

# MINUTES

## Regulation of Nursing and Assisted Living Beds Interim Committee



Representative Wayne Steinhauer, Chair  
Senator Mike Vehle, Vice Chair

**First Meeting, 2016 Interim  
Tuesday, July 12, 2016**

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

The first meeting of the Regulation of Nursing and Assisted Living Beds Interim Committee was called to order by Representative Wayne Steinhauer at 10:00 a.m. (CDT) in room 413 of the State Capitol.

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

Staff members present included Ms. Amanda Jacobs, 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>.*

### Opening Remarks

**Representative Wayne Steinhauer** welcomed everyone to the meeting and said the committee will focus only on the scope of study given to them by the Executive Board. The committee will not have time to go beyond the scope of study.

### 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 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,** presented a PowerPoint regarding the regulation of nursing and assisted living beds ([Document #1](#)).

Secretary Malsam-Rysdon said the Department of Health is responsible for regulating the health care facilities in the state and they work closely with the Department of Social Services.

The Department of Social Services plays the lead role in working with informal caregivers (pages 3-5 of the presentation). People prefer to stay home rather than going into a facility and the informal caregiver is an unpaid individual who assists with activities of daily living and/or medical tasks, usually a family member, friend, or neighbor. The informal caregivers save the state about \$803 million a year. In response to a question, Secretary Malsam-Rysdon said informal caregivers are typically spouses or adult daughters.

Mr. Martinec presented the information on Residential Living (pages 6-7). The majority of residential living facilities are small and based out of private residences. These facilities are required to be registered but there is very light regulation and the state does not track the occupancy rates.

In response to committee questions, Mr. Martinec said there is a list of the residential living facilities available on the Department of Health's website. The law requires that these facilities must care for two or more elderly or disabled people who are not related to the owner of the facility. Mr. Martinec explained that the larger facilities on the list may be attached to another type of assisted living facility.

Mr. Martinec presented the information on Assisted Living Centers (pages 8-10). Assisted Living Centers (ALC) provide some personal care and services and limited health care services. There are 167 licensed ALCs with a total of 4,500 beds in South Dakota. Some facilities have one bed and some are very large. The trend is that the smaller facilities are closing and larger facilities are being built.

Chair Steinhauer asked about the need for staffing. Mr. Martinec said the need for long term care workforce is a huge issue across the state, and that trend will continue to get worse.

In response to committee questions, Mr. Martinec and Secretary Malsam-Rysdon said clients in ALCs can receive Medicaid through a waiver program and about a fourth of the people in ALCs do receive Medicaid. The Department of Social Services administers the waiver program.

Mr. Martinec presented the information on Nursing Facilities (pages 11-13). Nursing facilities provide round the clock nursing care and there are 110 licensed nursing homes in South Dakota. Within those 110 nursing homes, there are 6,855 licensed beds and 8,039 moratorium beds. Page 13 of the document is a map showing all the communities in South Dakota where nursing facilities are located.

In response to committee questions, Secretary Malsam-Rysdon explained there are lower needs clients found in nursing facilities often because there is no other type of facility available, and it can be difficult to provide more types of facilities because of the staffing challenges found in most of the state. The Secretary added that more needs to be done to make sure people understand their facility options, but in a lot of areas, certain services just aren't available.

**Senator Alan Solano** asked if there are situations where a family is hesitant to remove someone from a nursing facility with the fear they will not be able to find another facility should they need that care again. Secretary Malsam-Rysdon said that may be a consideration but most families take care of their loved one as long as possible and only move them into the nursing facility when they are no longer able to care for them.

**Representative Roger Hunt** asked if increased emphasis on home health care by the state would help address some of the problems. Secretary Malsam-Rysdon said this suggestion is heading in the right direction but the Department of Social Services administers home care and can better answer questions regarding that type of care. Both departments have been working together on this option for several years.

Chair Steinhauer asked about the profitability of assisted living centers. Secretary Malsam-Rysdon said that the state is an active payer in only 25% of the assisted living centers' funding, whereas nursing facilities have 55-58% Medicaid funding. Facilities that provide a variety of health care services would be beneficial to the state but there are not enough of those types of services needed in rural communities to make that viable.

**Representative Blaine Campbell** asked if some nursing homes also provide assisted living. Secretary Malsam-Rysdon said some nursing facilities also have assisted living beds. Mr. Martinec said there is no moratorium on assisted living beds and theoretically a nursing home bed could be used for lower level care. **Representative Steve Westra** said a health care facility would lose money by switching a nursing home bed to an assisted living bed.

Mr. Martinec said there are basically four levels of long term care in South Dakota. The least amount of care provided would be the independent living facility; the next step up is the residential living facility; the next higher level is the assisted living centers; and the highest level of care is the nursing facilities.

Secretary Malsam-Rysdon reported on the Certificate of Need (CON) program as it applies to long term care costs (pages 16-19). Many CON programs were put into place as a result of the federal Health Planning Resources Development Act of 1974. CON laws are used to control costs and coordinate the planning of new nursing facility beds and facilities. South Dakota did have a CON program in place until the moratorium was implemented.

Secretary Malsam-Rysdon continued by discussing the nursing facility moratorium (pages 20-29) which was enacted in 1988, the same year South Dakota repealed the CON laws. Once implemented, the moratorium was extended five times with an indefinite extension in 2005. The moratorium applies only to nursing facilities and nursing facility beds. The main purpose of the moratorium is cost control. Mr. Martinec pointed out that there would not have been the growth of assisted living facilities without the moratorium.

Mr. Martinec explained there is no mechanism for the state to take unused moratorium beds from a facility. Moratorium beds are redistributed when a facility closes. Four facilities have closed since 2005 and there are 101 moratorium beds available because of those closings. A facility may choose not to use all their moratorium beds for different reasons such as Medicaid reimbursement, or converting from double occupancy rooms to single occupancy rooms. Utilization of nursing facilities has been declining in South Dakota as well as nationally.

Chair Steinhauer asked why there is a decline in nursing home bed use. Secretary Malsam-Rysdon said people try to stay home as long as possible and there is more use of assisted living care. There is also more use of in-home care.

Secretary Malsam-Rysdon went through the list of exceptions to the moratorium (page 29). The last two exceptions were in 2016, one for relocating the White River Nursing Facility to Rosebud, and one for an additional 24 beds at the Michael J. Fitzmaurice Veterans Home. Since 2013, 74 beds have been redistributed from closed facilities with 50 unused beds going to Rapid City and 24 unused beds going to Sioux Falls.

Mr. Martinec presented the information on the expansion of Assisted Living Center (ALC) services (page 34). A workgroup that met in 2011 clarified restrictions on accepting and retaining residents and a dementia care workgroup met in 2013 and developed rules that allow ALC facilities to provide feeding assistance and full assistance with assisted daily living. Only three facilities thus far have elected to offer that level of services.

**Senator Jim Bradford** asked about the long term care facility that was recently built in Eagle Butte. Mr. Martinec explained that the facility was built with the intention of being a nursing home but was never licensed as such, and one of the reasons for that is the lack of workforce. The building did sit idle for a period of time but a part of it is now being used for apartments and assisted living.

Mr. Martinec said one program that is being used to address the need for healthcare workers is the Rural Healthcare Facility Recruitment Assistance Program (page 35) which was established in 2012 and has been a very popular program with the rural facilities. This program provides a \$10,000 payment to healthcare providers who complete a three-year service commitment working in eligible facilities located in communities with a population of 10,000 or less. In response to committee questions, Secretary Malsam-Rysdon said the \$10,000 payment is not made until after the person has completed the three years, and 100% of the funding comes from state funds. Representative Hunt asked if the \$10,000 amount could be increased and Secretary Malsam-Rysdon replied that it could.

Secretary Malsam-Rysdon went through the challenges facing long term care (page 36). These challenges include aging infrastructure, workforce challenges, and the financial burden of long term care.

**Representative Jim Stalzer** said he has had several constituents tell him there are no available nursing facility beds available in the Sioux Falls area. Representative Stalzer asked how the 160 unlicensed beds can be made available to those who need them. Secretary Malsam-Rysdon said the challenge is not always finding an available bed, but can also be finding a facility that provides the services specifically needed by the patient.

Chair Steinhauer asked Secretary Malsam-Rysdon what would help improve things. Secretary Malsam-Rysdon said she would like to see more healthcare services available to families in their homes and communities. The Secretary said that today's providers are good providers and that their models should be expanded into more home care settings, and that she would like to see a seamless delivery service for providing the healthcare people need.

### **Department of Social Services**

**Ms. Lynne Valenti, Secretary, SD Department of Social Services**, introduced **Mr. Justin Williams, Director of the Division of Adult Services and Aging, SD Department of Social Services**, and **Ms. Marilyn Kinsman, Policy Analyst and former Director of the Division of Adult Services, SD Department of Social Services** as the presenters of the PowerPoint presentation regarding the long term care study ([Document #2](#)).

Mr. Williams went through the presentation. The total amount of Medicaid received by the 110 nursing facilities in South Dakota in FY15 was \$136.2 million (page 4). The number of patients served in these facilities was 3,252. About 55% of the nursing facility residents in South Dakota pay for their care through Medicaid. A map of all the nursing facility and assisted living beds available in South Dakota can be found on page 5 of the document.

Ms. Kinsman said the Department of Social Services (DSS) hired Abt, a consulting firm, in 2007 to do an analysis of long term care in South Dakota and they submitted a lengthy report with their findings. Abt did an update of that report in 2015. Pages 6-9 of the presentation lists some of the differences in the findings of these two reports.

In 2008, per the analysis report from 2007, a 100-member long term care task force was appointed to take an aggressive approach to addressing future long term care needs. The seven recommendations made by that task force can be found on page 9 of the document.

Ms. Kinsman said that in response to the first task force recommendation, South Dakota now has an Aging and Disability Resource Center (ADRC) with five call centers located across the state. The ADRC focuses on helping people age 60 and over and adults with disabilities. Information retrieved from the phone calls received by the centers is entered into the system and reports can be run based on that information.

**Senator William Shorma** said the 2007 and 2015 reports do not show shifts in the availability of home and community-based services. Ms. Kinsman said in looking closer at that information, the DSS learned that people are taking care of family rather than using certain services. Home based services does not include people taking care of their own family members but rather in-home services provided by outside caregivers.

Ms. Kinsman listed the three recommendations that came from the 2015 Long Term Care Study Update, which are to gather more information, expand and enhance home and community based services, and continue counseling through the ADRC (page 11).

Mr. Williams said after the 2015 study update, DSS developed a consumer survey to identify service needs, awareness of services, and determine natural supports currently being utilized. 7,500 surveys were distributed and they received 1,000 responses. The results of that survey can be found on pages 13-15 of the document.

Mr. Williams said the Adult Services and Aging Home and Community-Based Services Workgroup was formed to focus on rebalancing the long term services and support system. This group met three times during the summer of 2015 and developed four recommendations for long term healthcare in South Dakota (pages 17-21). Those four recommendations included providing education and training, analyzing the expansion of services, enhancing awareness and understanding of the ADRC process, and reviewing the ADRC process to better ensure smooth transitions between hospital and home.

Mr. Williams said there is adequate capacity for nursing homes in South Dakota based on various reports and studies. Representative Stalzer said there may be adequate capacity but having to drive long distances to visit loved ones is not adequate. Ms. Kinsman agreed that it is not appropriate to have to travel to spend time with family and being allowed to move some beds as needed has helped DSS better serve everyone.

Senator Solano said in looking at the adequacy of long term beds, it is important to consider the need for specialized beds. In Rapid City, the concerns are for the need for memory care beds. Ms. Kinsman replied DSS works closely with those with the need for memory care. The federal initiatives coming forward are to get people outside the institutional setting to work with those in need of specialized care. Some answers are still on the horizon and DSS continues to work with the Department of Health on these issues.

Senator Shorma said there needs to be a way to measure what progress is being made. Mr. Williams said one of the options available now are the Medicaid waiver for healthcare services, which would allow for more at home healthcare. Mr. Williams added that it will be easier to measure progress once measurables have been established.

**Representative Karen Soli** asked if there are enough memory care beds in the state. Mr. Williams said there is adequate memory care and they are starting to change the way DSS looks at memory care by having the patient stay at home as long as possible and then helping them transition through the different levels of care facilities as needed.

Senator Solano asked for information on respite care for the caregivers. Ms. Kinsman said there is a federal program that provides respite services that helps make arrangements for care of the loved one while the caregiver is away.

Chair Steinhauer asked Mr. Williams what he sees as the advantages of the moratorium. Mr. Williams said the moratorium helps control costs and without that control they would not be able to offer other healthcare services outside the nursing facility care. Mr. Williams continued saying without the moratorium there would be additional nursing homes built and the limited Medicaid dollars would be used by those facilities leaving little to help with other services.

Chair Steinhauer asked for more information regarding the fact that many facilities have fewer licensed beds than they do moratorium beds. Secretary Valenti said she would prefer to address that issue at the next study committee meeting.

Representative Campbell asked about payment for care and if a client can use both Medicaid and private funding or if it has to be one or the other. Secretary Valenti explained that there are two parts to the nursing facility rate.

The average daily rate is \$132 and then each resident is rated on his or her needs for care and that case mix is added to the average daily rate. 55% of patients in nursing homes are funded through Medicaid. \$200 a day is the highest amount Medicaid allows. The DSS believes it makes sense to increase support for community based care so people can stay in their homes and the Medicaid waiver program is one resource used to help make that happen.

Secretary Valenti said there has been increased federal regulations in this area, specifically in defining home and community based healthcare and assisted living care. The federal government has recently decided to take a long hard look at assisted living and the state will be affected by those changes in rules.

Senator Shorma asked that both the Department of Social Services and the Department of Health propose policy changes the committee can consider that would help families keep their loved ones at home as long as possible.

### **Public Testimony**

**Mr. Paul Craig Reuman, Presho, SD**, presented to the committee the challenges his family faced when searching for an acceptable nursing home facility nearby for his father who has dementia. Mr. Reuman said during the search he discovered most of the nursing homes in South Dakota are old and decrepit and he believes that is the result of there being no competition allowed within that industry. Mr. Reuman said another problem caused by the moratorium is that the children of the people needing nursing home care have to find ways to financially break the parents so the state will help pay for the care because the costs are so high. The family did find a facility in Brookings where the father is now living, although not ideal because of the distance, the father is settled there.

Senator Shorma asked if the Reumans would have preferred to keep their father closer to home. Mr. Reuman said that two closer facilities have contacted him the last month letting him know they have openings, but his father is comfortable where he is and they prefer not to move him now.

**Mr. Mike Diedrich, Regional Health System, Rapid City**, said this study is important because people want to keep their loved ones near. Mr. Diedrich said there are some beds available in Rapid City but some of the facilities do not accept Medicaid as payment, adding that the nicer facilities only accept self-pay or insurance-pay clients. Mr. Diedrich said there is some progress being made in opening nursing home beds, but not as fast as is needed.

In response to questions from Representative Steinhauer, Mr. Diedrich said the lack of nursing home beds can lead to longer stays in the hospital, and it is more expensive to spend a night in the hospital than in a nursing home.

### **South Dakota Health Care Association**

**Mr. Mark Deak, Executive Director, South Dakota Health Care Association (SDHCA)**, said that today's facilities do have some challenges but he is in awe of the people who work in these facilities. The SDHCA represents nursing home facilities and assisted living facilities and they are very supportive of the current moratorium, but also support the exceptions that the state chooses to make in specific instances. Mr. Deak said the State does a good job balancing the needs of the people with the needs of the service providers.

Mr. Deak said that when looking at the operating margin for long term care centers, once everything is filtered in, it is about 1.9%. The operating margin for an assisted living center would be more because the level of care needed would be less. In response to committee questions, Mr. Deak explained that the standard daily rate for a nursing facility ranges from \$100 to in excess of \$200. The Medicaid standard is about \$132. The average cost per year on a cash basis is about \$60,000.

Chair Steinhauer asked for Mr. Deak's thoughts on the benefits of the moratorium. Mr. Deak said they want to maintain the quality of care current facilities provide and if the market is allowed to expand unchecked that quality will suffer.

Representative Hunt asked Mr. Deak if he would write a letter to the committee regarding the introduction of free enterprise into the management of healthcare facilities. Mr. Deak said he will share that request with his leadership for their consideration. Mr. Deak did point out that they are not free of competition as healthcare services are also offered in skilled centers.

### **Committee Discussion**

The committee discussed the need for members to tour healthcare facilities to better understand the mission that has been presented to them. The committee agreed that the next meeting will be August 23, 2016, in Pierre.

### **Adjourn**

**A MOTION WAS MADE BY REPRESENTATIVE WESTRA, SECONDED BY SENATOR HAGGAR, TO ADJOURN. The motion prevailed on a voice vote. The Committee adjourned at 4:10 pm.**