

## MEMORANDUM

### A.1967-B (Paulin)/S.7190 (Scarcella-Spanton)

#### *AN ACT to amend the public health law, in relation to the use of electronic monitoring devices in the rooms of residents in assisted living residences and nursing homes*

LeadingAge New York opposes this legislation, which amends Public Health Law to create a resident right to install, operate and maintain an electronic monitoring device in resident rooms in nursing homes and assisted living residences. While we are sensitive to the concerns of resident family members, the bill does not provide sufficient consideration for the dignity, privacy, and autonomy of the resident or their roommate. The bill is also overly simplistic in its approach to the complex issues raised by electronic monitoring, overlooking many of the legal, ethical, and operational challenges that are addressed in other states' laws.

Federal and state nursing home regulations and accompanying interpretive guidance place a high priority on ensuring each resident has a right to privacy and to be treated with dignity. Federal regulations at 42 CFR § 483.10(h) (see also state regulations at 10 NYCRR § 415.3(e)) provide that the resident has a right to personal privacy, in relation to accommodations, medical treatment, communications, personal care and visits. Regulations also require the facility to promote care for residents in a manner and in an environment that maintains or enhances each resident's dignity and respect in full recognition of his or her individuality. (42 CFR §483.15(a); 10 NYCRR § 415.5(a))

Similarly, the assisted living residence statute and regulations (see 10 NYCRR §1001.8 (b)) also place a high priority on ensuring each resident has a right to privacy and to be treated with dignity. Every resident has the right to have private communications and consultations with his or her physician, attorney, and any other person. Every resident has the right to have privacy in treatment and in caring for personal needs, and the right to confidentiality in the treatment of personal, social, financial and medical records, and security in storing personal possessions.

It is important to recognize that the interests of family members and residents are not always aligned. While family members may want to have eyes on every minute of a resident's day, the resident may consider this intrusive. Further, a resident may consent to electronic monitoring for some aspects of their daily living outlined above, but may want to reserve privacy for other aspects. For example, a resident may want to have a private visit with a loved one, but may consent to monitoring of the provision of care. However, it may be difficult for residents to manage the equipment to enable and suspend monitoring at specific times. Moreover, if monitoring is turned on and off, disputes will inevitably arise over how this occurred and who was responsible for it.

Further, the interests of roommates must also be safeguarded and may not be aligned with the interests of the resident who chooses electronic monitoring. Roommates are also entitled to autonomy, privacy and dignity. In some cases, it may be infeasible to install a video monitoring device in a room that

captures images only of one roommate's physical space and not the other's. The bill does not address who secures a roommate's consent and how the roommate is protected.

Electronic monitoring also raises legal and cybersecurity issues that are not addressed by the bill. If the monitoring includes recording of images and sound, the recordings must be securely stored, protected from unauthorized access, and securely destroyed consistent with data privacy and security standards. Facilities should be protected from liability for unauthorized access and other harm resulting from a resident's or their representative's use of electronic monitoring. Other states that have enacted similar laws have addressed these issues.

LeadingAge New York's more specific concerns and recommendations are:

1. The legislation does not specify the nature of the capacity required to consent to electronic monitoring. It is important to recognize that someone may lack capacity to make some decisions (e.g., complex health care or financial decisions), but have the capacity and the right to make decisions about their privacy and dignity. There may be circumstances where the resident and family wishes differ, and the resident's wishes should be honored.
2. Although the bill requires that video monitoring be limited to the personal space of the resident who requested monitoring, there is significant potential for inadvertently capturing audio or video of a roommate. Other states' laws require consent of the resident and any roommate to both audio and video monitoring. This bill has an odd structure that provides a general consent to electronic monitoring and a separate consent for audio-capture alone. This implies that there is a different level of consent for audio-capture. Consent by the resident and the roommate should be a prerequisite to the installation and use of an electronic monitoring device for either audio or video capture or both.
3. A camera must not be placed in a location to capture the provision of medical procedures and personal care services to the resident, unless resident privacy and dignity issues are addressed. Consent to the authorization for installation and use of a monitoring device should include a release of liability to the assisted living residence or nursing home for a violation of the resident's right to privacy and dignity insofar as the use of the monitoring device is concerned.
4. Given the sensitive nature of the images and conversations that may be captured by such devices (including images or audio of the roommate), there should be limits placed on the residents and their representatives related to access by parties other than facility, the resident, and individuals authorized by the resident. If any images and audio are transmitted from the resident's device and saved to the cloud, rebroadcast to a third party, and/or viewed by unauthorized parties, this could create additional HIPAA security and privacy liability for the facility. Facilities should be immune from civil and criminal liability and administrative penalties for any activity or action arising out of a resident's use, or their representative's use, of any electronic monitoring device.

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5. This bill would allow visitors and staff to be monitored, but requires signage only in relation to audio capture. Visitors and staff should be made aware that they are being monitored whether by a video or an audio device.
6. The resident or resident's representative should be required to provide a copy of any recording to the facility in the event of any civil, criminal, or administrative proceeding, and to the facility and affected employee in a disciplinary proceeding.
7. The bill should address the admissibility of recordings in court or administrative proceedings and should include provisions to prevent the admissibility of enhanced or edited recordings. If a device is installed without the facility's knowledge and without all needed consents/requirements, any recordings or information obtained from the electronic monitoring should be inadmissible in any legal or administrative proceeding.

**For these reasons, we urge the Legislature to oppose A.1967-B (Paulin)/S.7190 (Scarcella-Spanton) and consider amendments to address each of these concerns.**

*LeadingAge New York represents approximately 350 not-for-profit and public long term care providers, including nursing homes, home care agencies, senior housing, retirement communities, assisted living, adult care facilities, adult day health care and managed long term care.*

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