



To: Senator Kellie Warren, Chair and Members, Senate Judiciary Committee
From: Rachel Monger, Vice President of Government Affairs, LeadingAge Kansas
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Testimony in Support of House Bill 2126

LeadingAge Kansas is the state association for not-for-profit and faith-based aging services. We have 160 member organizations across Kansas, which include not-for-profit nursing homes, retirement communities, hospital long-term care units, assisted living, homes plus, senior housing, low-income housing, home health agencies, home and community-based service programs, PACE and Meals on Wheels. Our members serve more than 25,000 older Kansans each day and employ more than 20,000 people across the state.

HB 2126 Provides Justice for Residents While Preserving our Long Term Care System

HB 2126 does not shield bad actors from accountability. Just like the immunity provisions given to other health care providers during the pandemic, HB 2126 liability protections do not apply to acts, omissions or decisions that result in gross negligence or willful and reckless conduct. It is a sad fact that in any situation, and in any industry, there will be someone who decides to do the wrong thing. If there is an adult care home in Kansas who decided to turn their back on their residents during the pandemic or decided to ignore clear public health directives around fighting COVID-19, then they should be held accountable. HB 2126 allows for that accountability to happen in court.

The liability protections in HB 2126 that apply to the rest of our adult care homes are an acknowledgement of the unprecedented public health emergency we have found ourselves in for the last eleven months. Our ability to care for and protect our residents from the COVID-19 virus continues to be hampered by shortages in every way possible. At every phase of this pandemic, we have faced limitations in basic understanding of the virus and how it is transmitted, evolving and sometimes conflicting guidance and requirements from federal, state and local authorities, shortages in testing, PPE, and staffing. And most recently, confusion and shortages surrounding the COVID-19 vaccine.

The Expanded Protections in House Bill 2126 are Necessary

HB 2126 amends the adult care home provisions of the COVID-19 Response and Reopening for Business Liability Act to ensure that adult care homes in Kansas receive the same degree of protection from unwarranted and potentially ruinous lawsuits as every other business and health care provider in the state during the public health emergency. We are very appreciative of House and Senate leaders who worked hard to secure an affirmative defense for our adult care homes in the face of so much resistance from the administration in offering any kind of legal support and protection for providers that were clearly in crisis. However, the affirmative defense for adult care homes in the existing liability statute is not sufficient protection for our providers. It is far too narrowly drawn, and even if written broadly, an affirmative defense still requires expensive and time-consuming litigation. Immunity from COVID-19 related claims will ensure that such issues are addressed early in the case and minimize the considerable financial and resource drain of unwarranted lawsuits.

The Real Story Behind the Fight Against COVID-19 in Long Term Care

In early November 2020 the Associated Press worked with researchers from the University of Chicago to study nursing home outbreaks in twenty states, including Kansas. The researchers found that the quality of a nursing home was unrelated to the number of COVID-19 infections and deaths they experienced during the sudden surge in nursing home outbreaks this past fall. The biggest factor in nursing home outbreaks was the degree of infection spread in the community. If the county had a high infection rate, so did the nursing home, no matter how good of care they were providing. Researchers found that the main contributors to the surge in nursing home outbreaks were (1) high community infection rates; (2) high number of asymptomatic carriers; (3) nursing home staffing shortages; (4) lack of access to timely testing and testing supplies; and (5) inadequate supplies of personal protective equipment. To be clear, these issues were not limited to early on in the pandemic. These issues were happening this fall and winter and continue on today.

Staffing: For much of the pandemic nursing homes have been facing dire workforce shortages. We hear from Directors of Nursing putting in 80-100 hour work weeks to cover nursing shifts on top of their immense duties as head of clinical care at the nursing home. We hear from administrators and other leaders working as nurse aides to care for residents in a desperate effort to keep afloat while staff members are sent home to quarantine. Eleven months into this pandemic our workers are exhausted. The exhaustion is not just from being overworked. They are also exhausted from going to work every day facing the fear, grief, and trauma this virus has wrought upon our elders and the people who care for them. Our staffing crisis continues unabated.

Testing: Access to testing supplies and timely lab results was limited throughout most of 2020. As outbreaks exploded in Kansas during the fall, the federal government increased its shipment of rapid antigen tests to providers and the state started standing up free regional lab resources in early December. This has helped greatly in identifying and isolating outbreaks earlier, but

only goes so far when community spread continues. There are also continues to be periodic slow-downs in lab testing results around the state.

Personal Protective Equipment: PPE supplies also remained limited throughout much of 2020. When we testified on the COVID-19 liability bill during the special session in June we described the garbage bags sent to us by the federal government to use as isolation gowns, as well as the protective masks made out of Hanes underwear. Our providers' ability to obtain larger amounts of medical grade PPE improved by the end of 2020, but supply chains still remain shaky to this day. Our providers continue to struggle with periodic shortages in masks, gowns and gloves.

Conclusion

The liability protections in HB 2126 preserve the ability to go after actual bad actors, while allowing all other providers to continue doing their best during this pandemic without the constant threat of litigation that drains precious resources away from patient care.

Singling out long term care for personal injury and class action lawsuits during this pandemic threatens the very existence of the senior care system in Kansas. A system that was already on the verge of disaster before the pandemic started. It has already sparked a crisis in our liability insurance markets and may ultimately affect the stability of our state's health care stabilization fund. It also represents a demoralizing punishment for the tens of thousands of long-term care workers in this state who are loving, dedicated, and exhausted heroes risking their health every day to care for Kansas seniors during the one of the worst public health crises in history. Now is the time to support nursing homes, give them the resources and support they sorely lack, and recognize their important role in the health care system. That includes providing them the same protections that every other health care provider needs during this heartbreaking time.