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Senate Health Committee
Am. Sub. House Bill 110
April 28, 2021

Good morning, Chair Huffman, Ranking Member Antonio, and members of the committee. I am Pete Van Runkle from the Ohio Health Care Association. OHCA represents providers of assisted living, home care, hospice, intellectual and developmental disabilities, and skilled nursing services. We appreciate the opportunity to provide written testimony on one specific issue relating to the Department of Health's language proposals in Am. Sub. House Bill 110 that is very concerning to our skilled nursing and assisted living members.

The Executive Budget contained a new, non-fiscal provision that would give the Director of Health virtually unfettered authority to issue summary orders against licensed skilled nursing facilities and residential care facilities (assisted living) at essentially the Director's whim. Although OHCA advocated in the House of Representatives to remove this provision, the House left it in the bill with some minor changes.

Under current Ohio law, the Director's main enforcement authority against facilities with regulatory violations is to revoke its license to operate, obviously a very stringent penalty. This penalty applies to both SNFs and assisted living communities. By law, it requires notice and a hearing before it can be imposed.

The Director of Health has many other enforcement options against SNFs, depending on the seriousness of the situation. These actions, which are recommendations to the US Centers for Medicare and Medicaid Services (CMS), include the following:

- Terminating the facility's ability to participate in Medicare and Medicaid, which is tantamount to closing the building.
- Imposing fines of up to $22,000 per day.
- Inserting temporary management.
- Denying payment for new admissions.
- Requiring certain corrective action (called a directed plan of correction).

The Director can and does use these enforcement authorities quite liberally. Millions of dollars of fines are imposed annually, and the Director typically revokes the license of a handful of facilities each year.

The key point about all of these enforcement actions is none of them can be applied summarily by the Director acting alone. In cases of immediate jeopardy, which are the most serious deficiencies, a SNF can be terminated from Medicare and Medicaid and have other sanctions imposed before a hearing is afforded, but even then, the facility is given an opportunity (which may be as short as two days) to correct the deficiencies. Most importantly, the decision is not solely that of the Director, but CMS reviews the recommendation before the penalty is imposed and determines it is appropriate under applicable law.

In the most urgent situations, current Ohio statute (ORC 3721.08) allows the Director to go to court to take action against a SNF or assisted living community where dangerous conditions exist:

> [I]f, in the judgment of the director of health, real and present danger exists at any home, the director may petition the court of common pleas of the county in which the home is located for such injunctive relief as is necessary to close the home, transfer one or more occupants to other homes or other appropriate care settings, or otherwise eliminate the real and present danger. The court shall have the jurisdiction to grant such injunctive relief upon a showing that there is real and present danger.

This authority is very broad – closing the facility, moving out residents, or taking any other action to eliminate the danger. The court can act very quickly through a temporary restraining order, but it is critical to note that this statute includes the check and balance of judicial involvement. The Director must convince a judge that the situation requires extraordinary action, and it is the judge, not the administrative official, who issues the order.

In HB 110, the Director seeks to expand upon this existing Ohio law by adding a new section 3721.081 that would authorize the Director to do everything the existing judicial remedy statute allows, but to do it through a summary administrative order without any checks or balances. There would be no limits on what the Director could order. There would be no hearing before the order is imposed and no reviewing entity to determine if the Director is acting appropriately. Remember this is an order that could severely harm or even shut down a business that houses and employs scores of Ohioans. If the business does not comply with the Director's order, she could impose a summary, administrative fine of up to $100,000.

We are not aware of any other business in Ohio that is subject to such unbounded authority on the part of an administrative agency. The proposed language would give the Director this immense power based only on the Director's personal opinion that immediate action is necessary to protect resident health and safety.

In discussions with Director McCloud during the House process, she gave two examples of situations in which she would have liked to have had the power to issue orders. In neither case, from what we were able to discern, did Health Department surveyors feel there was immediate jeopardy – even though they cite immediate jeopardy more than 100 times a year. The department certainly did not think the situation was bad enough to go to court for immediate action. But the Director nonetheless wants to have ultimate power in her hands with no checks or balances.

The House made a few tweaks to the language as proposed by the Executive. These include such things as 24-hour advance notice (but not a hearing), reducing the maximum administrative fine for noncompliance with the order to $100,000, and allowing a facility to recover damages in an after-the-fact administrative hearing if the Director exceeded her authority (which is hard to imagine given its breadth).

These tweaks do nothing to address the fundamental problem with the proposed statute: it gives one administrative official essentially unlimited power over an Ohio business based on that official's opinion without review by anyone else or any opportunity for the business to be heard.

Current law already gives the Director authority to take immediate, decisive action when there is a clear and present danger – by going to court and proving the case. The argument that this action requires time and effort on the part of state employees simply doesn't hold water when balanced against the potential harm to a health care provider and their residents and staff.

Proposed section 3721.081 is unnecessary and inappropriate. We respectfully request that it be removed from the bill.

Thank you, and I would be happy to address any questions you may have about this issue.