

**ALASKA STATE LEGISLATURE
ADMINISTRATIVE REGULATION REVIEW COMMITTEE**

March 3, 2005

3:12 p.m.

MEMBERS PRESENT

Representative Tom Anderson, Chair
Representative Vic Kohring
Representative Sharon Cissna

MEMBERS ABSENT

Senator Gene Therriault, Vice Chair
Senator Ben Stevens
Senator Lyman Hoffman

OTHER LEGISLATORS PRESENT

Representative Lesil McGuire
Representative Les Gara
Representative Berta Gardner

COMMITTEE CALENDAR

OVERVIEW: ASSISTED LIVING HOME REGULATIONS

- HEARD

PREVIOUS COMMITTEE ACTION

No previous action to record

WITNESS REGISTER

JOHN ONEY

Mama's Assisted Living Home
Anchorage, Alaska

POSITION STATEMENT: Testified on the new assisted living home regulations.

AMY ONEY

Mama's Assisted Living Home
Anchorage, Alaska

POSITION STATEMENT: Discussed the situation in which the new assisted living home regulations have left her assisted living homes.

SHERRY METTLER

Northern Lighthouse Assisted Living Home
Anchorage, Alaska

POSITION STATEMENT: Discussed the four areas of concern the assisted living home providers have in regard to the new assisted living home regulations.

JOEL GILBERTSON, Commissioner

Department of Health and Social Services (DHSS)
Juneau, Alaska

POSITION STATEMENT: Provided comments on DHSS' view of the assisted living home regulations.

STEVE ASHMAN, Director

Division of Senior and Disability Services
Department of Health and Social Services (DHSS)
Juneau, Alaska

POSITION STATEMENT: Provided comments on DHSS' view of the assisted living home regulations.

RYNNIEVA MOSS, Staff

to Representative John Coghill
Alaska State Legislature
Juneau, Alaska

POSITION STATEMENT: Related the need to level the playing field between the pioneers' homes and private assisted living homes.

GERI JOHNSON

Johnson's Assisted Living Association
Homer, Alaska

POSITION STATEMENT: Expressed concern with the room and board [cap under the new regulations].

MARY RAYMOND

Seniors at Large
Homer, Alaska

POSITION STATEMENT: Urged the [division] to talk with the assisted living providers before any further regulation changes.

MARY JO METTLER

Northern Lighthouse Assisted Living Home
Anchorage, Alaska

POSITION STATEMENT: Expressed concerns with the new regulations.

ACTION NARRATIVE

CHAIR TOM ANDERSON called the Administrative Regulation Review Committee meeting to order at [3:12:34 PM](#). Representatives Anderson, Kohring, and Cissna. Also in attendance were Representatives McGuire, Gara, and Gardner.

OVERVIEW: Assisted Living Home Regulations

[3:13:02 PM](#)

CHAIR ANDERSON announced that the only order of business would be the overview of the assisted living home regulations.

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JOHN ONEY, Mama's Assisted Living Home, informed the committee that the mission [of Mama's Assisted Living Home] is to give respect to Alaskan seniors during their golden years. Mr. Oney said that he [and Ms. Mettler] have pooled their resources to provide the committee with insight into these new regulations and the devastating impact they are having on Alaska's seniors and the private sector. Mr. Oney mentioned that he has four major concerns with the new regulations. He highlighted the fact that Commissioner Gilbertson is not in the "trenches" [of these assisted living homes].

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AMY ONEY, Mama's Assisted Living Home, explained that assisted living homes provide staff to take care of the frail elderly and disabled adults and provide the daily living activities, such as baths. Ms. Oney clarified that for those on the waiver program to reside in an [assisted living home], they must meet nursing level of care. Therefore, any of the residents of Mama's Assisted Living Home are eligible to be in a nursing home at any time. She explained that the Choice waiver program was implemented in order to provide the frail elderly, the disabled, and mentally ill individuals the choice to receive services in a home environment rather than an institution while providing a cost benefit to the state.

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SHERRY METTLER, Northern Lighthouse Assisted Living Home, stated that [assisted living providers] have the following four key areas of concern: the room and board rate cap; the liability of

the assisted living homes due to the Medicaid refinancing by the Department of Health and Social Services (DHSS); administrative and general costs cap; and failed notification procedures. Ms. Mettler said that the failed notification procedures really lead to today's current situation. In the PowerPoint entitled, "Effects of July 1, 2004 Regulation Changes on Assisted Living Homes", she highlighted the March 19, 2005, letter from DHSS, which relates: "Under the proposed regulations, there will be no change to the assisted living provider's cash flow." Therefore, the assisted living providers were under the assumption that the new regulations would only impact those receiving Adult Public Assistance (APA) under the Choice waiver program. However, that was not the case, the cuts went straight across to every recipient of the Choice waiver program.

MS. METTLER then directed attention to the room and board cap [the slides for which begin on page 13 of the PowerPoint]. Throughout the entire [regulations process] assisted living providers had no idea that room and board would be capped until June 11, 2004. On July 1, 2004, the \$564 a month cap per resident was implemented. These new regulations required all Medicaid waiver recipients living in assisted living homes to repay the state all their entitlements received for their costs of care. Therefore, any funds beyond the \$100 for personal needs and the \$564 for room and board was returned to the state and was deducted from the Choice waiver side for services. The aforementioned amounts to \$18.54 a day for room and board. However, room and board includes a myriad of items, including wages, workers' compensation, food costs, food and housekeeping supplies, food and housekeeping equipment, building maintenance, snow removal, lawn care, transportation, utilities, building and insurance, and business taxes. She pointed out that pages 15-20 of the PowerPoint specifies what the assisted living home providers have to pay for with this \$18.54 a day for room and board.

MS. METTLER moved on to page 21 of the PowerPoint, which has an excerpt from the August 19, 2004, letter from Governor Murkowski. This letter, she said, illustrates Governor Murkowski's misunderstanding that a four-bed assisted living home would receive \$39,782 a year for room and board, which he opined should be sufficient to cover the cost for food/preparation costs, supplies, equipment, and building maintenance.

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CHAIR ANDERSON highlighted that assisted living homes consist of two groups: the disabled and seniors. He inquired as to how many assisted living homes there are in Alaska and how many of each of the two types of residents are in each.

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MS. METTLER specified that as of April 2004, there were 330 assisted living homes in Alaska. She explained that those homes are split almost in half [with regard to the clientele served]. The DHSS homes [serve those falling under] the older Alaskans waiver and the disabled older Alaskans. The other [assisted living homes serve those falling under the] developmentally mentally handicapped (DMH). She informed the committee that there are about 153 of the DMH homes, and noted that some of the DMH homes can qualify for the Choice waiver program. She highlighted that mental problems alone don't qualify an individual for a Choice waiver program. Therefore, there are fewer [clientele] on the DMH side than the DHSS side. She estimated that probably 2,000 or more of the clientele are in the older Alaskans and disabled older Alaskans group. She assumed that the DMH homes serve approximately the same number of clientele.

CHAIR ANDERSON concluded then that [assisted living homes in this state are serving] 4,000-plus people. Therefore, he surmised that [providing care to these individuals] is costly and the cut is dipping into the bottom line such that the assisted living home providers can't facilitate and administer the assisted living homes and cover the costs. He asked if this cut applies to all of the 4,000 or so living in assisted living homes.

MS. METTLER clarified that it applies to anyone on a waiver program, such as the older Alaskans and disabled older Alaskans waiver program. She noted that there are four different waiver programs. "Our understanding is that it cuts to any Choice waiver, home and community-based waiver program," she related.

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REPRESENTATIVE GARDNER surmised that most of these assisted living homes are small businesses that need to pay the costs and make a profit.

MS. METTLER confirmed that these assisted living homes are small businesses that need to [make a profit], although she indicated that these assisted living homes aren't making a profit.

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MS. METTLER returned to Governor Murkowski's letter, from which she highlighted the following: "It is important to note that the room and board payment is only for the cost of meals and bed space." She reminded the committee of her earlier testimony regarding what the room and board payment includes. She opined that if the room and board payment covered only the cost of meals and the bed space in the bedrooms, then she wouldn't be present today -- the costs would've been shifted to the direct column on the Choice waiver, which would've resulted in the assisted living homes being reimbursed more on the Choice waiver side, and room and board could've dropped.

MS. METTLER, in response to Chair Anderson, explained that assisted living homes must keep room and board costs separate, which was cut to \$18.54 a day by these new regulations, from the Choice waiver or Medicaid funds. The Choice waiver and Medicaid funds are used for services. However, if an assisted living provider receives Medicaid funds and "we do not fulfill that according to that contract", the assisted living provider must return those Medicaid funds to the state. There is no profit built into the Choice waiver programs. Therefore, if a refrigerator goes out, the [replacement] cost has to be taken from the room and board funds.

MS. METTLER reviewed the effect of the room and board cap via an example on page 24 of the PowerPoint. If an assisted living home resident had \$1,217 in entitlements, the resident was allowed to keep \$100 for personal needs, and the remainder, \$1,117, could be used for room and board under the old regulations. Under the new regulations, the assisted living provider is only allowed to use \$564 [for room and board costs] and anything over that would be paid to the state for cost of care. Therefore, in this example the \$553 remaining after the cap must go to the Medicaid side, which reduces the amount of Medicaid money the assisted living provider receives per month per client. The aforementioned scenario, under the new regulations, results in a 49.51 percent tentative loss of room and board per resident per month. Ms. Mettler pointed out that for a client receiving APA, the assisted living home wouldn't notice a difference because these individuals would only have social security income and APA income of \$362. In fact, such an

individual would have a combined income of \$926, of which the individual could keep \$100. However, DHSS has refinanced the Medicaid side such that the assisted living provider faces a 26 percent net loss of cash flow per resident per month. She noted that assisted living providers have discovered that they can't use the resident's entitlements.

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MS. METTLER directed attention to page 26 of the PowerPoint, which details an actual scenario of Mama's Assisted Living Home. The actual scenario shows a loss, and there's nowhere from which it can be made up. If the Medicaid refinance can be used for room and board, the loss would be reduced although it wouldn't place the provider at the breakeven point.

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REPRESENTATIVE GARDNER surmised that instead of the assisted living provider determining the rates for his/her individual home, the state specifies what the provider receives and what the provider has to provide.

MS. METTLER said that is the case if [the individual] qualifies for a Choice waiver program. She related that all the residents in her home qualify for the Choice waiver program. Although Ms. Mettler acknowledged that the Choice waiver program is a welfare program, it's necessary for the elderly to be able to pay for health care costs, which are out of reason.

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REPRESENTATIVE GARDNER surmised then that the larger the assisted living home, the greater the loss.

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REPRESENTATIVE GARA identified the following two problems presented by Ms. Mettler: the amount of money [the state] reimburses the assisted living providers is not enough; the state refinancing of the \$262 a month from the resident's APA and applying it to Medicaid. He related that the assisted living providers believe they can't legally apply for the refinanced Medicaid funds because Medicaid can't be charged for room and board. Representative Gara informed the committee that he had asked the administration to guarantee that if the assisted living providers applied for the Medicaid funds, they

would be held harmless if the federal government ever came back and asked for the money. He asked if that ever came to fruition.

MS. METTLER answered that the state has never provided that guarantee in writing, although it may have been suggested at community hearings.

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REPRESENTATIVE GARA asked whether a guarantee from the state to hold harmless assisted living homes that apply for the Medicaid funds would solve that problem.

MS. METTLER said such a guarantee would allow the \$8.65 a month to be used for room and board. However, it wouldn't solve the problem related to capping the resident's entitlements and returning anything over \$564 to the state.

MS. ONEY commented that she didn't know on what basis the state would have to contradict the federal law, which is what would place assisted living providers in fraud.

REPRESENTATIVE GARA opined that if the state tells the providers to [apply for the Medicaid funds] and guarantees to hold harmless the providers, then the providers would be okay.

MS. METTLER questioned what would prohibit the federal government from placing assisted living providers who applied for the Medicaid funds in jail while waiting on a determination as to the legality of it.

REPRESENTATIVE GARA related his belief that if the state tells the providers to [apply for the Medicaid funds], then the providers aren't committing fraud.

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REPRESENTATIVE CISSNA related that she requested a legal opinion from Legislative Legal and Research Services regarding this issue of fraud. The opinion said that it didn't appear to be fraud because of any action of the assisted living providers who are relying on the state. However, if a program is based on something that may be questionable, then it's not good policy. Representative Cissna asked if prior to the new regulations, the bookkeeping [for assisted living homes] was completely

different. She related her understanding that the assisted living providers send money back to the state.

MS. METTLER explained that money is returned to the state by way of subtracting it from the Medicaid billings, it's a third party billing. The assisted living providers are the accounting people for those dollars for the state.

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REPRESENTATIVE CISSNA inquired as to what these bookkeeping responsibilities mean for assisted living providers.

MS. METTLER confirmed that these bookkeeping responsibilities add hours and stress to the provider's day and life. She informed the committee that often the provider doesn't even know the entitlements of these individuals because it comes through various guardians. Therefore, the providers often don't know how much entitlement the resident is receiving. Prior to these new regulations, the providers had an idea how much of an entitlement the resident received because the provider received a certain amount of dollars. "So now we're not only accounting for our own home's money, but we're accounting for the state money as well as that," she highlighted.

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MS. METTLER moved on to the next concern, the administrative and general (A&G) cost cap, which is covered beginning on page 36 of the PowerPoint, that becomes effective July 1, 2005. She characterized this concern as crucial. Ms. Mettler explained that effective July 1, 2005, there will be an additional cap on these assisted living homes, which further reduces the Medicaid reimbursement from those receiving Choice waivers. Currently, there are assisted living homes that have 32-55 percent A&G. The aforementioned will be capped at 25 percent. Ms. Mettler informed the committee that of the six state run pioneers' homes, their highest A&G rate is 13.68 percent. That A&G rate correlates with how the pioneers' homes are allowed to spread their expenses. The 300 private assisted living homes have A&G rates up to 55 percent. Therefore, unless the assisted living provider is able to recategorize all of these expenses, there will be a negative impact. [Referring to page 29 of the PowerPoint], she informed the committee that out of 21 facilities with a cost-based reimbursement in place, 81 percent will have a potential loss of \$535,000 in addition to the room and board loss, which is an average loss of \$31,000 per home.

Ms. Mettler then drew attention to the last few pages of the PowerPoint that go through various examples of assisted living homes and their potential loss.

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MS. METTLER concluded her testimony by highlighting the following concerns: the room and board cap; the liability of the \$8.65 or adult public assistance of \$262 and how that can be legally used; and the administrative and general cap. "We'll be out of business because there's no way anyone can sustain that type of loss. We have no profit ... in any of these homes, we have no return on investment, they're strictly a cost-based institution," she stated.

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JOEL GILBERTSON, Commissioner, Department of Health and Social Services (DHSS), noted his appreciation for the passion with which these individuals provide these assisted living services. The department, he said, can't accomplish its mission without delivering long-term care services in the state, of which assisted living homes are an important piece. Commissioner Gilbertson addressed how this situation came to be. As noted earlier, DHSS developed regulations last summer that dealt with APA refinancing. However, he pointed out that this all began with the budget last year. In that budget the legislature included a reduction to the Division of Public Assistance public assistance payments in the amount of \$1.236 million. Language was attached to that reduction which directed DHSS to move forward with refinancing. He highlighted that there was an increase in the Division of Senior and Disability Services to Medicaid in the amount of \$688,000 in GF as well as an increase in the general relief program in the amount of \$548,000. The department moved forward to implement that budget and thus moved forward with the regulation development.

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COMMISSIONER GILBERTSON acknowledged that there is litigation regarding this refinancing. He opined that it's close to being dismissed. He informed the committee that there was a court order regarding the Administrative Procedures Act that stated: "The notices issued by the department gave members of the public sufficient information to decide whether their interests could be effected by the agency action and thus whether to make their views known to the agency. The court holds that the department

met the burden of notice established in the Administrative Procedures Act."

COMMISSIONER GILBERTSON stated that the refinancing is, to some extent, an effort to continue to maintain services when GF support hasn't been maintained. Based on the budgets thus far, the department is going to [cut] more. He noted that the House subcommittee budgets put forth almost \$20 million in reductions to the Division of Senior and Disability Services, in part on Medicaid. "These refinancings and these regulations are efforts for us to manage the program within the appropriated amount," he maintained. Each year language is attached to the department's budget that directs the department to reduce services. It's becoming more difficult each year to do these refinancings, and the impact on consumers is becoming more real. Commissioner Gilbertson said that the department needs continued support for its programs. He opined that [these regulations] work, and pointed out that these regulations have been in effect for over six months and there hasn't been any market distortion. However, there is an almost 40 percent vacancy rate in the assisted living homes in Anchorage. In conclusion, Commissioner Gilbertson said, "We stand ready to work with the legislature to protect these services."

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REPRESENTATIVE GARA reiterated that one easy solution for part of the problem would've been for the department to guarantee that it would hold harmless any provider who applied for Medicaid funds for room and board. The aforementioned protection wasn't provided. He questioned why the department wouldn't issue a letter holding harmless these providers when the department has said it's legal for these providers to apply for the Medicaid funds.

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COMMISSIONER GILBERTSON informed the committee that DHSS has been in dialogue with the Centers for Medicaid Services for Region 10, which have said that what the state is doing is allowable in that states maintain the authority to set room and board rates. Furthermore, how the state [department] apportions costs is up to the discretion of the state. There are certain services that are allowable and permissible and some that aren't. He mentioned the need to involve other departments, such as the Department of Law, involved in this dialogue. Commissioner Gilbertson opined, "I personally know for a fact

that if we [the department] put something forward such as this and providers follow that, then that obligation is borne by the state, that's my personal belief."

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REPRESENTATIVE CISSNA highlighted the economic importance of seniors to this state. If what the providers are saying about cost is correct, then the continuum of senior services has a huge hole. She questioned how can the state government do this to an industry.

COMMISSIONER GILBERTSON related that he disagrees with the claims that [the adult public assistance refinance] causes a financial hardship on the providers. "If you run the numbers and you look at it, it's not correct," he charged. The same presentation was rejected by a court of law. However, he said the aforementioned doesn't mean that there isn't tremendous fiscal pressure on these assisted living providers. This reduction was put forth in order to mitigate the impact on consumers. Commissioner Gilbertson surmised that Representative Cissna is really raising the issue as to how the state will provide long-term care for seniors in the state, with which he is concerned. He informed the committee that DHSS is in the process of having a long-term study and planning document. To address these matters, it will require a sizable financial investment by the state. He mentioned that assisted living homes are a key component of providing care to Alaska's seniors, as the personal care attendant program. Commissioner Gilbertson closed by highlighting that [the adult public assistance program] is an important welfare program, but the state and the legislature have to decide what level of care/standard for which it will pay.

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CHAIR ANDERSON disagreed, and related his belief that these assisted living providers are experiencing a financial hardship. With regard to the court case, Chair Anderson recalled that the judge stated that there was no fault in the public process, although the judge never [commented] on the financial impact.

COMMISSIONER GILBERTSON agreed that [the judge didn't comment on the financial impact] in the formal order.

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REPRESENTATIVE CISSNA related that the assisted living home across from her home [brought up the same problems as those discussed today]. Representative Cissna emphasized that assisted living homes keep people out of more costly options that [the state can't afford]. These assisted living providers are the supply side and the state has to work with them. If even half of what the providers are saying is true, the state can't afford the consequences.

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CHAIR ANDERSON said that he doubted it would be less expensive if the state took over assisted living services.

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COMMISSIONER GILBERTSON agreed with Representative Cissna regarding the need for senior care. However, the state is not well-positioned to [provide it], which is why the department is working with the Mental Health Trust to begin the planning process. An entire continuum needs to be in place, which the administration supports. Within the department, the shared philosophy of the department is that care should always be delivered in the least restrictive setting and provide the greatest degree of control in the location of the care and the care itself. He reviewed the position DHSS finds itself as it attempts to provide the aforementioned while working in the financial constraints provided in its budget. Commissioner Gilbertson clarified that he believes the pressure on assisted living providers is real, but it's not just from this regulation change. He maintained that the greatest source of fiscal pressure is the acuity of need and while the cost of doing business is increasing, the reimbursement rate structure isn't keeping pace.

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REPRESENTATIVE MCGUIRE related the need to have better dialogue on these matters. Although she said she hears what the commissioner is saying in that through the budget the legislature is giving the department directives, the legislature, only in session for 120 days, doesn't receive an opportunity to see how the cuts and regulations ultimately impact system. Furthermore, she said she found it ironic that just recently the commissioner was discussing the Bring the Kids Home campaign and placing children in facilities similar to those being discussed as ready for closure. "Who picks up the

pieces," she queried. Representative McGuire said that it becomes frustrating because "we" can't seem to see ahead. Although she expressed her desire to reach out to the department and say that it's not all the department's fault, she opined that everyone can see [from the presentation] that there is a problem. Representative McGuire acknowledged that legislation could be introduced, but she suggested that there may be a way to work at the problem that is less adversarial.

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COMMISSIONER GILBERTSON said he appreciated the dialogue. He related his frustration with the lack of long-term planning, which, to some extent, is driven by the state's one-year budget cycle. Commissioner Gilbertson said that the challenges are real. As the state reviews the services it's going to deliver in assisted living homes, the [department and the providers] have different numbers. Commissioner Gilbertson stated that this administration is committed to serving seniors better in this state. The DHSS, he opined, is about self-sufficiency and there's a variety of ways in which self-sufficiency and independence is realized. Commissioner Gilbertson said that the department and this administration wants to work with the legislature to find ways to support the aforementioned, but it will require an additional investment. He noted that the department is requesting an additional investment this year, and he hoped the members would support it.

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STEVE ASHMAN, Director, Division of Senior and Disability Services, Department of Health and Social Services (DHSS), explained the payment process prior to these regulations. Most clients, 71 percent, in assisted living homes have two sources of income: supplemental security income (SSI) in the amount of \$564 a month and APA, 100 percent GF, in the amount of \$362 a month. The client in the assisted living home could retain \$100 for personal needs, and therefore \$826 was left available to pay for nonmedical services. The regulations were put in place to refinance those general funds. He explained that under the refinancing, the client would still retain his or her SSI of \$564, the APA was reduced to a \$100 personal needs allowance. At the same time, payments to Medicaid were increased -- "that cost differential of \$262, so that would be available to the assisted living home through those two sources of \$826 for those folks on adult public assistance." With regard to why the \$564 plus the \$262 refinanced to Medicaid was chosen, he explained

that before the regulations 55 percent of the clients in assisted living homes didn't have income in excess of the APA or SSI rate of \$926. Therefore, 55 percent of the assisted living homes were able to get by with a room and board rate "of that amount."

MR. ASHMAN turned to the question as to whether the APA refinance would result in liability to assisted living homes. He echoed earlier testimony regarding the discussion with representatives from Region 10 of "CMS" as well as from Maryland headquarters. The federal government has no problem with the refinancing, he related. Mr. Ashman informed the committee that 71 percent of the clients in assisted living homes have no income in excess of the SSI and APA rates. With regard to the market place, Mr. Ashman related that the number of assisted living homes in the market place between May 2004 and March 2005 rose by 15 percent. Therefore, he said he couldn't imagine there would be a market increase if the homes aren't receiving sufficient reimbursement rates on both sides of the equation.

MR. ASHMAN addressed the A&G rate of 25 percent, which is in a different set of regulations. He recalled that just over 100 homes have a cost-based reimbursement with the Division of Senior and Disability Services. The average A&G rate for all of the homes with a cost-based rate is 24.4 percent while 56 percent of the homes with a cost-based rate have an A&G rate of 25 percent or less, and 65 percent of the homes have an A&G rate of 30 percent or less. He opined that 25 percent seems to be a realistic perspective.

MR. ASHMAN turned to the assistance the division provided to the assisted living homes over the years. He mentioned that "part of it is part of that Senate Bill 73 that went into effect in 2002." He informed the committee that the [division's] reimbursement rates to assisted living homes used to average \$78 per day per assisted living home. However, now the average reimbursement is in line with about \$125 a day. There has been an increase of 15 or so providers, but a budgetary increase of about \$7 million. The division has tried to work with the providers because the regulatory rates were not sufficient for recovery, which is why the division entered into cost-based reimbursement. "We believe that the pricing of the services are fair and reasonable for the home and that the home should not go out of business because of the regulatory actions that have taken place," he opined.

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CHAIR ANDERSON asked if the [division] is prepared to allow the private homes to recategorize their pro forma to follow the model of the pioneers' home, which is run by the state.

MR. ASHMAN answered that the methodology used by the pioneers' homes to calculate their reimbursement rates is the same methodology used for all the other homes that the division provides cost-based reimbursement. He noted that in some cases the pioneers' home is a more affordable reimbursement rate than some of the private sector.

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CHAIR ANDERSON directed attention to Governor Murkowski's letter regarding room and board expenses, which he understood was only to be used for food and bed space. He asked if the division would allow the assisted living homes to relocate their room and board expenses to only include food and bed space. He reminded everyone of the presentation with regard to all the things that room and board includes. He then asked if the division believes that room and board includes more than merely room and board.

MR. ASHMAN said he would have to look at the letter, but he noted that the [division] can adopt its own methodology when calculating reimbursement rates. However, there are specific items, such as room and board, that the federal government won't allow the [state] to pay for, which isn't defined in federal code. Mr. Ashman said that this could be reviewed and, in fact, it's part of the long-term care study to review reimbursement rate methodologies for all services the [division] provides. Mr. Ashman said that the current regulatory language is problematic because it's up to individual interpretation, although [the division] "holds constant its interpretation of those regulations, however."

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REPRESENTATIVE GARA returned to the issue of whether the assisted living homes can apply for the \$262 a month that used to be received from APA, and apply for that through the Medicaid program. He questioned why the department can't specify, in writing, that assisted living homes would be held harmless if the state is wrong about the assisted living homes' ability to apply for the aforementioned funds.

MR. ASHMAN informed the committee that a department attorney had been contacted, and found that the state won't use the term hold harmless. However, he recalled a letter he wrote to providers that related that the \$262 can be refinanced into Medicaid and that the federal government is okay with the procedure used. "We are able to establish what ... we believe to be fair and reasonable reimbursement rates for Medicaid services, and they can spend those funds any way they want," he specified. He recalled Ms. Mettler's testimony that the income sources aren't being combined in bank accounts, and related his belief that the room and board and Medicaid funds can be co-mingled so long as the receipt of the funds is justified. "I have no problem writing another letter to all the providers telling them they can spend the money how they want," he stated.

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REPRESENTATIVE GARA related that he is sympathetic to assisted living providers' belief that \$564 a month with the \$362, which they may or may not be able to use, might not be enough for room and board for an elderly person. He highlighted that at the pioneers' homes there are three levels of care, of which the lowest level of care only provides room and board for which the state charges \$2,300 month. Representative Gara related his understanding that the state's room and board rates are part of the reason such a high percentage of the people at the pioneers' homes have Alzheimer's, because fully able elderly can't afford to live at a pioneers' home. However, private assisted living homes are being told to provide the same services on \$564 a month, or \$862 if the [Medicaid funds] are added. Therefore, the reimbursement rate for assisted living homes is either too low or what is being charged by the pioneers' home is too high. Perhaps, it's a bit of both. Furthermore, the over 100 empty rooms at the pioneers' homes seems to be an indication that the rate is too high at the pioneers' homes. Representative Gara expressed his frustration that the department has decided not to do anything in its budget request to fill those empty pioneers' home beds.

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REPRESENTATIVE CISSNA opined that legislators are experts with regard to what is going on in the trenches. To that end, she related that she has seen the unintended consequences, although she isn't hearing that in this conversation. She questioned how this conversation is started because this is a huge problem.

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CHAIR ANDERSON inquired as to the division's ultimate plan. He related his belief that the [committee and others present] reject Commissioner Gilbertson's comment that there is no financial hardship on these assisted living homes.

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MR. ASHMAN reminded the committee that [the department] is reviewing the long-term care system in the state. Part of the study will include a consultant meeting with each individual provider type to obtain their perspective and any suggestions or recommendations. Furthermore, the study will review the best practices of other states. Moreover, there is the desire to have dialogue with providers before any regulations are drafted in the future. This year, the governor's budget for the Division of Senior and Disability Services includes a requested increase of about \$53 million over last year.

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REPRESENTATIVE KOHRING expressed concern with regard to potential cost to the state if these private entities go out of business and the services have to be provided by the state. Representative Kohring directed attention to figures [provided by Ms. Moss] specifying the total cost per resident per year in the pioneers' homes to be \$75,812.52.

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RYNNIEVA MOSS, Staff to Representative John Coghill, Alaska State Legislature, informed the committee that in 2000, the legislature passed Senate Bill 73. Then Senator Mike Miller introduced Senate Bill 73 in order to raise the base rate to \$70 a [day]. However, the legislation only applied to vulnerable adults and those qualifying for general assistance medical care. Ms. Moss opined that the current situation has come about because the division has earnestly tried to save GF spending. At first there didn't appear to be a problem because there were communications from the division that there would be no change in the income to assisted living homes. Later, through the regulations, that was found not to be the case. Ms. Moss stated that she has been concerned for some time that the assisted living homes were going to run afoul of the federal government by using Medicaid funds for room and board. The aforementioned led to numerous conversations with Mr. Ashman, who assured her

that wouldn't be the case. Ms. Moss pointed out that Legislative Legal and Research Services provided her a legal opinion regarding whether the [rule] that one can't use Medicaid funds for room and board has changed. The legal opinion from Legislative Legal and Research Services says that nothing has changed. Even still, Mr. Ashman assured her that isn't the case. Therefore, Ms. Moss said she didn't see how assisted living home providers could be held responsible for Medicaid fraud. Ms. Moss, however, expressed concern that assisted living homes can provide services at a greater savings than could the state. To that end, she provided the committee with a document entitled, "Pioneers' Home".

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MS. MOSS, in explaining her calculations, pointed out that the pioneers' homes don't have to pay workers' compensation or liability, which provides a bit of an edge. Although the difference of \$.71 a day, which is only \$260 a year, under the new regulations, doesn't sound like a lot, the \$664 cap regulation creates a tremendous difference for those assisted living homes relying on the resident's income as additional income to operate the facility. Providing services on \$18.65 a day is unrealistic. Ms. Moss acknowledged that the department is trying to reduce GF spending, but she opined that taking income from an assisted living home is not an appropriate solution. Furthermore, with regard to the guidelines provided by the legislature to reduce GF spending, she recalled the House Finance subcommittee members expressing concern with "PSAs". Ms. Moss also expressed concern with the disparity between pioneers' homes and assisted living home [costs]. The cost for a pioneers' home bed is almost \$76,000 while the same bed in a private assisted living home is about \$68,000. She related that if all of the clients in the pioneers' homes were in assisted living home facilities, the state would save over \$6 million a year.

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MS. MOSS turned her comments to the assisted living providers who feel the state is trying to put them out of business, and suggested that some fences need to be mended. She reminded the committee that the pioneers' homes charge based on the level of care, and presently bill on three levels of care. Although Ms. Moss said she didn't believe the administration is trying to put assisted living providers out of business, she did highlight that the pioneers' homes have an unfair advantage. Pioneers'

homes are self-insured and can redistribute administrative costs and can receive more for basic room and board. Therefore, the playing field needs to be leveled. She expressed hope that both the legislature and the administration would work toward parity such that all assisted living homes would be treated the same, with the same pay and the same regulations. Ms. Moss related her view that the legislature has a tough road ahead in determining priorities.

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GERI JOHNSON, Johnson's Assisted Living Association, noted her agreement with Ms. Moss that some fences need to be mended. She also expressed concern with the room and board amount and the paperwork required by [these regulations].

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MARY RAYMOND, Seniors at Large, informed the committee that when she started her home in 1981 it was all private pay. When she was approached by a [care coordinator] to accept an individual receiving a waiver, the care coordinator could match the cost of the private pay individuals. Now, her home consists of three private pay clients and three clients receiving waivers. However, Ms. Raymond related that she has been contemplating not accepting any more clients who receive waivers because of the cost and difficulties. Furthermore, when she first accepted clients with waivers, she felt that she had a contract with the state. However, the state later took away some of the assistance from the clients receiving waivers, which resulted in increased cost to the assisted living home. Furthermore, recertification and becoming licensed, which seem to be the same thing, create paperwork and costs that could more effectively spent on an individual's care. Ms. Raymond concluded by urging the [division] to talk to the assisted living providers before changing the regulations in the future. With regard to the need to save money, she related that perhaps an income tax should be implemented.

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MARY JO METTLER, Northern Lighthouse Assisted Living Home, recalled that many of Commissioner Gilbertson's responses seemed to center around the legality of the matter. However, that doesn't necessarily mean it's right. She asked the committee members whether they could meet the room and board requirements with \$564 a month. In fact, she opined that the per diem, for

food alone, for legislators and state employees is more than what's given for all of the [room and board] requirements. She informed the committee that Choice waiver clients are at the nursing home level of care. Although Ms. Mettler acknowledged that the Choice waiver program is a welfare program, she reminded the committee that welfare spans every age group. She highlighted that elderly individuals aren't able to get a job, and most of the time, they don't even have family to help. She urged the committee to consider the aforementioned when reviewing funding. Ms. Mettler recalled from earlier testimony that the A&G rates are up to 55 percent in private assisted living homes. She inquired as to the A&G rates for the pioneers' homes and inquired as to how it's calculated. Ms. Mettler turned to the concerns regarding the room and board changes, which were initially viewed as related to those receiving APA versus those on the Choice Medicaid waiver. She likened the aforementioned to feeding one homeless person versus supporting an entire shelter. With regard to the testimony that people are still opening new assisted living homes, Ms. Mettler said that they're doing so because they care about seniors and those with disabilities. Often, these individuals have no idea about the financial difficulties associated with running an assisted living home.

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MS. ONEY reiterated that she can't stay in business [under these new regulations]. She said that she made this trip and has related information based on her real experiences and budgets. Ms. Oney said that for the department to not reach out [to the assisted living providers] until this formal arena suggests to her that the department doesn't realize that when it crunches numbers it impacts people and small business. "There is no way that we can continue to provide the level of care in our home," she said. She informed the committee that after polling all the assisted living homes in the state, 80 percent have said they will have to close without support, even if allowed to use Medicaid funds. She explained that the waiver request reflects true costs, and therefore the assisted living provider has to give up something that the provider has already spent in order to meet the basic room and board needs. Ms. Oney stated, "I honestly can say for the record, ... I was quite offended that they [the department] got up here and told me that I made this trip and put my numbers on the ... board and told me that it wasn't correct." She informed the committee that her assisted living homes went through two Medicaid audits, which were costly, with flying colors.

MS. ONEY turned attention to the liability issue, which has been the cause of conflicting information. If it's true that the assisted living providers can use the \$262 in Medicaid funds to cover room and board costs, she questioned why can't the assisted living providers "redo our pro formas to get the other expenses that were coming up short into the Medicaid side." Ms. Oney related that [assisted living providers] received a letter from Mr. Ashman stating that Medicaid funds couldn't be used for room and board, although it also stated that the department wouldn't audit [the providers]. She questioned why the language "hold harmless" can't be used if it's true.

MS. ONEY moved on to the A&G cost cap, and stated that there's no way for [assisted living providers] to make up those expenses. In fact, the A&G cost cap goes into effect in July, which is too late because it takes about five to six months to get a pro forma negotiated through the state. Therefore, she surmised that the department is expecting the assisted living providers to take "this hit" for six months. The earliest one could be reimbursed for this cap is the middle of January. Ms. Oney then addressed the failed notification procedures. She agreed that the court said the department did the minimum to meet the legal expectations of the department. However, she opined that the department went above the minimum [legal requirements] to reassure the assisted living industry that the [new regulations] would have no impact on the industry. This, she further opined, was done in order to purposefully mislead the industry and keep it quiet until the regulations were in effect. She told the committee that when [assisted living providers] asked the department how these regulations would effect them, no answers were provided. The farther the process proceeds, department representatives said that they can't comment on pending regulations. Therefore, Ms. Oney questioned where one could obtain answers. Moreover, how does one even know the questions to ask. If nothing else comes out of this process, Ms. Oney stressed the need for the committee to ensure that people can obtain answers to questions during the 30-day [public comment] process.

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REPRESENTATIVE CISSNA opined that she didn't believe this was intentional, but rather many bad things that happened simultaneously. She expressed her belief that "we" are going to shout long enough and loud enough to stop it.

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CHAIR ANDERSON applauded the advocacy of the assisted living home providers who have come here on their own dime. As Representative Cissna stated, the [committee] needed to get to the bottom of this. Chair Anderson turned to the departmental testimony that [these regulations] are the result of a legislative mandate through a decrement in DHSS's budget, and rejected that the cut had to be at the level it is. Furthermore, he disagreed with the department's view that these new regulations don't cause a financial hardship. In conclusion, Chair Anderson stated that at this stage these regulations are unacceptable, and if necessary he will sponsor legislation in the next month to address these regulations.

ADJOURNMENT

There being no further business before the committee, the Administrative Regulation Review Committee meeting was adjourned at [5:11:40 PM](#).