

Testimony
Senate Bill 2113 – Department of Human Services
Senate Human Services Committee
Senator Judy Lee, Chairman

January 9, 2019

Chairman Lee, and members of the Senate Human Services Committee, I am Karla Backman, State Long-Term Care Ombudsman with the Department of Human Services (Department). I am here today in support of Senate Bill No. 2113, which was introduced at the request of the Department.

Long-term care facility as defined in chapter 50-10.2 of the North Dakota Century Code means “any skilled nursing facility, basic care facility, assisted living facility or swing bed hospital approved to provide long term care services.”

The right of a resident of a long-term care facility, or his or her representative, to place and use audio or video recording equipment, i.e. electronic monitoring, in the resident’s room is an issue that is brought to the long-term care ombudsmen on a regular basis. There is audio and video recording equipment already being used in resident rooms and sometimes it is concealed. Currently North Dakota law allows for audio recordings with one-person consent, but the law is not as clear on video recordings. The Long-Term Care Ombudsman Program takes the position that a resident has the right to conduct electronic monitoring in his or her room. However, there should be protections for the resident and roommates. Thus, the overall goals of this legislation are to provide specific definition on electronic monitoring for:

- Protection of residents’ rights and privacy,
- Insuring long-term care facilities are notified of electronic monitoring within their facility,
- Assignment of costs and responsibilities,
- Access to the recordings and use of the recordings.

In developing this legislation input was sought from stakeholders such as the Department of Health, Protection and Advocacy, and the Long-Term Care

Association. Laws on this issue from other states were also reviewed and used as a model.

I have attached to my testimony a copy of amendments to this Bill that were developed with the Long-Term Care Association.

This Bill is proposing to create and enact a new section to chapter 50-10.2 of the North Dakota Century Code and to amend and reenact sections 12.1-31-14 and 50-10.2-01 of the North Dakota Century Code relating to authorizing electronic monitoring by health care facility residents and privacy and to provide a penalty.

Section 1. Page 2, Lines 1 and 2, amends section 12.1-31-14 of the North Dakota Century Code to add subsection 3 to cover the proposed amendment to chapter 50-10.2 in Sections 2 and 3 of this Bill

Section 2. Page 2, Lines 7 through 16 and Page 3, Lines 1 and 2, amends section 50-10.2-01 of the North Dakota Century Code to include the definitions of “authorized electronic monitoring”, “authorized electronic monitoring device”, and “resident representative.” The definition for “authorized electronic monitoring device” has been written with the intent of not creating a barrier to residents maintaining contact with family and friends through the use of Facetime, Skype, webcams etc.

There is also a change from using “person’s” to “individual’s” in the definitions of conflict of interest and resident. This change is for clarity as “individual” means a human being. A “person” can include a human being but also a corporation, entity, government, etc.

Section 3. Creates and enacts a new section to chapter 50-10.2 of the North Dakota Century Code.

Page 3, Lines 9 through 12, states residents of long-term care facility can place an electronic monitoring device in their room if it focuses on their area of the room. This gives a basic boundary to where a resident can use electronic monitoring equipment. The Department will create rule with more specifics on the focus of video monitoring equipment to address further privacy issues. There is also an amendment to this that will be described later in my testimony.

Page 3, Line 13, requires that the facility must be given notice of the installation of the monitoring equipment and its use. This is to eradicate hidden cameras and audio recording devices and assure the facility staff, roommates, and other visitors have full knowledge that electronic monitoring is occurring. There are also amendments to this line that will be described later in my testimony. The Department will also create rule with more instruction on the process and time frames for the notice.

Page 3, Lines 16 through 19, assigns all costs of the electronic monitoring, except for electricity, to the resident or resident representative. The Department will create rule to address the use of a facility's wireless internet access to include private use versus public use wireless and bandwidth capacity. It is the intent that the long-term care facility not take on financial responsibility for a resident electing to do electronic monitoring.

Page 3, Lines 20 through 26, are intended to protect the privacy of the resident's roommates and has them release the facility of liability regarding their right to privacy concerning the use of the electronic monitoring devices in the room. Consent from the resident's roommate is necessary to respect their right to privacy, dignity, and respect and provide the opportunity to work through concerns in these areas prior to electronic monitoring equipment being used. There is an amendment that will be described later in my testimony. The Department will create rules with specific language to use in the written consent and liability release.

Page 3, Lines 27 and 28, sets forth reasonable cooperation between the resident and the facility in the installation of the electronic monitoring devices.

Page 3, Lines 29 through 31, Page 4, Lines 1 through 11, gives further direction for a resident in obtaining the consent of his or her roommate for the electronic monitoring and allows the roommate to limit the use of the monitoring up to withdrawing consent. The withdrawal of consent requires the resident to cease use of electronic monitoring until accommodations can be made.

Page 4, Lines 12 through 19, instructs a facility to make reasonable attempts to relocate a roommate if he or she refuses to consent to electronic monitoring and gives instruction on what is reasonable. This shows the balance needed to protect a resident's right to have electronic monitoring while also protecting the roommate's right to have choice and privacy. There is an amendment that will be described later in my testimony.

Page 4, Lines 20 through 23, balances one resident's right, and wish, to have electronic monitoring in his or her room and a facility taking into consideration if potential roommates will give consent.

Page 4, Lines 24 through 27, provides protection of a resident's right to choose electronic monitoring by prohibiting a facility from either refusing admission or discharging a resident for that choice.

Page 4, Lines 28 through 31, requires a facility to post signs so that all individuals – resident, family, community visitors, and staff – are aware that electronic monitoring is occurring within a resident's room.

Page 5, Lines 1 through 13, set protections for the recordings, and the devices, and requires consent from the resident or a court order for facility staff to access the recordings. This leaves oversight of the devices and the recordings to the resident

who initiated the electronic monitoring. Penalties are also established lines 4 through 9.

The first proposed amendment to page 3, line 12 is to require the placement of the electronic monitoring device in a way to protect the privacy and dignity of the resident. For example, to protect the resident's private body parts from being visible on the electronic monitoring device, when personal cares are being provided.

The second amendment to Page 3, line 13 clarifies the notice must be in writing. The third amendment to this same line is to assure that the installation of the camera doesn't jeopardize the facility's compliance with regulations.

The fourth amendment to Page 3, line 25 adds additional protection under HIPAA as protected health information of both of the resident and that of any other resident residing in the room may be shared within the resident room and captured by the electronic monitoring device.

In the fifth amendment to Page 4, line 7 the first sentence of the amendment was added at the request of the North Dakota Long Term Care Association, to show a withdrawal of consent by the resident sharing the room. The remaining language to the amendment clarifies the responsibility to end the electronic monitoring, upon request of the resident sharing the room, is that of the resident or resident representative who initiated the monitoring.

The sixth amendment to page 4, line 19 is to remove the language "until the request can be fulfilled."

This concludes my testimony. I am available to answer questions the committee may have. Thank you.

PROPOSED AMENDMENTS TO SENATE BILL NO. 2113

Page 3, line 12, after “roommate” insert “. The placement of an electronic monitoring device should protect the privacy and dignity of a resident”

Page 3, line 13, after “given” insert “written”

Page 3, line 13, after “use” insert “. The written notice must include an installation plan that complies with that facility’s standards and regulations as provided by the facility to the resident”

Page 3, line 25, after “privacy” insert “and for any potential disclosure of protected health information as defined by title 45, Code of Federal Regulations, part 160, section 103”

Page 4, line 7, after the underscored period insert “This shall be considered that consent is withdrawn for the electronic monitoring. The resident or resident representative who initiated the use of the authorized electronic monitoring device shall be responsible to turn off the device or to block the visual or audio recording or transmitting component of the authorized monitoring device.”

Page 4, line 19, remove “until the request can be fulfilled”

Renumber accordingly