

Testimony of

Pennsylvania Health Care Association (PHCA)

Delivered by

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at an

**Informational Discussion on the Challenges Facing Nursing Homes and
other Long-Term Care Providers**

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I am Stuart Shapiro, the CEO of the Pennsylvania Health Care Association. With me are Paul McGuire, the Association's Chair and Russ McDaid, our President and Chief Operating Office. Paul is also Vice-President of Mid-Atlantic Health Care a regional provider of long-term and post-acute care services with 9 facilities in Pennsylvania.

I want to thank Chairmen Hennessey and Samuelson for inviting the Pennsylvania Health Care Association to testify today on PHCA's thoughts around the direction of aging services in Pennsylvania

This committee has always been bipartisan and I intend to treat this committee that way today. You all know me well enough to know that I am like an umpire at a baseball game, I call balls and strikes as I see them and I always try to be as direct and honest as I can when it comes to issues around the elderly, and, I always attempt to be non-partisan.

This will be the last time that I am likely to testify before this committee. Russ McDaid who is sitting to my right will become the new CEO of the Pennsylvania Health Care Association on January 1, and I expect that he will also be a tremendous resource for you, and treat you all with the same respect that I have.

I know you all recognize PHCA's deep belief that how we care for the commonwealth's rapidly aging population promises to be one of our state's most pressing social and fiscal challenges, and how we deal with this will be a real measure of our humanity. Unfortunately, there is no "silver bullet" solution. The issues are complex, diverse and costly, and your leadership in examining these issues and exploring potential solutions is essential. As always PHCA looks forward to working with you.

PHCA is a statewide advocacy organization for Pennsylvania's elderly and disabled residents and their providers of care. Our mission is to ensure that those who need long-term care receive quality services in the most appropriate setting as they age.

For many, services at home can be safely and cost effectively delivered. For others, a nursing home or an assisted living facility or personal care home is the most appropriate setting for safe and cost-effective care.

PHCA represents both for-profit and nonprofit providers who offer services that range from integrated retirement communities and multi-level care campuses to freestanding nursing homes, assisted living/personal care homes, and ancillary care/home-care enterprises. Overall, PHCA represents more than 500 long-term care and senior service providers that care for almost 50,000 elderly and disabled individuals daily.

As you know all too well, Pennsylvania has a lot at stake when it comes to issues affecting older residents. We are among the nation's oldest and most rapidly aging states. Our commonwealth ranks third nationally by percentage of population age 65 or older, behind Florida and West

Virginia. About 2 million of our 12 million residents are age 65 or older, today. In the decades ahead, when we talk about the elderly in Pennsylvania, we will be among them, representing 25 percent of the commonwealth's population.

All of us have read about the wave of 80 million baby boomers that began turning 65 in 2011. An estimated 3.4 million of these baby boomers live in Pennsylvania --- almost 5 percent of our nation's total. Unless individuals, families and both the state and federal governments plan ahead, or come up with clear solutions, the fiscal tsunami will overrun us all.

This hearing will help to bring awareness to a number of issues, for the state's, and the nation's, long-term care system isn't plagued simply by financial constraints, but by public misconceptions, too.

For example, the National Commission for Quality Long-Term Care found 34 percent of Americans believe most long-term care is paid for by Medicare, 20 percent believe it is paid for by Medicaid, and 22 percent believe individuals and their families pay for most long-term care. Thirteen percent said they had no idea how long-term care is financed under the current system. Many think their needs will be met by existing health insurance or Social Security.

They're all wrong: Social Security doesn't; Medicare and other government health insurance programs won't; state Medicaid programs can't, as they are already stretched too thin; and basic insurance doesn't cover long-term care services. Perhaps it is because of these misconceptions that the Urban Institute found long-term care to be a leading cause of catastrophic out-of-pocket costs for families.

The fact that people are not planning ahead should be no surprise.

No one likes to think about getting older, facing chronic illness or becoming too frail to safely live on our own. But it happens, and when it does, more and more seniors and their families are finding themselves unprepared. Data show that only 35 percent of people 65 or older think they will need long-term care in the future, whereas 70 percent of those turning 65 this year will eventually require some form of long-term care. Despite these facts, few people have insurance coverage against the high cost of their long-term care. That needs to change, because, as I will discuss today, State Governments **alone** cannot solve all of the problems of financing long-term care that exist today. Pennsylvania's Medicaid program can and should do its part, but the current growth curve for the State's Medicaid program is not sustainable.

I would now like to ask Paul McGuire, the Chairman of PHCA's Board of Directors, to share his perceptions on a number of the challenges facing nursing homes before I present several key issues for your attention as we head into 2016.

Paul McGuire

Good morning Chairman Hennessey, Chairman Samuelson and distinguished members of the Committee. I am Paul McGuire, and I have the honor serving as both the Chairman of the Board of Directors PHCA and as the Vice-Chair of the Pennsylvania e-Health Partnership Authority. I work in the profession as the Vice-President of Operations for Mid-Atlantic Healthcare, a PHCA member company, and thus observe each and every day, the hardworking men and women in Pennsylvania's skilled nursing facilities that provide the highest level of care to ensure that the approximately 80,000 of Pennsylvania's sickest, frailest elderly and disabled residents live a healthy, safe life and age with dignity and respect in nursing homes across the state.

I am passionate about caring for our seniors and others who need the around the clock skilled care our nursing homes provide. I am passionate about meeting their needs with high quality, skilled care. But most importantly, I am a passionate advocate for the dedicated women and men who show up to work every day and provide high quality care to our mothers or fathers; our grandmothers or grandfathers; and do so with a caring touch and a smile.

The direct caregivers we employ are true heroes in every sense of the word. They show up to work each and every day, rain or shine. They provide high quality, high compassion care to the residents who have entrusted them with their care. I have gotten to know many of the direct care workers under my leadership personally over my more than 26 years in the business. I am fortunate to call many of them friends, and they ALL have my undying admiration and respect.

Their chosen work isn't the most glamorous or the highest paying, yet most refuse to take a day off because their 'residents need them'. They work hard, providing compassionate care. They work in a setting where success is expected, and when something goes wrong, it ends up as a headline in the local newspaper. They provide tremendous care, and they do it with a smile.

During my time in the industry I have seen the acuity, or sickness, level of the residents in nursing homes increase significantly. We care for many people today who would have been cared for in hospitals a decade ago.

As the level of care needed by residents has risen, so has the cost to provide this care. Unfortunately, funding has not kept pace with costs, especially for those supported by Medicaid, the state's medical assistance program, putting Pennsylvania's nursing facilities on a financially unsustainable path –even as the need for high-quality long-term care continues to grow.

Attached to our testimony is a series of four charts showing the fiscal challenges facing our nursing homes.

(First chart Medicaid shortfall)

The first chart, being held by our incoming President and CEO Russ McDaid, shows the gap between what Medicaid pays for care and the true cost of care, which continues to widen. This gap is called the “Medicaid shortfall.” As you can see in the chart, a recent national study demonstrated that Pennsylvania’s shortfall was \$23 per resident per day in 2014. With 65 percent of all nursing home residents relying on Medicaid to pay for their care, nursing homes now sustain an average loss of \$8,500 a year on two-thirds of the residents in their care. The shortfall for 2014 alone was estimated at \$471 million.

(Second chart-Margins)

The next chart shows what we have long known—that Pennsylvania’s nursing homes have among the lowest margins in the country. Several recent national reports from Avalere Health, a respected Washington D.C. research company, and MedPAC, the Medicare Payment Advisory Commission, show nursing home margins at roughly 2%. An Avalere study from last year pegged the margin for Pennsylvania’s nursing homes at 1.2%, with the highest Medicaid facilities at 0.3%, barely above breakeven. For some homes, including several of our high Medicaid homes in urban areas, the margins are even lower.

(Third chart-Medicare cuts)

The third chart shows us how Medicaid under-funding is one piece of the financial stress for nursing homes, but Medicare funding is also a challenge. Historically, generous Medicare revenue has allowed nursing homes to care for Medicaid residents whose care was provided at payment rates substantially below cost. This is no longer the case.

Hundreds of millions of dollars in Medicare payments to nursing homes have been cut. These cuts are in addition to the \$760 billion in Medicare cuts to pay for the Affordable Care Act. Pennsylvania’s nursing homes’ share of the Affordable Care Act is about \$1 billion over 10 years, and the other cuts are more than \$300 million annually.

(Fourth chart-Margins compared to other sectors)

Our skilled nursing facilities historically have the lowest operating margins among any health care companies. According to 2012 numbers, you can see the average net margins of the other companies in the slide displayed:

- Pharmaceutical companies, 25.8%
- Medical device companies, 19.6%
- Managed care plans, 5%
- Hospitals, 4.5%

Given these problems, our members can't invest in advanced medical technology that could aid in patient care. They can't invest in capital improvements to upgrade aged buildings. And they cannot invest in staff by offering the wages and or benefits they would like to offer, but simply cannot afford.

The state budget is an issue that I know you've been spending a great deal of time on in the Capitol over the past several weeks. Following the release of the Governor's proposed budget last March, PHCA visited many of you asking for a 2.4 percent increase or \$36million (state funds) in Medicaid payments to nursing homes to cover the ever increasing cost of care and allow our members to make additional investments in our valued direct care workers. We didn't pull the 2.4 percent out of the air. Rather, it is the three year average increase in the nursing homes market basket used by the Centers for Medicare and Medicaid Services (CMS) to set Medicare rates.

To help preserve access to care for our most vulnerable populations, PHCA also asked for continued funding for the Medicaid Access Program that the legislature created two years ago, this time at \$16 million in state funds—the approximate value of a 1% increase in Medicaid rates for nursing homes. I'm sure that these numbers sound high to many of you who are scrambling for \$1 million here and \$1 million there as you work to finalize a state budget.

Simply stated, high quality care requires a significant investment in our facilities and staff. And, for those of us with higher than average levels of residents on Medicaid, that is only possible with increased funding.

The Medicaid program is not covering the cost of care. As I shared earlier, our highest Medicaid nursing homes—those operating homes where more than 75% of their residents rely on Medicaid—are operating with dangerously low margins. Until the operating margins for high Medicaid nursing homes rise above 0.3% and approach other health care companies, and until Medicare cuts are restored at the national level, we will not be able to pay our direct care staff as much as we would like. We will not be able to invest in as many staff per shift as we would like. And, it will get more difficult for Pennsylvania's nursing homes to deliver the high quality care they have become accustomed to delivering.

Thank you again for the opportunity to testify today. I'd now like to turn the remainder of the time over my friend and colleague, **Dr. Stuart Shapiro**, to share his thoughts on the challenges that lie ahead for our sector.

Stuart Shapiro

Thank you, Paul.

Increasing Access to Care

Let's begin with increasing access to care. Earlier this year, I testified before this committee on the Final Report of the Long-Term Care Commission appointed by prior Governor Tom Corbett. This Commission had every stakeholder possible...consumers, providers, government officials, managed care companies, and many more.

As I indicated in that testimony, I did not like every word, every idea, and every recommendation of the final report, but, in the end, the report was a compromise document, much like legislation, that gave a roadmap that can work to begin to address some of the issues facing the individuals and the commonwealth. So I voted yes, as did every other member of the Commission.

The Commission endorsed the concept that we must modify the long-term care system in a way that care and services are delivered in a cost-effective manner. That care and services are no longer just about "want", and consumer choice, but other factors like cost effectiveness should to be considered.

Allow me to quote from Page 25, Recommendation 4 of the Commission recommendation, which states: "**MAKE THE LTSS (LONG-TERM SERVICES AND SUPPORTS) SYSTEM FISCALLY SUSTAINABLE.**" Then in the Background section also on page 25, the report was unequivocal stating: "Both public comments and Commission discussions highlighted the many fiscal challenges confronting Pennsylvania's current LTSS system...and the Commissioners considered how the current system could be changed to make it more fiscally sustainable...."

Likewise the first Strategy, 4.1, on page 26, of the Report reiterated a real powerful goal for the LTSS System: "**Serve the greatest number of individuals in the safest, most appropriate, least restrictive, and cost-effective setting possible with the limited available state and federal resources.**"

The Life Program here in Pennsylvania is an example of a cost-effective program that effectively combines Medicare and Medicaid dollars.

I want to be clear that even though the Pennsylvania Health Care Association primarily represents nursing homes, assisted-living facilities and personal care homes we fully endorse and support individuals remaining in their homes and receiving services under the Commonwealth Medicaid program for as long as it is safe and for as long as it is cost-effective. No one should be in a nursing home who does not need the type of services provided there on a 24 seven basis.

In order to assure that no-one goes into a nursing home who does not need those services, it is very important, as the Commission recommended, that the Eligibility Process for all seeking LTSSs be streamlined and standardized and the care needs for all should be expedited.

This is very important to correct so that we can assure that individuals receive care in the least restrictive and cost-effective setting possible. Consumers should be able to return to their homes from a hospital visit, or stay in their homes, when the home is safe and cost-effective for care. The eligibility process should not put barriers in the way, and should be reformed immediately. I would hope this Committee would hold a hearing on this.

We would also recommend that while looking at the eligibility issue, this Committee also addresses the **lack of adoption of a single uniform assessment tool that collects comparable data elements at specified intervals for all LTSS consumers in all Commonwealth funded LTSS settings.**

This was mandated in ACT 56, SB 704, of 2007, but has never been implemented. **Without this we will never have comparable data to monitor and understand what the Commonwealth is paying for, what the quality of care really is, whether we are getting the type of outcomes that our seniors deserve, and whether the taxpayers are getting value for their investment.**

This was also addressed by the Long Term Care Commission which expressed the desire, just as I would assume members of this Committee also would, that the **greatest number of individuals be served with the limited resources available.**

Thus, I suspect that the citizens of Pennsylvania (along with this Committee) would be very surprised to learn that in many cases the Medicaid program, under the various waiver programs, is paying more than \$150,000 annually to care for individuals in their homes when the annual cost is only about \$50,000 in a nursing home.

For example, based on data given to the Commission, there are over 1,100 individuals, **in just the Aging Waiver**, where the annual cost of individuals' care is higher than in a nursing home. When care can be provided safely for less in a person's home than in a nursing home, it should be, and no-one should be in a nursing home who does not need 24/7 care.

On the other hand, I do question whether the tax payer funded Medicaid program should be paying far more for around the clock care in the person's home when quality care can be given in one of Pennsylvania's nursing homes at a lower cost. If we set a ceiling at the cost of care in a nursing home for an individual, which is allowed by the Federal Government for the waiver programs, many more people could be served with the same dollars, putting considerable savings back on the table. I would hope that this Committee would look closely at this data.

Quality of Care

Turning now to the quality of care in Pennsylvania's nursing homes. There is good news on this front.

Recent reports would have you believe the quality in Pennsylvania's skilled nursing facilities has declined. Yet, by all quantitative and qualitative measures, care is quite good and improving on a daily basis.

Pennsylvania nursing homes receive fewer deficiencies than the national average, and rank the lowest in the number of serious deficiencies per home in the nation. This means that the state's nursing homes rank better than all other 49 states in number of serious deficiencies.

The Pennsylvania Department of Health's official annual survey of each facility provides one measure of quality, but because of its structure, often assesses processes rather than clinical care. Each nursing home is licensed and subject to unannounced inspections by the Department of Health at least once a year. These on-site surveys ensure centers are meeting strict regulatory guidelines for quality, operational integrity and staffing. And, we are proud of the overall results!

Nursing homes are subject to such intensive and thorough regulation and enforcement that is second only to the nuclear industry in the number of state and federal regulations imposed to ensure quality and safety.

With a focus on enhancing treatment services and improving the overall experience for residents, Pennsylvania skilled nursing facilities have been continually improving in clinical outcomes.

Based on the quantitative data from the U.S. Centers for Medicare and Medicaid Services (CMS) five star rating system, from the first quarter of 2014 to the first quarter of 2015, Pennsylvania nursing homes improved on 10 of 11 quality measures, and Pennsylvania now ranks better than the national average on 8 of the 11 measures.

We are proud of these results. Despite the chronic financial challenges which Paul discussed, Pennsylvania's skilled nursing facilities continue to provide the highest level of care to the men and women who rely on our centers for their daily living needs, and comfort to the families who entrust us with their care.

In order to continue to provide quality care, nursing homes must be adequately paid by the Commonwealth.

Tort Reform in Pennsylvania

Turning now to the legal climate in Pennsylvania.

Unfortunately our state has become a magnet for aggressive advertisements by **out-of-state predatory law firms** that have moved to the commonwealth to file volumes of lawsuits in the hope of cash settlements. In recent years the number of cases, and the payouts against nursing homes and other providers of long-term care services, has been increasing faster in Pennsylvania than any state in America. This has nothing to do with quality of care.

Since 2011, these out of state lawyers with their small satellite Pennsylvania offices in Philadelphia and Pittsburgh have placed advertisements that have appeared more than 150 times in Pennsylvania newspapers. In 2015 alone there have been at least 40 **full page advertisements attacking 52 nursing facilities**. The ads have brought public mistrust and anger against an industry that cares for the frail elderly, and has made hard-working staff embarrassed to go to their local grocery store.

These predatory lawyers are here because nursing homes do not have the same punitive damages protections as physicians. Current Pennsylvania law (MCARE) has limited punitive damages to two times the amount of compensatory damages for physicians since 2002. PHCA is working to conform the MCARE limits on punitive damages to long-term care providers, which would include nursing homes, assisted living residences and personal care homes.

Prior to the protections enacted for physicians as part of the MCARE revisions in 2002, they had been facing large numbers of frivolous lawsuits, and were settling cases for fear of unpredictable jury verdicts. Since the limits have been put in place, the number of cases has fallen dramatically. Prior to 2002, physicians settled almost 100% of the cases. Today they litigate more than 80% of these frivolous malpractice cases because they believe the case will be judged fairly on the merits, and they have considerable protection from unpredictable punitive damage awards by runaway juries.

Nursing homes, on the other hand, **settle virtually all of their cases** because of the fear of punitive damage awards. Pennsylvania ranked second among all 50 states both in total medical malpractice payouts and payouts per capita in 2014. According to the 2015 Medical Malpractice Payout Analysis published by Diederich Healthcare, those medical malpractice payouts total \$346 million—a \$27 million increase from 2012. In 2014, 95 percent of the payouts were settlements, not judgments.

According to a recently released actuarial analysis on liability costs, the liability cost per Medicaid day in Pennsylvania is \$4.96. Given that Medicaid paid for about 19.2 million days of care in 2014, Medicaid spent more than \$95 million on liability related costs in 2014, much of this in contingency fees to out-of-state predatory lawyers. **This is an increase of almost \$5 million over previous year expenditures**. Most of the almost \$95 million could have been used to improve the quality of care and the quality of life for nursing home residents.

Punitive damage reform is crucial for Pennsylvania's long term care providers in order to continue to provide quality care to our most vulnerable citizens. Excessive litigation and damage awards result in higher consumer prices and decreased availability of services. The high legal costs paid by Pennsylvania health care providers, employers and governments inhibit job growth, increase health care costs and limit access to medical care.

Enacting the identical limits for long term care providers as currently exist for physicians will help to reduce frivolous litigation and shift resources back to patient care where they should be spent, which is why PHCA strongly supports SB 747.

Senate Bill 747 PN 1115, which limits punitive damages to 250% of the amount of compensatory damages for skilled nursing facilities, personal care homes and assisted living facilities passed the Senate 40-9 in June with bipartisan support, and currently awaits a vote in the House of Representatives. We hope it will be passed soon.

Managed Care

Before concluding I would like to let's now turn briefly to the subject of managed care for the elderly. Managed care for the elderly and disabled is coming to Pennsylvania, and I hope that we do it right. If we are not careful in its implementation, we run the risk of spending millions of extra dollars, reducing access to care for the elderly, and destroying an infrastructure of caregivers and providers that have taken decades to establish.

About thirty states are experimenting with managed care under Medicaid for the elderly. I use the word experimenting purposely for there are NO CONCLUSIVE RESULTS that show that managed care improves care or outcomes, gives consumers choice, and saves money. In fact, preliminary data seems to say that it does none of these. **So let's get in right.**

While I believe Pennsylvania is most prudent to wait for some real and consistent data from other states that the elderly are not hurt by so called managed care and that managed care actually saves the state money, PHCA has been supportive of the Wolf Administration moving ahead with a first phase in Southwestern Pennsylvania in 2017.

Today is not the day for a deep dive into the literally thousands of elements of that program, and PHCA has been working with the Administration on these, but I do want to discuss a couple of broad issues.

Let's take the time to get this as close to right the first time as we can, then let's fix problems when they occur. Let's always keep our eyeballs on preserving availability and access to care, preserving the quality of that care and preserving our long-term care safety net for our most vulnerable seniors by making sure we serve individuals in the most cost-effective ways commensurate with their needs , and do so in a way that does not artificially shift costs from state government to the federal government, or vice-versa.

To accomplish all that is contained in that very long last sentence is a tall order, and, I believe the Long-Term Care Commission got it right when they said: **Proceed Prudently.**

To do that, I believe the Administration should issue a single RFP to start the program in 2017 in SW Pennsylvania. After a year of implementation, keep the program going while it is evaluated, fix what needs fixing, and then use that experience to roll it out further. Include stakeholder involvement in this evaluation.

We want to avoid what the March 5, 2014, edition of the *New York Times* reported in an article entitled, “Pitfalls Seen in a Turn to Privately Run Long Term Care,” in which the reporter recounted what happened to one 75-year-old man with debilitating arthritis, lung disease, newly blinded and with growing dementia who was first forced from a nursing facility to inadequate services in the community, and then denied continuation of even those paltry services. This man’s story is part of a report that focused on Tennessee, New York and Minnesota, all states that are trying to implement managed long term care services by shifting dollars to privately run MCOs. **All have experienced serious quality, coordination and outcome problems, as illustrated in the article. We should not allow this story to repeat itself here in Pennsylvania.**

Thus, PHCA recommends that the departments **proceed prudently, not lock the commonwealth into one program, and consider** testing alternatives to fully capitated MLTSS as part of an extended Phase 1. For example, a viable program could include a provider owned or operated program subject to some type of capitation. Make the providers part of the solution. Eliminating the “middleman” may save money and improve care.

Private Sector Alternatives: Long-Term Care Insurance, Conversion of Life-Insurance for Long Term Care, and Reverse Mortgages

Before concluding, I would like to suggest that this Committee also look at several ways other than Medicaid to improve the financing of long-term care services in Pennsylvania, because we believe that Government alone cannot solve the financing and delivery challenges within long-term care. Private Sector solutions should also be considered.

Clearly, individuals should carry a part of the responsibility for financing their own long-term care whenever possible, and long-term care insurance is one way to do this. Pennsylvania could pass legislation that would take long-term care insurance in Pennsylvania, to the next level. Legislation could be crafted that would allow people to deduct the purchase of long-term care insurance “above-the-line” on their state tax forms --- that is, deduct it directly from their total income before taxes, thereby decreasing their tax bill in most cases. We believe this should also be done at the federal level, but we suggest starting with legislation here in Pennsylvania to permit this deduction or tax credit. Providing either a deduction or a tax credit would benefit the state in the long term by reducing Medicaid costs, and many states already provide this tax relief.

Alternatively, Pennsylvania could pass legislation that would easily allow individuals to access their life insurance for long-term care in the form of an accelerated death benefit. In 2011, 69 percent of American families had some form of life insurance; for many individuals, it may make some sense to convert at least a portion of this life insurance to pay for long-term care or to buy long-term care insurance. A few insurance companies allow this, but legislation might make this easier.

The third idea would be to pass legislation that would expand the concept of reverse mortgages, which would allow people to use the equity in their homes to help pay for long-term care or long-term care insurance. A reverse mortgage lets you tap into your home equity, and you don't have to pay back the loan for as long as you live there. Funds from a reverse mortgage could pay for renovations to make the home safer for an elderly loved one, for home health care, to provide family caregivers with funds for out-of-pocket expenses, or to purchase long-term care insurance. Legislation could better enable this process and simultaneously build in consumer safeguards.

These are just a few ideas, but the point of these suggestions is clear: Government must play a role, but new government programs are not the only answer. Government can't afford to take on much more.

Chairman Hennessey and Chairman Samuelson: Thank you both, and the entire Committee, for asking us to testify today. We appreciate your commitment to assuring the Commonwealth builds and maintains the finest long term care system in the nation. We will be pleased to answer any further questions.