

Opening Statement of Senator Herb Kohl
Special Committee on Aging Hearing
S. 2838, the Fairness in Nursing Home Arbitration Act of 2008
June 18, 2008

Good morning. We are here today to examine arbitration agreements in nursing home admissions contracts. We are conducting a joint hearing with both the Judiciary and Aging committees because the issue involves access to justice as it relates to the 1.5 million Americans currently in long term care facilities and all those who may someday need this kind of care.

Over the past several years, more and more long-term care facilities have required incoming residents to sign mandatory arbitration agreements. By signing these agreements, residents give up their right to go to court.

It is important to note that we believe the vast majority of nursing homes are doing a good job and working hard to deliver quality care. But, we must protect the right of those who receive inadequate care to hold poor-performing facilities publicly accountable. As we will hear today, Mr. Kurth and his family want to protect others from the tragedy they have suffered and to send a strong message to underperforming facilities that harmful care is unacceptable.

The experience of placing a family member into a long-term care facility is very emotional. Often, the decision is a last resort after a medical emergency or when a family acknowledges that they cannot provide the level of care their loved one needs. The family's sole focus is on finding the best facility, not studying technical legal clauses buried in the document. Many incoming residents lack the capacity to make even simple decisions, much less judge the legal significance of an arbitration agreement. Most are unaware that they are signing away their right to go to court.

Typically, admissions agreements are presented on a take-it-or-leave-it basis. Residents have few choices because they require immediate admission or because there are no other facilities in the area. As a result, whether or not they understand the arbitration provision, they often feel compelled to sign in order to ensure that their loved one will be admitted.

In response to these concerns, Senator Martinez and I have introduced a narrowly targeted bill which would invalidate mandatory arbitration agreements in long-term care facility contracts. It is important to note that our bill does not preclude arbitration as an option for resolving disputes. As proponents of arbitration emphasize – and with whom I agree – arbitration can be a timely, efficient and less adversarial option for resolving disputes than going to court.

However, it is critical that the decision to use arbitration be made voluntarily by both parties and only after a dispute occurs. It is only fair that families and residents have the opportunity to make an informed decision based on the facts of their particular case. After the dispute, if both parties feel that arbitration will truly offer a fair shake – as its proponents argue – then they should be free to agree to it at that time.