Statement of Walter M. Weber,[1] Senior Counsel, American Center for Law & Justice on Oregon SB 239 (Mar. 21, 2017)

I was asked to review SB 239. I reviewed the unamended version and wrote the following:

> SB 239
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> This bill addresses residents of residential care facilities and of adult foster homes.
> The bill defines "Individually based limitation" to include "a limitation on the resident's right to . . . (B) Access food, freely and with support, at any time" and "(C) Have visitors of the resident's choosing at any time" (p. 3, ll. 35, 38-39; p. 6, ll. 15, 18-19). The bulk of the bill involves authorizing third parties to consent to such an "individually based limitation," i.e., to refuse (among other things) food and visitors to the resident, when the resident is personally incapable of giving or refusing consent. The only limitation on such third party's decision is that party's "good faith understanding of the resident's best interest and of what the resident would have wanted if the resident were capable of making the determination" (p. 1, ll. 24-25; p. 4, ll. 20-21). The bill also would broadly immunize any such third party (p. 3, ll. 4-6; p. 5, ll. 29-31):
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> > (8)(a) A legal representative is not subject to civil or criminal liability or in violation of any professional oath, affirmation or standard of care for any determination the legal representative made in good faith under subsection (2) of this section.
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> Hence, liability would only attach if it could be proven that the third party acted in bad faith. This, in turn, could only happen if someone raised an objection, pursued it with the relevant authorities, and found someone willing to follow up with the matter.
> Finally, it bears mention that the third party decisionmaker need not be a spouse or family member or even someone designated by a spouse or family member. If no such person is "available or can reasonably be located" (p. 1, ll. 26-27; p. 4, ll. 22-23), the facility can create a committee to make the decision.

The bill was subsequently amended. The website http://gov.oregonlive.com/bill/2017/SB239/ listed a work session on the bill on Mar. 15, 2017. This website in turn linked to the original bill text, https://olis.leg.state.or.us/liz/2017R1/Downloads/MeasureDocument/SB239, and also linked to a website that noted that an amendment was adopted on Mar. 15, 2017, https://olis.leg.state.or.us/liz/2017R1/Measures/ProposedAmendments/SB239; the text of the amendment is at https://olis.leg.state.or.us/liz/2017R1/Downloads/ProposedAmendment/9334.

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Exclusion of visitors

The original bill authorized restriction of patient visitors. Notably, the amendment *did not change* this (except it is now labeled "D" instead of "C"). Thus, this bill authorizes restrictions on "visitors of the resident's choosing at any time". This can be important, as having family and friends visit can be beneficial to the patient, both as a direct matter and as a matter of providing a second set of eyes to monitor patient healthcare. *E.g.*, Alisa Khan, MD, et al., "Parent-Reported Errors and Adverse Events in Hospitalized Children," *JAMA Pediatrics* (Apr. 4, 2016). Excluding such visitors, consequently, may damage patient health and well-being.

Food & fluids

The adopted amendment did significantly change some parts of the text. In particular, the amendment specifies as follows (p. 3, ll. 11-20; p. 6, ll. 8-17):

> "(10) Notwithstanding subsections (1) and (3) of this section, a residential care facility may not obtain a decision regarding consent under this section to limit a resident's right to:
> "(a) The usual and typical provision of nutrition and hydration that is necessary to ensure that a resident does not suffer a substantial and irreversible physical impairment of a major bodily function; or
> "(b) Assistance with eating, including but not limited to the provision of nutrition and hydration by cup, hand, bottle, drinking straw or eating utensil, that is necessary to ensure that a resident does not suffer a substantial and irreversible physical impairment of a major bodily function."

Hence, this bill no longer authorizes restrictions on "the usual and typical provision of nutrition and hydration that is necessary" to avoid "substantial and irreversible physical impairment of a major bodily function". The term "usual and typical" is not defined, so the scope of this amendment is not completely clear. However, the intent plainly seems to be to ensure that there is no authorization to deprive a resident of food and fluids where such food and fluids actually benefit the resident physically. (Causing death by starvation/dehydration obviously would impair major bodily functions, so such a course would not be authorized.) That is, the bill, as amended, would not authorize the denial of food or fluids that the resident can digest unless death is truly imminent (a matter of hours or less) from other causes. Nor would it authorize the denial of manual assistance with eating or drinking where the resident can process or digest the food or fluids, again unless death from other causes is truly imminent.

The amendment also provides that the physician (or registered nurse, added by the amendment, p. 3, l. 24; p. 6, l. 21) who determines a resident's incapacity must render an opinion that is "independent" and "professional" and that physician (or registered nurse) must not be an administrator of the facility (p. 3, ll. 23-25; p. 6, ll. 20-22). Adding authorization for nurses expands the reach of this provision, while disqualifying administrators narrows it somewhat. Requiring an "independent, professional" opinion is an added safeguard.

The amendment alters the definition of "Individually based limitation". Instead of "(B) Access food, freely and with support, at any time" it now says "(C) Access to food at any time". It is not clear that this change in wording has any significance. More important would be the specific provisions discussed above declaring what limitations on food and fluids do not include.