

House Aging and Older Adult Services Committee

**PALA TESTIMONY REGARDING HB 2549
Amendments to the Older Adult Protective Services Act
Wednesday, September 5, 2018**

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Good Morning Mr. Chairman and members of the Committee:

Thank you the opportunity to address HB 2549 that proposes to amend the Older Adults Protective Services Act (OASPA). I am Margie Zelenak, the Executive Director for the Pennsylvania Assisted Living Association otherwise known as PALA. We represent Personal Care Homes (PCH) and Assisted Living Residences (ALR) throughout the Commonwealth.

PALA appreciates this Committee's efforts to address the significant concerns and, frankly, the confusion that has arisen among providers of long term care services and supports since the Commonwealth Court's December 2015 decision in *Peake v. Commonwealth of Pennsylvania* regarding the permissible hiring of individuals with a criminal history background. The adoption of sensible guidelines and procedures that will govern the employability of individuals with a criminal history who are seeking employment in the long term care industry will help to lessen providers' concerns and diminish their confusion and hopefully can enhance the job market for these individuals. Let me present comments and recommendations from our association regarding the proposed amendments.

Section 301.1 Duties of Financial Institutions and Fiduciaries

PALA supports the addition of the guidelines for Financial Institutions and Fiduciaries to the OAPSA. There is a national epidemic of scams that affect the seniors of the Commonwealth. PCH and ALR employees are alert to recognizing signs of this increasing problem because of the use of Internet and social media by residents. As an administrator of a PCH in the early 2000, I experienced the financial exploitation of a resident by her nephew. The first sign of concern was when the nephew ceased making payment for her monthly rent at the community. He ignored repeated calls from the community and his aunt. The resident retired with a good pension and savings. She was quite aware of what finances she had and could not understand why her nephew was not paying her bill. When

I called to report the exploitation to Area Agency on Aging (AAA), I was informed that this type of concern was not a reportable incident and that I would have to pursue a remedy before the local magistrate. I insisted it was exploitation and they did file the report. The result was she was assigned a representative payee. The nephew was gambling away his aunt's money. The reason I detail this event to you is to emphasize the importance of this new addition to the OAPSA legislation in protecting the seniors from exploitation along with the importance of the AAA investigating these reports.

PALA does recommend a review of the timelines of up to 40 days on the disbursement of funds. Seniors' health may be compromised if they are unable to safely and promptly access their funds to purchase medications or for their care needs during this time frame. The Financial Institution may attempt to "freeze" an account during this investigation, which would unduly limit a senior's access to their funds for essential health care expenses.

Section 302 Reporting

(e 2) Mandatory Reporting - This section includes immediate contact of law enforcement officials for financial exploitation. PALA recommends that this be excluded for financial exploitation until the financial institution completes the investigation.

(e 4) The Incident Reporting system as defined is HCSIS – Home and Community Service Information. Personal Care Homes and Assisted Living Residences do not use this system but file a paper report by fax or email to the Bureau of Human Services Licensing (BHSL).

Section 304.1 Receipt and investigation of reports

(e) Investigations involving facilities – PALA supports the joint investigation by the Area Agency on Aging with the Bureau of Human Services licensing. This change would expedite and promote the efficiency of the investigation of the incident. Currently, Protective Services will conduct their investigation and then a separate investigation is conducted by BHSL. Communities will take steps to protect the residents by beginning a plan of supervision or suspension. If it is determined that the report was unsubstantiated by Protective services, the PCH or ALR must keep the plan in place until the BHSL completes

their investigation. This process, at times, can extend for several weeks or months thus placing significant increased supervision of the employee if not continued suspension pending the outcome of the investigation along with financial burdens to the community and employee.

(g) Unsubstantiated reports – The current practice of BHSL is to cite the community for a violation of 2600/2800 42b, Resident Right regarding abuse, even if it is found that the report is unsubstantiated or was not due to any act or omission by the provider of services. Why? Because BHSL insists that it must “track” the incident and that is the only way to do so. This misleading information is posted on the Department of Human Services website which obviously adversely affects the providers’ reputation. PALA’s position is that unsubstantiated reports of abuse or events that are not the result of any act or omission by the personal care home or assisted living residence plainly do not require an automatic citation to track the incident as a matter of law or common sense and should never be posted on the DHS/BHSL website. BHSL can maintain a completed Reportable Incident Form in a file.

Section 503.1 Criminal Histories

PALA supports the completion of State Police and FBI criminal history reports for all employees upon hire. We understand the increase of applicants that live in neighboring states. This is a change from the OAPSA which only requires the FBI if the person has not lived in the Commonwealth for the prior two years. This new mandate will increase the cost of hiring for PCH and ALR communities. The State Police requirement was increased from \$8.00 to \$22.00 without advance warning OR explanation as to the three fold cost increase to providers. The FBI clearance cost is \$22.60. The additional costs will affect small homes especially those accepting SSI residents. The low reimbursement rate of \$1189.30 and additional cost to hire will only hinder access to homes by SSI residents. According to the July 31, 2018 statistical report of Personal Care Homes, there are 557 communities serving 5514 residents. Our suggestion is for the state to consider a discounted rate for criminal clearance for the small PCH/ALR communities especially those who serve the SSI residents so as not to reduce access by potential SSI residents who need

and can benefit from personal care services.

(2) As indicated in this section the FBI requirement will be for new hires, not current employees who were hired prior to the effective date of this legislation. PALA supports adding a clause to the reference so that no regulatory agency will require all employees to complete the FBI clearance. This will be extremely costly for PCH and ALR communities to complete.

(b) Prohibited Offenses – PALA agrees with the proposed tiers for prohibited offenses because there is a waiver process included in the amendments.

(c) Waiver request - After the Peake decision in 2015, employers had the ability to determine the eligibility to hire an applicant after review of the criminal history reports and company policies. The possible delay in the determination by the department on the waiver requests is a concern for PALA. Everyone in this room is well of the alarm nationally and certainly acutely experienced throughout Pennsylvania over the lack of direct care workers for human services entities. The waiver process alone may hinder an applicant from considering the rewarding position of working with Pennsylvania's seniors in PCH/ALR when they can go down the street to a retail establishment to work. I would be curious to see the statistics on substantiated abuse reports for employees that were hired after the Peake decision that would fall into the 25/10/5 proposed prohibited offenses. Will these employees be required to submit a waiver or will this requirement only apply to new hires?

(c 1-6) Waiver request criteria – PALA believes that waiver criteria #5 and #6 are completely unnecessary as they are outside the scope of the purpose of the proposed amendments. The purpose of the waiver process is to assess risk, not to determine an applicant's abilities and competency and the legislation should not conflate those two separate determinations. The right to pursue a lawful occupation guaranteed by the Pennsylvania Constitution cannot be unreasonably restricted. It is one thing to inquire into an applicant's rehabilitation post conviction. But inquiry into the applicant's "prior or present relevant work experience" and "competency and proficiency in relevant work" is

not nor should it be within the purview of an agency hearing examiner who, most likely, is neither trained and skilled in human resources generally nor familiar let alone experienced with the nature and scope of the various and specific types of positions within the industry. (In that regard, what of the background and experience of hearing officers to determine an individual's rehabilitation?) The determination of any individual's suitability for a position, apart from positions subject to licensure, are wholly the responsibility of an employer. Why subject waiver applicants to job specific considerations when determining whether, in the first instance, they can be eligible to apply for and accept a position in an assisted living residence or personal care home? How to assess and weigh an eligible applicant's work experience and his/her competency and proficiency whether for a position in dietary, or housekeeping or direct care is the task of an employer, not the government. And recall, at subsection (g), the proposed amendment expressly disclaims that the granting of a waiver does not guarantee employment. Exactly. That determination, including the evaluation of an applicant's work experience and general competency, is for the employer to make and the government should not assume that right and responsibility.

Many Direct Care Workers (DCW) take the first step to working in this challenging field of providing care for seniors in PCH and ALR. These communities train the staff and I am sure my colleagues also have examples of employees who have risen through the ranks after starting with no relevant experience. The increasing lack of DCWs seemingly will continue and denying a person a waiver due to an uninformed or misinformed sense of "relevant" work experience or an applicant's current or potential for competency and proficiency will exacerbate the problem.

As to criterion #4, "evidence of rehabilitation," it is, as written, a rather vague and amorphous term. The legislation must provide more guidance to the agency on this foundational determination to assure fundamental fairness to every applicant and to assure uniformity and consistency in its application to every waiver request. Realizing the known challenges to obtaining employment post conviction, will, for example, letters of recommendation and the absence of recidivism constitute sufficient demonstration of rehabilitation?

(d) Waiver approval – PALA recommends clear-cut guidelines on the waiver approval process so that each individual is receiving the same evaluation. Since the department will have 30 days to approve or deny the waiver request, the community should have the ability for a provisional hire until the department makes the determination.

(e) Applicability - If the employee completes the annual form with no additional crimes, why require yet another waiver in three years? PALA recommends removing this unnecessary and redundant requirement that surely will strain the Department of Aging's ability to complete the waiver reviews in a timely manner.

(f) Exception - PALA recommends the addition of the portability of the waiver from one PCH/ALR to another rather than requiring the receipt of a new waiver at each community. If an employee receives a waiver for PCH/ALR and then would move to a home-based entity, a new waiver can be required.

(m 1) Provisional hiring of employees for limited periods – PALA recommends that the time period for a provisional hire be increased to 90 days to accommodate the delays encountered with PA State Police and FBI reports.

(m 3) PALA recommends clarification on this section to indicate the intent in regard to provisional employees limited periods. The reference is to supervision of applicants and not employees.

Thank you for your dedication to the seniors of the Commonwealth.

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