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Ongoing Concerns Regarding Parole of Medically Frail Prisoners

1. Resident Rights in Long Term Care Facilities

The Federal Nursing Home Reform Act, part of the Omnibus Budget Reconciliation Act of 1987 (OBRA '87), enumerated substantial rights for residents of long term care facilities across the county.¹ Michigan has enumerated similar rights in the Public Health Code.² Among these include the right to “interact with members of the community and participate in community activities both inside and outside the facility” and for the resident to “receive visitors of his or her choosing at the time of his or her choosing, subject to the resident's right to deny visitation when applicable, and in a manner that does not impose on the rights of another resident.”^{3,4} The long term care facility must provide immediate access to a resident by immediate family and other relatives of the resident, and to anyone else visiting with the consent of the resident.

The Centers for Medicare & Medicaid Services (CMS) has made it clear these protections extend to paroled residents. CMS released a memorandum on May 03, 2016 covering this exact topic.⁵ This memo addressed “justice involved individuals,” an umbrella term which includes individuals on parole. This memo states that under federal requirements, “a nursing

¹ Resident rights enumerated at: Medicare – 42 U.S.C. § 1395i-3(c); Medicaid – 42 U.S.C. § 1396r(c); Federal Regulations – 42 CFR § 483.10

² MCL 333.20201

³ 42 CFR § 483.10(f)(3)

⁴ 42 CFR § 483.10(f)(4)

⁵ CMS Center for Clinical Standards and Quality/Survey & Certification Group; Guidance to Surveyors on Federal Requirements for Providing Services to Justice Involved Individuals, S&C: 16-21- ALL, 5/3/16

home cannot incorporate into care plans restrictions that violate resident rights, and cannot serve as an agent of the pertinent law enforcement or criminal justice supervisory authority by enforcing supervisory conditions or reporting violations of those conditions to officials.”⁶ The memo also states “Some DOC or law enforcement terms of release or placement may conflict with the CMS requirements if the terms affect the care and services provided by the facility or violate the resident’s rights. *In such a case, if a facility agreed to enforce restrictive law enforcement terms applied to a resident (for example, restricting visitors), the nursing home would not be in compliance with federal requirements and would risk enforcement action and termination from participation if it did so*”⁷ (emphasis added).

2. Issues with HB 4129-4131

As passed by the House, HB 4129 seeks to ensure the resident rights of parolees are protected. Proposed subsections (14) and (15) state parolees must have the “full patient rights at the medical facility where he or she is placed” and that the terms and conditions of parole will not “violate any state or federal regulations.” Additionally, late amendments to the bill sought to protect nursing facility staff and ensure they would not violate resident rights or be responsible for enforcing parole. Proposed subsection (17) states the facility “is not responsible for the enforcement of conditions of parole or the reporting of violations of conditions of parole for any parolee” and that the facility “will comply with state and federal laws and regulations that protect resident rights and state and federal laws and regulations for skilled nursing facilities, regardless of the conditions of parole imposed on a resident parolee.”

⁶ CMS Center for Clinical Standards and Quality/Survey & Certification Group; Guidance to Surveyors on Federal Requirements for Providing Services to Justice Involved Individuals, S&C: 16-21- ALL, 5/3/16, at 6.

⁷ *Id.* at 7

On its face, that language protects resident rights and guarantees facility staff will play no part in enforcing parole or serving as agents of law enforcement. Unfortunately, the criminal penalties listed in HB 4131 seem to negate those protections for both residents and staff. HB 4131 creates a misdemeanor penalty punishable by imprisonment for not more than 1 year, a fine not more than \$1,000.00, or both, for a series of acts related to medically frail parolees. These acts include knowingly causing a medically frail parolee to have contact with a person with whom the parolee is prohibited from having contact, either as a condition of his or her parole or a personal protection order. The acts also include assisting the parolee (with the intent to violate his or her parole) in absconding or attempting to abscond from supervision by leaving the medical facility in which the parolee has agreed to reside as a condition of parole without the permission of the parolee's supervising agent. The penalty for assisting a paroled resident to leave the facility does not apply in circumstances in which the resident has to leave the facility for medical care or emergencies, or natural disasters, fires, etc., which would necessitate immediate evacuation of the facility.

These criminal penalties pose several problems. Despite the language in HB 4129 stating staff shall comply with state and federal regulations "regardless of the conditions of parole" facility staff do not appear to be protected from the criminal penalties set forth in HB 4131. If facility staff realize the parolee is barred from having contact with a certain individual, but that individual shows up at the facility at the request of the parolee resident, facility staff will have conflicting obligations under HB 4131 and federal nursing home requirements. Residents have the right to visitors of their choice pursuant to federal law. If the staff denies the parolee resident the right to visit with the individual, they could face sanctions or other penalties for resident

rights violations. If they allow the individual to meet with the parolee resident, they could face up to a year in prison, a fine of \$1,000.00, or both.

Similarly, if the facility knows the parolee resident cannot leave the facility as a condition of parole, they could find themselves in the same dilemma. What if the facility is taking residents to an event in the community and the parolee resident wants to attend? What if the parolee resident wants to go to church? Or visit with family as part of the Therapeutic Leave Days benefit? The facility must then decide whether to ban the parolee resident from leaving and violating resident rights, or to let the parolee resident leave and face the criminal misdemeanor penalties.

HB 4131 penalizes staff who have the “intent to assist a medically frail parolee in violating his or her parole,” but subsection (1)(B) would permit staff to avoid these criminal penalties if they first get permission of the “parolee’s supervising agent.” This could help facility staff avoid penalties and protect resident rights. However, it seems unlikely that the supervising agent would approve violations of parole. Even if supervising agents were agreeable, requiring this process still places additional burdens on staff. Moreover, the parolee resident rights will be violated because other residents don’t need permission from anyone to meet with visitors or leave the facility.

The bills do not explicitly state parole conditions will include a ban on leaving the facility, and HB 4129 subsection (15) states the parole conditions cannot violate state and federal regulations. But the language discussed above requiring permission from a supervising agent to leave the facility certainly implies there will be bans on leaving the facility, which would violate resident rights. Additionally, HB 4129 sponsor Representative Beau LaFave testified to the

House Judiciary Committee on March 5, 2019 that parolee residents would not be able to leave facilities.

3. Further Guidance from CMS

In order to qualify for Medicare or Medicaid payments, CMS has stated long term care facilities “must demonstrate continuous compliance with federal requirements.”⁸ If a resident is forced to waive rights or if facility staff are forced to ignore those rights, the facility would not be in compliance with federal requirements. Additionally, Rebecca Ward from CMS further clarified in a March 7, 2018 email that “The rights of all residents in nursing homes are established under federal law and regulation, irrespective of state law. *A facility that accepts residents who have restrictions on those rights is violating federal Requirements for Participation for long term care facilities and would not be able to maintain their certification*”⁹ (emphasis added). Based on the language of these bills parolee residents admitted to facilities would likely have restrictions on their rights, thus threatening a facility’s ability to maintain certification.

Respectfully submitted April 25, 2019

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⁸ *Id.* at 3.

⁹ E-mail from Rebecca Ward, Nurse Consultant, CMS to Dan Wojciak, Attorney, Michigan Elder Justice Initiative (Mar. 5-6, 2018)(see attached).

