

Chairman Lee and Members of the Committee:

My name is Marina Spahr, and I am the Director of the Medicaid Fraud Control Unit. I am here today representing the Office of the Attorney General and the Medicaid Fraud Control Unit. I am providing testimony regarding SB#2070. The Office of the Attorney General is in support of this bill, but that support is contingent on the inclusion of two critical amendments.

The first amendment requested by the Office of the Attorney General is the removal of the waiver of criminal and civil liability. This waiver language, located on page 10, lines 29-31, is overly broad and requires reexamination. As currently written, the language grants ‘facilities’ immunity from any criminal and civil liability for violations of privacy rights concerning patients, so long as the facility has a policy permitting the use of authorized electronic recording or monitoring devices. This approach is problematic for several reasons.

Patients, both pursuant to this bill and other existing laws enjoy numerous privacy rights that extend beyond the scope of recording or monitoring devices. Granting such a sweeping waiver undermines these rights and creates significant legal and ethical concerns. For example, limiting liability in this manner makes it impossible to anticipate every situation that might arise, leaving critical gaps in accountability and enforcement. This waiver could essentially tie the hands of oversight bodies such as the Medicaid Fraud Control Unit and eliminate recourse for egregious violations of privacy or care standards.

The Office of the Attorney General is unequivocally opposed to waiving criminal liability. Criminal liability exists to address conduct that must be investigated and prosecuted if it occurs. Immunizing facilities from such liability undermines the very principles of justice and accountability, sending a dangerous message that unlawful behavior may go unchecked.

With regard to civil liability, there have been instances where limitations have been applied, but these limitations have not extended to investigations and enforcement actions conducted by the Medicaid Fraud Control Unit (MFCU). An example of such tailored language is contained in N.D.C.C. 32-48-08 which states “This chapter does not apply to enforcement actions under chapters 50-24.8, 51-08.1, and 51-15.” The Office of the Attorney General recommends the complete removal of the liability waiver sentences; however, at a minimum, incorporating

language similar to that in N.D.C.C. 32-48-08 would help ensure that essential investigations and enforcement efforts are not impeded.

In summary, the Office of the Attorney General strongly urges the Committee to eliminate the waiver of criminal and civil liability from SB#20270. Such a provision is overly broad, undermines patient rights, and limits critical enforcement tools needed to protect vulnerable individuals in long-term care facilities. Ensuring accountability and preserving the integrity of investigations should remain paramount as this legislation is considered.

The second requested amendment is a clarification that monitoring devices may also be used to record. Currently, the bill states on page 9, lines 26 and 27, "The resident and the resident representative may not record virtual monitoring and virtual visitation." While recording is permitted, it is not allowed when the resident uses a monitoring device, which creates an inconsistent distinction. Allowing monitoring devices to record is consistent with the purpose of patient rights, transparency, and oversight. Additionally, this restriction could inadvertently impact legitimate law enforcement activities. Clarifying this language would ensure that such recordings are permissible and do not hinder investigative or protective efforts.

Thank you for your time and consideration. I welcome any questions the Committee may have.

Marina Spahr, January 14 2025