



House Aging & Older Adult Services Committee Hearing

Testimony on HB 2549: Older Adult Protective Services

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Good Morning Chairman Hennessey, Chairman Samuelson and members of the House Aging and Older Adult Services Committee. Let me start by thanking you for the work you do to protect seniors in Pennsylvania and the opportunity to provide testimony on Chairman Hennessey's HB 2549, which amends the Older Adult Protective Services statute.

My name is Anne Henry. I am the Senior Vice President and Chief Government Affairs Officer of LeadingAge PA, which represents nearly 350 not-for-profit providers of senior housing, health care, and community services across the Commonwealth. Our members include about 200 nursing facilities, nearly 200 personal care homes or assisted living residences, more than 80 affordable housing developments, and 175 Continuing Care Retirement Communities. Our members also provide adult day services, LIFE programs, home health care, home care, hospice, and independent living options for older adults. HB 2549, as currently drafted, would affect many of our members.

Please know that LeadingAge PA members are committed to the provision of excellent senior services, while continually evolving to meet and even anticipate consumer demand, creating new ways of delivering needed services and improving upon traditional service lines. Key to our members' success is talent management and engaging and empowering team members in order to cultivate high performance, innovation and increased satisfaction, which brings us to the discussion of healthcare workforce issues in general and the provisions of HB 2549 specifically.

According to the Kaiser Family Foundation, the healthcare industry overall accounts for 10.3%¹ of employment as a percentage of total employment in Pennsylvania, ranking sixth in the country for the percentage of its workers employed the healthcare field. Competition for these workers is fierce, contributing to difficulty finding and retaining qualified and competent staff to provide the excellent senior services our members demand. We recognize that we must ensure that every senior receiving services is protected by a qualified workforce, but we urge the Committee to also be careful not to impose barriers that complicate hiring and retaining good staff.

I would like to start by commending Chairman Hennessey for introducing this bill. There has been much uncertainty since the *Peake* Supreme Court decision regarding criminal history and eligibility requirements for applicants and employees, and clarification is necessary.

LeadingAge PA is concerned that the bill would newly require both Pennsylvania State Police and FBI checks for all applicants, and by this redundancy unnecessarily increase costs. Much of the cost for long-term care and services in the Commonwealth is funded by the seniors themselves either through their own limited resources, or by Medical Assistance. We know that Medical Assistance (MA) does not cover the cost of providing care, with our members reporting that they subsidize residents who rely on MA by \$100 to \$150 per resident per day. We expressed concern when the State Criminal History Record Check fees were increased from \$8 to \$22 without any MA rate increase for impacted providers. The proposed FBI check requirement would impose an additional \$22.60 to screen each applicant. This unfunded mandate would increase the cost from \$8 per applicant in 2017 to \$44.60 per applicant upon passage of HB 2549. LeadingAge PA recommends retaining the process outlined in the current Older

¹ <https://www.kff.org/other/state-indicator/health-care-employment-as-total/?currentTimeframe=0&sortModel=%7B%22colId%22:%22Health%20Care%20Employment%20as%20a%20Percent%20of%20Total%20Employment%22,%22sort%22:%22desc%22%7D>; accessed 8/30/2018.

Adult Protective Services Act (OAPSA) where an FBI check is not required if the applicant has been a resident of Pennsylvania for the past two years. If the additional FBI checks are required, the bill should provide additional funding to meet these new requirements.

In addition to the cost burdens associated with the proposed requirement to conduct FBI checks on all applicants, we have serious concerns that this provision will create a barrier to employment, especially since the bill does not provide a timeframe in which the Pennsylvania Department of Aging must determine eligibility for employment. We recommend that a timeframe be included in the bill for the Department to make the determination. This timeframe should be very soon after receipt of the criminal history information and should be considered when determining the provisional hiring timeframe, which I will discuss later.

We appreciate that HB 2549 retains the current OAPSA requirement to screen applicants, rather than requiring employees to undergo repeated background checks. We believe that HB 2549's requirement for employees to disclose charges related to prohibited offenses using the standardized form developed by the Department will provide the necessary information. Many LeadingAge PA members already require this disclosure of their employees and believe it is a best practice that should be required of all senior service providers covered by this bill.

Regarding the prohibited offenses, LeadingAge PA is concerned that the four tiers will create an administrative burden for employers to be able to tell if a conviction on a State Police background check precludes the applicant from employment in this field. We would appreciate simplification of the tiers so that the results of the Pennsylvania State Police background checks are easier to interpret.

LeadingAge PA appreciates that HB 2549 would allow applicants the opportunity to request a waiver of the prohibition on employment if they demonstrate that they have been rehabilitated. We believe that a waiver should apply as long as the employee continues to work for the same employer, and that the waiver should be portable if the employee gains a similar position with a similar employer. We appreciate that the bill requires that the Department of Aging develop a waiver request form and believe that this is necessary to support a standardized approach. Finally, we support the provision in the bill requiring the Department to issue decisions on waiver requests within 30 days. Given the need for an applicant to work and the challenges employers face in hiring, even a 30-day wait may force the applicant to move on to a different field, even if they are well suited for senior care.

We prefer a provisional hiring timeframe that is at least as long as the Department of Aging takes to determine if the employee is eligible plus the amount of time the Department takes to make a decision on a waiver. Ideally, employers should be allowed provisional hiring of at least 90 days, as OAPSA currently allows, for front-line staff and six months for management staff, to coincide with the typical employer's probation period for new employees.

I will turn now to a discussion of the reporting requirements for abuse, neglect, exploitation or abandonment that are included in the bill. Our members take great pride in their staffing and quality, doing their best to ensure the safety and satisfaction of those for whom they are responsible.

Duplicative reporting efforts to multiple agencies, portals, or other methods can be counterproductive, unnecessarily changing the focus of employees' time from care to administrative tasks. We understand the importance of identifying and reporting potential instances of elder abuse. Providers currently report under OAPSA and the Adult Protective Services Act, as well as state and federal licensure requirements to the AAA, law enforcement, and their licensing agency. The definitions, reporting

timeframes, what must be reported, and possible penalties are all different for each of these requirements. We believe that aligning, simplifying, and streamlining the definitions and reporting would provide better protection for seniors than simply adding more requirements.

In addition to reporting to multiple state and local entities, some of the providers included in HB 2549 already must comply with the federal Elder Justice Act (EJA)². The EJA was included in the 2010 passage of the Patient Protection and Affordable Care Act. Its provisions are intended to protect seniors and include required reporting of “reasonable suspicion of abuse, neglect or exploitation of a resident.”³ Providers are responsible to train their staff about their obligation as mandatory reporters to report instances of suspected abuse. Reporting requirements are fulfilled when an individual makes a report to local law enforcement and the State Agency responsible within either two or twenty four hours, depending if serious bodily injury occurred. The definitions and reporting requirements in EJA are in addition to and different from Pennsylvania’s OAPSA definitions and reporting requirements.

LeadingAge PA acknowledges that the current reporting system is complex and difficult to manage. We would respectfully request that the Committee take the time to review the various reporting systems for each of the covered entities and streamline the reporting. Ideally, each covered entity could continue to use its current reporting mechanism and the Commonwealth or local authorities would have information technology to assure that each report is forwarded or available to the appropriate entity within the required timeframes. LeadingAge PA would be happy to assist the Committee in reviewing and streamlining the current reporting structures. We do not believe that a complicated and

² https://www.cms.gov/Medicare/Provider-Enrollment-and-Certification/SurveyCertificationGenInfo/downloads/scletter11_30.pdf

³ <http://uscode.house.gov/view.xhtml?req=42+USC+1397&f=treesort&fg=true&num=45&hl=true&edition=prelim&>; accessed 8/30/2018.

inconsistent reporting system is as effective in preventing or mitigating abuse as a thoughtful review and restructuring to assure that the reports are provided timely to a single point in government to be shared with all other required governmental entities.

The bill also creates a new definition for financial abuse and seeks to protect elders from this type of abuse by providing education and reporting provisions for facilities and financial institutions. LeadingAge PA generally supports the approach in HB 2549 to prevent financial abuse; however, we do have some concerns about how the reporting will work in practice. For example, we would appreciate clarification regarding what law enforcement officials would view as a reasonable cause to suspect financial abuse and when this should be reported. We believe the reporting of financial abuse could be very helpful in protecting seniors from family members who may be using the seniors' Social Security or pension checks that must be used for their care. HB 2549 also poses an opportunity to protect seniors from the transferring of assets for less than fair market value, thus making the senior ineligible for Medical Assistance coverage of long-term care services for a period of time.

HB 2549 also makes significant changes to the penalties that can be imposed for violations of OAPSA as well as to the standards that would trigger the imposition of penalties. For example, currently penalties are imposed for willful or intentional failure to comply, while HB 2549 seems to allow the imposition of civil penalties if a provider fails to comply even if the failure was not done willfully. As I stated earlier, reporting of abuse, neglect, exploitation or abandonment is complicated and confusing due to the lack of consistent reporting standards and definitions.

The current OAPSA focuses the use of civil and criminal penalties on the administrator or owner of the facility, while HB 2549 would expand the use of these penalties to all mandated reporters, including the

employees of the facilities. This significant expansion of the civil and criminal penalties to individual reporters is an important and wide-reaching change. Finally, HB 2549 would allow for compensatory and punitive damages, including treble compensatory damages for retaliatory action or intimidation. While we would not condone retaliatory action or intimidation, reasonable people might disagree on what that might encompass, especially when it appears to include disciplinary action by the employer. To that end, the unintended consequences of these penalty provisions may have harmful effects on employment and the provision of senior services in the Commonwealth.

In addition, penalties are available through the federal EJA for failure to report for nursing facilities and hospice providers receiving more than \$10,000 annually from the Medicare or Medicaid programs. Employees of these facilities are independently liable for their obligation to report and can face civil penalties up to \$300,000 dollars for willful disregard of their reporting obligation that exacerbated harm to one or more persons. The act further outlines prohibited retaliatory offenses by a provider toward an employee.⁴ The penalties included in HB 2549 would be additive and may frighten good employees from entering or staying in the long-term care field.

Finally, HB 2549 provides protections for good faith compliance to financial services entities, AAAs and their employees, and the Department of Aging. We believe it is only fair that providers receive these same protections for good faith compliance.

LeadingAge PA is committed to finding and collaborating on solutions that best protect older adults and can be implemented in the most effective and appropriate manner. We well

⁴ 42 U.S. Code § 1395i-3a - Protecting residents of long-term care facilities

understand that the best interest of Pennsylvania's seniors is our collective priority and look forward to working with you to develop protections for seniors that are effective and not counterproductive to the provision of the excellent person centered care and services we all want for Pennsylvania's seniors. We look forward to continuing the discussion on OAPSA and thank you for the opportunity to testify today. I will be happy to answer any questions you have.