

# MINUTES

## Regulation of Nursing and Assisted Living Beds Interim Committee



Representative Wayne Steinhauer, Chair  
Senator Mike Vehle, Vice Chair

**Second Meeting, 2016 Interim  
Tuesday, August 23, 2016**

**Room 413 – State Capitol  
Pierre, SD**

The second meeting of the Regulation of Nursing and Assisted Living Beds Interim Committee was called to order by **Representative Wayne Steinhauer** at 9:00 a.m. (CDT) in room 414 of the State Capitol.

A quorum was determined with the following members answering the roll call: Representative Wayne Steinhauer, Chair; Senator Mike Vehle, Vice Chair; Representatives Blaine Campbell, Roger Hunt, Karen Soli, Jim Stalzer, and Steve Westra; Senators Jim Bradford, Jenna Haggar, William Shorma (via telephone), and Alan Solano.

Staff members present included Ms. Amanda Jacobs, Research Analyst; Mr. Fred Baatz, Principal Research Analyst; Mr. Jason Simmons, Senior Fiscal Analyst; and Ms. Cindy Tryon, Senior Secretary.

*NOTE: For purpose of continuity, the following minutes are not necessarily in chronological order. Also, all referenced documents distributed at the meeting are attached to the original minutes on file in the Legislative Research Council office. This meeting was web cast live. The archived web cast is available at the LRC web site at <http://sdlegislature.gov>.*

### **Approval of Minutes**

**A MOTION WAS MADE BY REPRESENTATIVE WESTRA, SECONDED BY SENATOR VEHLE, TO APPROVE THE MINUTES OF THE JULY 12, 2016, MEETING. The motion prevailed on a voice vote.**

### **Scope of Study**

The full title of this study as assigned by the Executive Board is, "A study of the benefits, merits, and negative impacts of regulating the number of nursing and assisted living beds in South Dakota. Further, recommend action that may include elimination of or revisions to regulations for the betterment of the South Dakota populace."

The scope of study includes: history of regulations in South Dakota; how have the issues surrounding this industry and its constituents changed in recent years; comparison to other states' regulations and their results; why continue to regulate the number of beds; what are the pro and con results from these regulations, who benefits, how are these results measured/quantified, what are the trends; how can more "free enterprise" be introduced into our management of care facilities; what are the forecasted changes for the industry in South Dakota and its constituents; how can the industry best respond to demographic and geographic changes in the state and what role should the state play in these changes for the benefit of all concerned.

### **Department of Social Services**

**Ms. Brenda Tidball-Zeltinger, Deputy Secretary, SD Department of Social Services, and Mr. Justin Williams, Director of the Division of Adult Services and Aging, SD Department of Social Services, gave a PowerPoint presentation providing information regarding payment methodologies for nursing facilities and the adult services and aging services waiver process [\(Document #1\)](#).**

Ms. Tidball-Zeltinger said the average nursing facility Medicaid rate is \$132.33 per day, and Medicaid pays for approximately 55% of nursing facility residents in South Dakota.

**Representative Don Haggar** asked what percent of total dollars do Medicaid dollars represent. Ms. Tidball-Zeltinger said that she would get that information to the committee.

**Representative Steve Westra** asked what the average rate is for the private payer. Ms. Tidball-Zeltinger said she will follow up with that information later.

Ms. Tidball-Zeltinger said the reimbursement methodology is such that the rate is unique to each patient and facility. Each patient is assessed through the Minimum Data Set (MDS) which is completed by the nursing facility staff and monitored by the state. It is this MDS that helps set the case mix weight. The case mix weight recognizes the needs of the patient. If a patient needs more care, the rate is higher; less care, the rate is lower. Case mix scores range from .59 to 2.67 and the statewide average is 1.17. The national rate is 1.03, meaning the care rates for South Dakota clients is slightly higher than the national rate.

Ms. Tidball-Zeltinger explained the ceilings, specialized needs and other factors that are used when determining the payment methodology. The document includes higher and lower care needs scenarios on slides seven and eight.

Ms. Tidball-Zeltinger explained the specialized services and that any nursing facility can request an add-on payment to serve clients with specialized needs. There were 85 individuals with specialized needs served in South Dakota during the month of July 2016.

Representative Steinhauer asked if the state was involved in developing the four units dedicated to specialized needs. Ms. Tidball-Zeltinger said the state did ask all facilities if they would like to partner with the state in developing these special services, and it was through these partnerships the specialty units for services such as traumatic brain injury were developed.

**Senator Jim Bradford** pointed out that the care needed for patients may change and asked if the case mix rate can be altered. Ms. Tidball-Zeltinger replied the facilities do have the ability to adjust the rates as the need for care changes.

Mr. Justin Williams presented the information on Adult Services and Aging (ASA) and community based services waivers program starting with slide 11 of the document. The waiver program allows people to stay at home as long as possible, and the state has broad discretion to address the needs of the target population. The eligibility requirements to participate in the waiver program can be found on slide 13 of the document. For FY17, the waiver rate for providers is \$40.50 per day. There were 1122 waiver consumers in assisted living in 2015 and 612 waiver consumers using in-home care in 2015.

In response to questions from Representative Westra, Ms. Tidball-Zeltinger explained that the waiver program is intended to allow individuals to stay in a more home-like setting while having all their healthcare needs provided. The waiver program is more cost effective, but does not work for every person. Ms. Tidball-Zeltinger agreed with Representative Westra's comment that this program allows people to stay in assisted living who ten years ago would have had to go to a nursing facility.

Mr. Williams explained the waiver services found on slide 15 and said that additional services may be allowed starting October 1, 2016. Those additional services are listed on slide 16.

Mr. Williams said the Department of Social Services supports the moratorium on nursing facility beds and gave five advantages to the moratorium listed on slide 18 of the document. Those advantages are: Long Term Care Studies

show adequate capacity of nursing home beds; there is a mechanism in place through the RFP process to move beds to areas of need; focus on home and community-based services ensures individuals remain at home when possible; the moratorium acts as a cost control measure; and the moratorium allows for a safety net for geographical access in rural parts of the state.

Senator Bradford commented he does not believe the moratorium assists with access in rural areas, as there is now a new nursing home in White Clay, Nebraska, that would have been built in South Dakota had there not been a moratorium.

Mr. Williams replied that without the moratorium, providers would focus on more heavily populated urban areas for financial purposes.

**Representative Karen Soli** pointed out that the RFP process was not in place when they started planning the nursing home that ended up being built in White Clay. With the current RFP process, building the home in South Dakota may have been possible.

**Representative Jim Stalzer** said statute states the Department of Health may consider additional facilities in "defined areas" of the state. Representative Stalzer asked for the location of those areas. Mr. Williams said he will look into the interpretation of "defined areas" in regard to that statute.

In response to questions from the committee regarding moving or adding moratorium beds, Ms. Tidball-Zeltinger said the RFP process regarding nursing facility beds thus far has only been used to redistribute beds. These redistributions were based on community needs.

**Senator Mike Vehle** said there are 100 moratorium beds not in use and asked why facilities would choose not to use all their beds. Ms. Tidball-Zeltinger said the reasons depend on the individual facility. A facility may have made changes so that some beds are no longer available for resident care. Representative Steinhauer said some facilities do not have the space to utilize all the beds assigned to them. Representative Steinhauer asked if related facilities can pool their available beds and build another facility that would allow them the room to use all their moratorium beds. Ms. Tidball-Zeltinger said currently there is no mechanism in place that would allow that, but if they go through the RFP process and a community need is demonstrated, perhaps it could be considered. The moratorium beds are tied to the facility's license and whoever owns the facility has control over those beds. There is no mechanism at this time to allow a facility to sell or transfer the beds to another facility.

**Representative Roger Hunt** asked for Ms. Tidball-Zeltinger's thoughts on changing the law to allow facilities to move beds around. The DSS's position is that there is some flexibility through the RFP process and they would prefer enhancements to that program rather than allowing the buying and selling of moratorium beds.

**Senator William Shorma** asked if the state reimburses for home health care and if so at what rate of pay. Mr. Williams said the care provider needs to be a licensed provider or the employee of an enrolled provider. The rate of pay is based on the services provided and those rates can be found on the DSS's website. Ms. Tidball-Zeltinger said the usual hourly rate is \$25.16.

### **National Conference of State Legislatures (NCSL)**

**Ms. Ashley Noble, NCSL Health Program**, gave a PowerPoint presentation via Skype regarding the Certificate of Need (CON) program used in several other states for regulating nursing homes beds ([Document #2](#)). Also present to answer questions via Skype from NCSL were Ms. Samantha Scotti and Mr. Dick Cauchi.

Ms. Noble went through the presentation explaining the CON program and the states that use this program. South Dakota does not use the CON program, and of the surrounding states, North Dakota, and Wyoming also do not use CON. Montana, Nebraska, and Iowa do use CON, while Minnesota uses a variation of the CON regulations.

Senator Vehle asked if the staffing issues South Dakota facilities are facing is a nationwide problem. Ms. Noble said it is a national problem because these are low-paying, high stress jobs.

Ms. Scotti and Mr. Cauchi commented that there is a national trend towards people seeking assisted living and at-home care. Individuals prefer to stay in their own communities as long as possible and that trend has changed the nursing home world.

**Senator Alan Solano** asked if the presenters are aware of any states experimenting with incenting families to provide home care for a longer period of time. Ms. Noble said she is not aware of incentives but most states are trying to find ways to improve the availability of in-home care services.

The committee did ask several questions that the NCSL presenters said they would have to do some research to find the answers and will send that information to the committee members when available.

### **Committee Discussion/Reports Regarding Visitation of Facilities**

Several committee members visited health care facilities prior to this committee meeting and they discussed those visits. The general consensus is that the biggest challenge these facilities are facing is finding sufficient staffing. This challenge can affect the number of beds a facility is able to open to clients, as the more beds being used the more staff members are required.

The committee also discussed the issue with government pay vs. private pay clients and the fact that private pay clients are charged a higher rate to compensate for the lower government rate. One administrator had commented that with the low rate of pay by Medicaid, it would be nearly impossible to be able to afford to build a new facility today.

The committee members said the common opinion is that there may be sufficient numbers of nursing facility beds by those beds seem to be in the wrong locations.

### **Public Testimony**

**Ms. Deb Fischer-Clemens, Avera, Sioux Falls**, gave the history of the nursing facility beds issues both as someone who has worked in the healthcare industry for many years and as a former legislator.

Ms. Fischer-Clemens said in 2015 Avera reviewed 559 patients who had stayed in the hospital more than 14 days and could have been discharged if the proper facilities had available beds. There was no facility at all for a lot of the special care patients. Avera did go through the RFP process negotiating with the state and is now ready to open a 24 bed facility in response to the RFP.

Ms. Fischer-Clemens said the biggest challenge is not that there are too few beds but that there are not enough workers to care for the patients, and the lack of workforce for healthcare facilities is a statewide issue. Avera has a long-term care facility in Pierre and traveling staff who are paid up to three times the average salary must be used in order to properly staff that facility.

**Mr. Phil Samuelson, Regional Vice President, Good Samaritan Society, Sioux Falls,** said the Good Samaritan Society supports the moratorium and explained why they have some moratorium beds not in use. Mr. Samuelson said the number one reason they have unused beds is the lack of staffing and there are staffing needs everywhere. Also, there have been more demands for private rooms, so many rooms that used to have double occupancy are now single occupancy.

Mr. Samuelson said the low reimbursement rate from Medicaid is an issue. The average Medicaid payment is \$126 per day for rural facilities and just under \$150 a day for urban facilities. The average private pay rate is \$221 per day for rural facilities and \$248 per day for urban facilities. The facilities do try to supplement the Medicaid losses with payment from private payers. The Medicaid reimbursement is higher for facilities located in larger cities than it is for facilities located in rural communities.

When asked for his opinion on the pros and cons of the nursing facility beds moratorium, Mr. Samuelson said there is a lot of competition and people are shopping around, which pushes providers to maintain the high level quality of care. The moratorium does limit his organization to only being able to move beds within a 15-mile radius, even though the facilities are all Good Samaritan facilities. The RFP process does allow that issue to be addressed and the Good Samaritan Society does believe the moratorium and RFP process is the best policy at this time.

**Ms. Jen Porter, Vice President, Post-Acute Care, SD Association of Healthcare Organizations (SDAHO), Sioux Falls,** said the members of SDAHO support the current moratorium coupled with a reliable RFP process. Ms. Porter added that the RFP process could use some improvements keeping in mind the need to be adaptive and receptive to forward thinking for healthcare in South Dakota. When asked what improvements are needed, Ms. Porter said that the RFP process needs to be more transparent.

Several committee members asked Ms. Porter for her thoughts on the workforce issues. Ms. Porter said SDAHO has been diligent in addressing this issue by going into the schools and reaching out to younger students to encourage their interest in the healthcare field. It can be difficult to keep staff due to the very stressful, hard work, and the low salaries.

### **Department of Health**

**Ms. Kim Malsam-Rysdon, Secretary, SD Department of Health, and Mr. Tom Martinec, Deputy Secretary and Director of the Division of Health Systems Development and Regulation, SD Department of Health,** addressed the committee to answer questions that arose during earlier testimony.

Ms. Malsam-Rysdon said RFPs are published on the state website and the link is shared with several organizations so they can forward that information on to their members. The Department of Health wants everyone interested in the RFP process to be made aware of it.

The Department of Health does have some options for incentives to join the healthcare workforce, such as assistance with tuition reimbursement, and assisting facilities with recruitment. The Department does have the program that offers nurses working in some areas \$10,000 if they fulfill a three-year commitment to a certain healthcare facility. At this time, CNAs do not fall under that program.

Ms. Malsam-Rysdon said the moratorium helps provide better resources for the full continuum of care. Nursing facilities are expensive and empty beds have a cost. The moratorium helps keep the number of empty beds at a minimum. More people are paying out of pocket for long term care than any other type of healthcare, because most people have healthcare insurance, but many cannot afford to also purchase insurance for long term care.

### **Committee Discussion**

The committee agreed to hold two more meetings. The next meeting will be September 8, 2016, in Pierre and the committee will discuss possible action, legislation, and findings that can be incorporated into a final report. The LRC staff will then have four weeks to prepare drafts for committee action at the final committee meeting on October 5, 2016, in Pierre.

### **Adjourn**

**A MOTION WAS MADE BY SENATOR VEHLE, SECONDED BY REPRESENTATIVE WESTRA, TO ADJOURN. The motion prevailed on a voice vote. The Committee adjourned at 4:00 pm.**