Testimony in Opposition to SB 328

Senate Committee on Health

October 4, 2023

Chairwoman Cabral-Guevara, Ranking Member Hesselbein and Members of the Committee, my name is Eric Borgerding and I am here speaking on behalf of the Wisconsin Hospital Association and over 130 members across Wisconsin in opposition to SB 328. I will be joined throughout the hearing by some of those very members, some of whom will be familiar to many of you having met with them recently in your district. They are on the front lines of running hospitals during some very challenging times, including complying with the growing number of government, payer and consultant data and information demands and cost and quality metrics of varying methodologies that seemingly change weekly.

We appreciate this opportunity to discuss SB 328, including the stated reasons for this legislation *in Wisconsin*, its purpose *in Wisconsin* and the state of price transparency *in Wisconsin*, where hospitals have been transparency leaders for over two decades.

Wisconsin hospitals are proud to be the cornerstones of their communities and in more and more ways every year, including serving patients 24 hours a day, every single day, regardless of payment, regardless of insurance company co-pays or deductibles hospitals are compelled to collect, regardless of whether a patient is insured at all. They are de facto nursing homes, public health agencies and housing and food resources. They manage care every day from their EDs and inpatient units, despite not being MCOs, and they all too frequently play a role as law enforcement. They provide services and deliver care in communities across Wisconsin that no one else is or would if the hospital was not there.

Hospitals are the ultimate Wisconsin health care safety net, and play that role while continuing, for years now, to provide some of the highest quality care in the nation. In fact, in August it was reported that Wisconsin has the fourth largest number of CMS five-star-rated hospitals in the country. Hospitals do all this while operating in an environment of shrinking reimbursement, skyrocketing labor, drug and supply costs, and growing amounts of federal, state and payer bureaucracy, including never ending, and ever changing, requirements for data and information from an expanding universe middlemen that occupy more and more of the space between patients and their providers.

Our hospitals also have a long and well demonstrated track record of supporting price and quality transparency, and I want to say very clearly, that WHA's opposition to SB 328 should not be misconstrued or misrepresented as opposition to price transparency. When it comes to transparency, Wisconsin hospitals again receive top marks. According to data from Turquoise Health, which has downloaded the mandated machine readable files from over 5,400 hospitals (nearly all of the acute care hospitals in the country), Wisconsin hospitals average 4.6 out of 5 stars for the completeness of their data.

Turquoise is one example of how the private sector is responding very quickly to the transparency mandate and is already using the hospital data to produce price information that is publicly accessible through free online tools. This is well ahead of any state legislation and is being done without new state rules, regulations, fines or state funding data entities and dashboards.

In May, a coalition of thinktanks stated in their memo to the Legislature supporting SB 328 that "Under the bill, hospitals would be required to make a machine-readable file (the "MRF") that contains standard

charges for services provided by the hospital that could be used by the private sector to improve public-facing price databases, *like Turquoise Health*." Reading that memo, one might think that federal law does not already require hospitals to publicly post MRFs … but it does, and they are. In fact, what the coalition overlooks is that the very group they point to as an example, Turquoise Health, gives Wisconsin one of its highest ratings for completeness of their publicly posted, federally mandated, MRFs (4.6 stars out of 5 stars). We know this not just because it's publicly available and very easy to find, but also because WHA and our members have had numerous direct conversations with Turquoise the past year to collaborate on compliance. This is hardly the disposition of an industry that some claim is ignoring the federal mandate.

But while Turquoise is one great example of how the mandate is working, they will tell you that they are not the arbiter of *compliance* with federal rules, nor are any other groups purporting to judge or give awards for compliance. *Enforcement is the job of CMS.* And to date, not one Wisconsin hospital has been fined by CMS for failing to comply with the federal transparency mandate. The lack of penalties in Wisconsin is not because CMS is not enforcing the law, in fact many Wisconsin hospitals have been hearing from and engaging directly with CMS about their compliance since 2021, the year the mandate first went into effect. Further, the federal Office of the Inspector General (OIG) has been reaching out to hospitals, including in Wisconsin, to gather their input on the challenges of complying with the federal transparency mandates.

Understanding this issue of enforcement and compliance is important because for about a year now it's been stated that Wisconsin needs legislation like SB 328 because, it's been said, that its easier for hospitals to just pay the fines than to comply with the law. It has been stated as fact that hospitals are paying their fines and walking away from the federal transparency law. This is completely inaccurate. Again, not one Wisconsin hospital has been fined by CMS.

Since no Wisconsin hospital has been fined to date, it is now said that we need legislation like SB 328 because enforcement of the law by CMS is "almost entirely non-existent." As of June 27, CMS had issued 906 warning letters to hospitals and required 371 corrective action plans. After a comprehensive compliance review, over 300 hospitals were determined by CMS to not require any compliance action and another 457 addressed deficiencies and received a review closure notice from CMS. Contrary to claims, hospitals do not just "walk away" from CMS letters, nor have we in Wisconsin and you will hear more about this and CMS enforcement, in later testimony.

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Further, CMS is now performing 200 full audits per month and on April 27, released updated guidance on their process for monitoring and enforcing the hospital price transparency mandate. Coming changes include: immediately requiring corrective action for noncompliant hospitals (no longer issuing warnings), requiring a hospital to be in full compliance within 90 days of receiving a notice for corrective action, and automatic civil monetary penalties for failures to comply. On July 13, CMS proposed rules to standardize hospital files and data elements, clarify where the files need to be located on hospital websites, and further strengthen their assessment and enforcement process, including requiring hospitals to attest to the accuracy of the data. And it is worth noting, that these provisions are embedded in a must pass rule governing Medicare hospital outpatient reimbursement.

And, it is also important to understand that the federal transparency regulations do not stand alone. Hospitals are also required to comply with the federal No Surprises Act and to provide price estimates to patients within specified days before they receive a service.

So, contrary to what some would have you think, CMS is not almost entirely ignoring enforcing the hospital transparency mandate, nor is CMS, nor is the OIG, done gathering input and modifying the regulations. To impose state level rules and requirements on top of all that, actual state statutes that will become outdated with every update to federal rules and law, will only add to confusion and resource intensive administrative burdens already inundating hospitals. To that point, by our count SB 328 differs in nine substantive ways from just the proposed changes in the CMS payment rule.

Another reason some national groups are backing this type of legislation is the claim that hospitals are taking advantage of the millions being disenrolled from Medicaid. One of these groups labeled hospitals, which includes those present in this room, as cartels and extortionists ready to pounce on the most vulnerable in our society, these former Medicaid enrollees, by ignoring the transparency mandate and purposefully hiding prices so they can gouge these unsuspecting, newly uninsured families. According to this group, "The predatory American healthcare system is about to encounter new prey in the form of millions of families thrown off the Medicaid rolls." I can assure you, that NOTHING is further from the truth about Wisconsin hospitals and I am quite certain Wisconsin's hospitals are doing as much or more than anyone, except DHS, to help people reapply/qualify for coverage, including Medicaid.

I dwell on this, probably too long, because this is the type of terrible rhetoric being used, by some, to demonize Wisconsin hospitals as justification for legislation like that before you today.

Aside from the "why" for this legislation, let me address the "how" of this legislation, and the burden of complying with an additional set of state rules, deadlines, fines, and definitions on top and different from what federal law already requires. This bill does not mimic federal law and will add administrative cost to what most acknowledge is a system that is far too costly, too complex and too filled with regulatory and administrative hurdles that drain resources from patients care.

You know, it's not often these days that WHA finds itself in agreeing with our friends at WMC. But one area where we seem to align is this very issue. WMC has long opposed creating new state laws and regulations on top of those at the federal level, and for very good reason. Recently, they stated that Wisconsin should align its "employment and environmental regulation with corresponding federal requirements to eliminate the additional cost and complexity of complying with overlapping and "Wisconsin-only" regulations." WMC further states that Wisconsin should "Ensure that newly promulgated rules are not more restrictive than federal requirements." That's very well said, and we could not agree more, especially as it relates to SB 328.

To the point, by our count, SB 328 contains at least 18 "Wisconsin-only" substantive differences compared to the current federal mandate.

In fact, Wisconsin has been heading in the opposite direction of this bill, avoiding creating new state laws on top of existing federal laws, and there is a great example of this in health care. In 2014, WHA worked closely with then Representative Howard Marklein and Sen. Leah Vukmir to pass legislation to repeal the bulk of the "overlapping Wisconsin-only" hospital regulations, instead following the federal CMS hospital regulations. This was done to streamline administration and enforcement and mitigate confusion and cost resulting from separate state and federal regulations, especially when trying to figure out which set of rules to comply with when they inevitably become misaligned.

The stated reasons for this legislation – hospitals are just paying the fines and walking away, hospitals and CMS are ignoring the law, or hospitals want to hide prices to prey on the uninsured - are simply not accurate *in Wisconsin*, and that is why WHA asks you to oppose SB 328.

Lastly, and to reiterate, we do not oppose transparency and our position on this legislation should not be construed as such. We are anxious to work with anyone seeking to foster fair competition, including engaging in equal enforcement of this federal law, and anyone committed to developing broad based strategies that will reduce the cost of providing care and assure savings make their way to consumers and employers, ultimately resulting in a more affordable and accessible health care system.

Thank you for the opportunity to comment on this legislation, I would be happy to take any questions or provide additional information in follow-up.