care Financing Administration (HCFA) requires that nursing homes that receive Medicaid and Medicare funding limit the use of bed rails. Under the federal nursing home reforms passed as part of the 1987 Omnibus Budget Reconciliation Act (OBRA), nursing home residents are granted freedom from restraints used for the purposes of discipline or convenience and which are not required to treat medical symptoms. Bed rails are considered to be "restraints" and can be used only when necessary to treat a resident's medical symptoms.

Thus, according to the Department of Consumer and Industry Services, bed rail use in Michigan nursing homes is limited to those situations where a documented comprehensive assessment of medical necessity has been made by a team of health professionals. The resident or his or her legal representative must consent to the use of bed rails, after being provided with information about the risks and benefits associated with restraints. Further, the resident's attending physician must approve of the use of bed rails. Despite these requirements, apparently bed rail use in some nursing homes has remained routine.

Federal and state regulators, consumer advocates, and others have made efforts to reduce the use of bed rails through research, education, and advocacy of alternative means for protecting residents from falls. The Department of Consumer and Industry Services issued an alert on May 12, 2000 concerning the use of bed rails, which summarized and re-emphasized several previous federal notices on the issue. Apparently in response to this alert, the heightened publicity regarding the dangers of bed rails, and because of several recent deaths of Michigan nursing home residents, some nursing homes have removed all bed rails and prohibited their use. Others report having been cited by DCIS survey teams, both for excessive use of bed rails, and for failing to allow their use in certain cases.

At the same time, many residents and their family members are alarmed at the removal of bed rails that they have relied upon to protect the residents from falling out of bed, and in some cases, as a means of improving mobility. Bed rails are important to many patients, who use them as grab bars to move into different positions or to sit up in bed, and especially to those who feel insecure about falling out of bed. Testimony before the House committee on Senior

Health, Security and Retirement indicated that many nursing home residents benefit from having bed rails and have suffered fear, indignity, and physical injury as a result of their removal. They object to the alternatives that have been supplied (such as lowering beds close to the floor). They report that nursing homes have made the decision to remove bed rails without any input or consent of the residents or their families. Nursing home administrators, trying to balance the safety of residents, the desires of family members, and the responsibility to meet regulatory standards, are also frustrated with the current state of affairs.

Legislation has been introduced to provide nursing home residents and their family members a greater say in the decision as to whether bed rails will be used. In addition, since it is evident that more study is required to adequately address this issue, it is proposed that the department develop guidelines for the use of bed rails in nursing homes.

• Under 1999 administrative rules, the Department of Consumer and Industry Services is authorized to appoint temporary managers and advisors for nursing homes with serious compliance problems. Through a contract with the Michigan Public Health Institute, a nonprofit organization created in statute and involving personnel from the Department of Community Health and the three large research universities, private sector professionals with nursing home experience are appointed to assist homes to achieve and maintain regulatory compliance, and if necessary, to protect residents if a facility closes. The goal is to avoid closure of facilities if possible, as closures cause harm and trauma to residents who are forced to leave their homes. It has been proposed that the authority to appoint temporary managers for troubled nursing homes be placed in statute.

• The federal Centers for Disease Control recommends that anyone 65 years of age or older, and especially residents of nursing homes and other chronic care facilities, receive an annual vaccination for influenza, which is a highly infectious virus. Accordingly, it has been proposed that nursing homes and homes for the aged be required by statute to offer or make available to their residents either the vaccination or information about how to obtain it.

• Homes for the aged are licensed under the Public Health Code to provide room, board, and supervised personal care. Typically, when residents suffer health complications that require more intensive nursing care, they must move to nursing homes. However, in some situations such a move would be traumatic or even harmful to an elderly person who wishes to remain in the same setting. In at least one situation, the Department of Consumer and Industry Services initiated license action against a home for the aged which continued to provide care for several residents who needed nursing care, despite the fact that the residents were paying the bill for the nursing services they needed and did not wish to move. Legislation has been proposed to provide an option for residents in this situation to be able to stay in their preferred residential setting.

THE CONTENT OF THE BILL:

The bill would amend the Public Health Code (333.21325 et al.) in the following ways:

Bed rails in nursing homes. The bill would amend the Public Health Code to require a nursing home to give each resident who uses a hospital-type bed (or the resident's legal guardian, patient advocate, or other legal representative) the option of having bed rails. A nursing home would have to offer the option to new residents upon admission, and to other residents upon request. The bill further states that a resident or his or her representative would have the right to request and consent to bed rails for the resident. Upon receipt of a request for bed rails, the nursing home would have to inform the resident or his or her representative of alternatives to, and the risks involved in, using bed rails. Further, a nursing home that provided bed rails would have to document that the requirements of the bill had been met, monitor the resident's use of the bed rails, and, in consultation with the resident, his or her family and attending physician, and the individual who consented to the bed rails, reevaluate the resident's need for the bed rails.

A nursing home could provide bed rails to a resident only upon receipt of a signed consent form authorizing bed rail use and a written order from the resident's attending physician detailing medical symptoms necessitating the use of bed rails, and specifying the circumstances under which bed rails are to be used. For purposes of the bill, "medical symptoms" would include a concern for the physical safety of the resident, and the physical or psychological need expressed by the resident. The bill states that a resident's fear of falling could be the basis of a medical symptom.

Further, the Department of Consumer and Industry Services would be required to develop clear and uniform guidelines to be used in determining what constitutes:

--acceptable bed rails for use by nursing homes in the state;

--proper maintenance of bed rails;

--properly fitted mattresses;

--other hazards created by improperly positioned bed rails, mattresses, or beds.

The department would be required to consider the recommendations of the Hospital Bed Safety Work Group established by the U.S. Food and Drug Administration, if available, in determining what constitutes an acceptable bed rail. Further, the guidelines would be developed in consultation with the Long Term Care Work Group, with the addition (for the purposes of the bill) of an individual representing manufacturers of bed rails, two nursing home residents or family members of residents, and a person with expertise in bed rail installation and use.

The department would have to report is recommendations to the legislature within six months after the effective date of the bill. (However, the bill would require the department to consider, as part of its report, the recommendations of the federal FDA Hospital Bed Safety Work Group if they are available, and would allow the department to delay its report to the legislature for up to three months in order to accommodate the completion of the federal recommendations). Further, the department would be required to consult with representatives of the nursing home industry to expeditiously develop interim guidelines on bed rail use to be used until the guidelines are developed.

The bill provides that a nursing home that complied with the bill's requirements, and with the guidelines developed by the department, would not be subject to administrative penalties imposed by the department based solely on providing bed rails. However, this provision would not preclude the department from citing specific state or federal deficiencies for improperly maintained bed rails, improperly fitted mattresses, or other hazards created by improperly positioned bed rails, mattresses, or beds.

Appointment of temporary managers. If the Department of Consumer and Industry Services finds that a nursing home is not in compliance with the Public Health Code, its administrative rules, or an applicable federal law or regulation governing nursing home certification, and that the noncompliance impairs the ability of the licensee to deliver an acceptable level of care and services, the department is authorized under current law to suspend the admission or readmission of patients to the nursing home, reduce the licensed capacity of the home, selectively transfer patients whose care needs are not being met by the nursing home, initiate action to place the home in receivership, or issue a correction notice that describes the violation and specifies the corrective action to be taken within a specified period of time.

The bill would amend these provisions to add two additional options for the department in those circumstances:

--it could require appointment, at the nursing home's expense, of a department-approved temporary administrative advisor or clinical advisor, or both, with authority and duties specified by the department, to assist the home's management and staff to achieve sustained compliance with required operating standards; or

--it could require appointment, at the nursing homes's expense, of a department-approved temporary manager with authority and duties specified by the department, to oversee efforts to achieve sustained compliance with required operating standards or to oversee the orderly closure of the nursing home.

The bill would further specify that the department could take any of the specified actions in the case of a nursing home closure (in addition to when it found noncompliance that impairs the licensee's ability to deliver acceptable care).

The bill would require the department to annually report to the House and Senate standing committees on senior issues on the number of times the department appointed a temporary administrative manager, temporary clinical advisor, and temporary manager as described in the bill. The report would have to include whether the facility closed or remained open. The bill specifies that this report could be included with other reports that the department is required to make to the legislature.

The bill specifies that if the department determined that a nursing home's patients could be safeguarded and provided with a safe environment, the department would have to make its decision concerning the home's future operation based on a presumption in favor of keeping the nursing home open.

Flu shots. The bill would require homes for the aged and nursing homes to offer each resident, or provide

each resident with information and assistance in obtaining, an annual vaccination against influenza in accordance with the most recent recommendations of the Advisory Committee on Immunization Practices of the federal Centers for Disease Control and Prevention, and as approved by the Department of Community Health.

Homes for the aged residents. Under the code, a home for the aged is licensed to provide room, board, and supervised personal care for adults age 60 and older. The bill would add language to the code specifying that if a resident of a home for the aged was receiving care in the facility (in addition to room, board, and supervised personal care) as determined by a physician, the department could not order the removal of the resident from the home if:

--the resident, his or her family and physician, and the owner, operator, and governing body of the home for aged consented to the resident's continued stay in the home; and

--the owner, operator, and governing body of the home for the aged committed to assuring that the resident received the necessary additional services.

FISCAL IMPLICATIONS:

According the House Fiscal Agency, the provisions of the bill that would allow the Department of Consumer and Industry Services to appoint temporary advisors or managers in nursing homes could result in increased state costs. Although the bill provides that the temporary managers would be employed at the expense of the nursing home, it is possible that some costs could be passed on to the state through Medicaid or Medicare payments. Further, the provision of the bill that requires the department to develop guidelines for the use of bed rails in nursing homes would result in a small one-time administrative expense for the department. The HFA reports that provisions limiting the department's authority to remove residents from homes for the aged, and requiring facilities to provide or assist residents in obtaining flu shots, would have no fiscal impact. (1-3-01)

ARGUMENTS:

For:

While there has been an outcry about the dangers of bed rails, and while it is of course a tragedy that deaths have occurred, it seems to many patients, family members, and nursing home administrators and staff members that state and federal regulators have overreacted in this matter. Many patients benefit greatly from having bed rails, and wish to continue their use. The *lack* of bed rails is also responsible for injuries, and perhaps even deaths, among nursing home residents who have fallen out of bed. In addition, the fear of falling causes these frail patients great stress and anxiety, which also takes a physical toll. In some cases, patients who have been accustomed to using bed rails to aid their mobility have lost this assistive device, resulting in a deterioration of their physical strength. Alternatives used in some nursing homes, including placing mattresses directly on the floor or lowering beds close to the floor and using protective mats around them, are not satisfactory in many cases. Beds placed very low to the floor make it difficult for family members and staff to interact with and care for the residents, and mats may be a safety hazard for staff people going in and out of rooms.

Nursing homes are placed in the difficult position of trying to reconcile the needs and wishes of their residents (and the residents' families) with their responsibilities to comply with state and federal regulations. Regulators, particularly state survey teams who issue citations to nursing homes, have not been consistent on this issue. While federal law grants patients the right to refuse treatment or to disregard medical advice with informed consent, apparently the individual resident does not have the ability to choose to use bed rails unless that option is considered to be medically necessary, after an assessment by an interdisciplinary team and upon a physician's orders.

What is needed, many believe, are clear and consistent guidelines for types of bed rails or other protective devices that can be used for nursing home patients, and for standards for how they may be used. The bill would require the development of such guidelines.

Further, the bill would place in the hands of the patient, his or her family, and his or her attending physician the decision about whether the advantages of bed rail use outweigh the risks. If a family, after being informed of the risks of using bed rails and alternatives to their use, chooses that option for their elderly family member, that option ought to be respected. Requiring a physician's involvement will serve to limit the use of bed rails to only those cases in which they are medically appropriate.

For:

Michigan should join the other states, including Minnesota and Wisconsin, that have begun to address this issue. A 1998 Minnesota statute specifically

allows competent nursing home residents (and family members of those who are not competent) to request and consent to the use of a physical restraint to treat the medical symptoms of the resident. Under the Minnesota law, "medical symptoms" include a concern for the safety of the resident, and physical and psychological needs expressed by a resident, including the fear of falling. Nursing homes must inform people requesting restraints (bed rails) of the risks and alternatives to their use, but must provide such restraints upon receiving a signed consent form and a physician's written order. The bill is modeled on this Minnesota law, which provides a humane way of dealing with residents who suffer from actual falls and with the fear of falling out of bed.

Against:

The bill would be a step backwards in reducing the use of bed rails in nursing homes. Indeed, the bill could result in an *increase* in bed rail use, as nursing homes would be required to offer their use to all new patients. This requirement would seem to make it easier for nursing homes to fall back on the over-use of bed rails as a means of restraining patients – just the opposite of the recent positive trend toward reducing this dangerous practice. Bed rails must not be used to substitute for adequate staffing levels, constant monitoring of patients, and other indicators of quality nursing care.

Use of bed rails has been determined to be dangerous for frail elderly patients. Many studies and reports have documented the dangers. Among the potential hazards are asphyxiation caused by entrapment between the rail and the mattress, accidental release of the rail resulting in compression of the patient's neck and throat, and falls resulting from the patient trying to climb over the rail to get out of bed. The Department of Consumer and Industry Services reports that there have been nearly 60 reported incidents involving inappropriate use of bed rails in Michigan nursing home in 2000, and three deaths have resulted. Federal authorities have received reports of over 200 deaths nationwide in the past 15 years, and many incidents appear to go unreported. Bed rails typically are divided, either vertically or horizontally, with slats spaced about six or more inches apart - a distance just large enough to trap a person's head or neck. In addition, though some beds, mattresses, and side rails are designed to fit together, often in actual use those pieces are bought separately and replaced at different times, so that the pieces do not fit tightly together, leaving gaps that can trap a person between the mattress and the rail.

Decisions about the use of bed rails for individual patients ought to be made by health professionals who have been educated about these risks, and about the feasible alternatives to their use. Several Michigan nursing homes, and nursing homes in Pennsylvania and other states, have devised creative solutions to this problem and have worked diligently to educate their staff, their patients, and their patients' families about alternatives. In these facilities the transition away from the routine use of bed rails has been more successful than in homes that have simply removed all bed rails quickly and without such education efforts. When efforts to remove bed rails are coupled with the use of alternative devices, more monitoring of individual patient's habits and schedules for getting out of bed, the use of monitors that alert staff to patients' movements out of bed, and so forth, the transition has been easier for all concerned. Efforts to address the problem of bed rail use in nursing homes ought to be aimed at replicating these successful, innovative programs, rather than going backward.

Response:

The bill would require the participation of the resident's attending physician in making a decision about the use of bed rails. Indeed, it would require the physician's written order and continued monitoring in order for the resident to be allowed the use of bed rails. This approach provides a compromise to allow the limited use of bed rails where they are medically appropriate for particular residents.

For:

The use of temporary managers and advisors is generally supported by providers, consumer groups, and the federal government as an effective way to deal with those nursing homes where continuing serious operating problems put residents at risk. A temporary manager may be able to make swift improvements in operations, stabilize staffing, and so forth, so as to avoid even more serious regulatory actions, such as the loss of Medicaid certification, that can lead to closure of the home. It is far better to remove inadequate providers from troubled homes than to force relocation of vulnerable residents, who will likely suffer increased morbidity and mortality after such trauma. The department has used this approach in several cases, including 9 cases in which temporary managers were appointed, and 17 cases in which clinical advisors were appointed. Most of these have had successful outcomes; i.e., a struggling nursing home was helped to come into regulatory compliance and residents were spared the trauma of transfer to new facilities. The bill would simply grant clear authority, in statute, for this regulatory tool to be used.

Against:

Concerns have been raised about requiring troubled nursing homes to pay the cost of state-approved temporary managers. Would this force financially troubled facilities over the brink into bankruptcy? Shouldn't the state assume this cost in the interest of the health and safety of residents?

Response:

It has been pointed out that the appointment of a skilled temporary manager could minimize financial harm to a business that has been mismanaged. If regulatory problems continue, the end result will be more serious regulatory sanctions, including loss of Medicaid certification, and possible closure. Additionally, some of the costs paid for temporary managers may be reimbursable by Medicaid.

Against:

While the concept of appointment of temporary managers for troubled nursing homes is generally supported by consumer groups, it has been suggested that the bill could provide stronger protection for residents. For instance, it would be helpful to define the terms "temporary administrative manager", "temporary clinical advisor", and "temporary manager", and more specifically clarify what authority would be granted to these individuals, in order to minimize future administrative appeals and litigation. Further, the bill should clearly state that a temporary manager had authority to take any actions necessary to protect residents and prevent closures, including hiring and firing staff, making necessary expenditures, and entering or terminating contracts with providers or suppliers. Moreover, it should be clear that facility administrators would be required to fully cooperate with the temporary manager and provide access to records and information.

For:

Elderly, frail people are especially at risk for suffering severe flu symptoms requiring hospitalization and even causing deaths. Since the disease is highly contagious, it makes sense to require residential facilities for elderly people to encourage vaccinations for residents. The cost of the vaccines is modest, and, in any case, is covered by Medicaid and Medicare. The bill would require that nursing homes and homes for the aged make certain that their residents have access to information about how to receive a flu shot.

For:

The bill would provide an option for continued care to be provided for a resident of a home for aged whose health deteriorates, when the resident, or his or her family, believes that a move would be harmful. It would allow residents to stay in their familiar home setting even when they began to need nursing care, under certain specified conditions. The resident, his or her family, and his or her physician would have to agree to the resident's continued stay, and the home would have to commit to providing the needed care.

Against:

Though the concept of "aging in place" is a good goal, the language added to the bill is too weak to ensure that adequate care is provided to residents who find themselves in the kind of situation being addressed. A facility that is providing nursing care should be licensed and staffed appropriately to ensure that standards of care are met; the bill would simply require a facility to "commit" to providing the services.

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