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December 12, 2013

To: The Honorable Members of the House Health Committee

From: Samuel R. Marshall

Re: House Bill 1621 and 1622 – Contracting rules for some providers when dealing with some insurers

Thank you for this hearing, and for bringing statewide attention to an issue that has dominated the concerns of western Pennsylvania consumers – the continued troubles between UPMC and Highmark and the impact that will have on the availability and affordability of quality health care and health insurance.

We appreciate these bills are an effort from Representatives Christiana and Frankel to address those needs and concerns. But we don't see the bills doing that. We'd like to explain why, to ask some essential questions, and to offer some alternatives.

At the outset, we'll acknowledge our perspective: The Insurance Federation represents commercial health insurers that offer health coverage throughout the Commonwealth and the country, and we represent UPMC Health, the insurance component of its Integrated Delivery System. We don't represent Highmark or any of the other Blues.

We are firm believers in the value of competition among insurers; we've seen it work in every other line of coverage, and we think the lack of competition in health insurance is one of the reasons that market has not served consumers as well as it should.

Our health insurers are eager to compete in western Pennsylvania, and we look at the bill largely from its impact on insurance competition. The fact that it is supported by the dominant insurer and opposed by all the others is telling: While not the sponsors' intent, the bills help Highmark at the expense of all other insurers. Whatever else a monopoly needs, it doesn't need government help to perpetuate that monopoly.

We feel the same about competition among hospitals, albeit with a concern that too much capacity leads to over-utilization. We want providers to face competition for their services, just as insurers do.

The problems with the bills

We hear the demands from consumers that UPMC and Highmark remain "in contract." That's understandable. Those are the dominant providers of health care and health insurance in western Pennsylvania, and they've seemed inseparable. Change in health care and health insurance is inherently unsettling, because it is the most intimate, crucial and universal service and need out there.

These bills answer that immediate demand by ostensibly assuring that consumers can continue their Highmark coverage with access to an "in-network" UPMC. They require that UPMC contract with Highmark (if Highmark wants, as it does for now) – presto, consumer demands met, fears taken care of, and problem solved.

If only the regulation of heath care and health insurance were that simple.

Briefly: These bills require mandatory arbitration between two direct competitors under rules that favor only one and will ensure that the largest insurer in Pennsylvania remains just that. They raise needless challenges and questions for government in regulating contracts between providers and insurers. They foreclose the emergence of competition to Highmark on the insurance side and the salvation of competition to UPMC on the hospital side. Whatever immediate balm they provide, it isn't worth it.

The bills require a hospital that is part of an Integrated Delivery System to contract with any willing insurer and to abide by a number of other restrictions in its insurance contracting practices.

- That sounds pretty good for the insurer, and it is. But in defining an "insurer," the bills leave out commercial group health insurers – so only the Blues and HMOs get this help.

- The bills inexplicably don't apply to all hospitals in setting parameters over their contracting practices – just ones that are part of an IDS, and only when dealing with certain insurers.

- We're not sure of the legality or reasoning in the limit. Does this mean all other hospitals can engage in the practices the bill outlaws? If the bills are to match their press releases - "a consumer's access to a provider shouldn't be limited by the logo on his insurance card" – then they should apply to all hospitals (and maybe all providers) and all insurers.

- We hear the limit is because this is only a problem with hospitals that are part of IDSs, not hospitals generally. That may be Highmark's perspective, but it isn't the case for other insurers: We face difficulties contracting with many hospitals, not just those that are part of IDSs.

- The bills make the decision to contract a unilateral one – it is purely at the insurer's discretion. We hear the bill is needed because consumers want Highmark and UPMC to remain "in contract." But it doesn't require Highmark to contract with UPMC or any other hospital. Instead, it only requires UPMC to contract with Highmark if that's what Highmark wants. There is no consideration of what consumers want or need – just Highmark.

The bills require that if selected hospitals and selected insurers can't agree to a contract, they go to mandatory arbitration.

- Good luck finding an arbitrator qualified and acceptable to both parties. And as the bill only regulates the hospital, not the insurer, and allows an indefinite interim contract during arbitration, the insurer is under no pressure to be reasonable.

- The bills provide no parameters for the arbitrator. They offer no guidance on pricing or other terms – in particular, they say nothing about the need to consider the competitive impact on other insurers or the contracts the hospital may have with other insurers. And with each contract likely set by different arbitrators, there will be no consistency even if all insurers and all hospitals were covered.

The bills require certain conduct from hospitals in an IDS, but not insurers in an IDS.

- The bills prohibit a hospital in an IDS from using payments from other insurers to subsidize its affiliated insurer. That may make sense in promoting competition, but it should be applied to an insurer that is part of an IDS, too: Why not prohibit an insurer from using premiums it collects to subsidize its affiliated hospital (or other operations)?

- That goes to a fundamental weakness in the bills: They don't regulate or restrict insurers or hospitals generally, or IDSs generally, or insurers within IDSs – just hospitals within IDSs. That leaves out all the other entities and dynamics involved in the health care and health insurance markets.

- An incomplete regulatory framework never works. Even if it addresses one concern, that solution is invariably outweighed by the problems it invites.

The bills require two directly competing IDSs – the two dominant hospitals and insurers in their region – to contract with each other.

- The law should make competitors compete, not collude, with the focus on fairness, integrity and transparency. Highmark and UPMC are direct competitors: Highmark's plan as an IDS, and its plan to save West Penn, is based on taking patients and patient revenue away from UPMC.

- Direct competitors should compete vigorously and evenly. Highmark (or any insurer that is part of an IDS) shouldn't get to pick and chose when it wants to contract with hospitals that are part of competing IDSs.

- Contracts between two directly competing IDSs should be prohibited or, at the least, held open for public review and regulatory approval were sought. The danger of two competitors colluding is too great. And we're not sure how the state can ever set fair terms in such contracts – fair to others trying to compete in the same market, whether hospitals or insurers.

The bills undermine competition and choice for consumers in both health care and health insurance. That's not the goal of the sponsors – but that's the result.

- We want West Penn to survive. To do so, it needs more patients coming from Highmark – not just more revenue, but more patients.

- A UPMC/Highmark contract may be good for Highmark, and maybe even UPMC. But it isn't good for West Penn or any of the other hospitals in Highmark's IDS, because it takes away patients from them. Nobody likes to think of "market share" and "patient revenue" when talking about hospitals. But they are subject to the basic rules of economics, including the one that a business needs more customers to thrive.

- As the Insurance Department found, Highmark is a monopoly. That's not good for consumers. A marketplace is starting in this region, not just with Highmark and UPMC Health, but insurers like Aetna, United and Cigna. That's good.

- This bill undercuts that. It helps Highmark get a favorable contract with UPMC even as it buys up all the other hospitals in the region. That's good for Highmark, but how does that bring other insurers into the region?

- UPMC is the dominant hospital in the region, and Highmark is the dominant insurer – and as IDSs, they are respectively the second largest insurer and hospital in the region, too. If you really want competition in both areas, you'll keep these two at arm's length – not force a one-sided marriage at the expense of other hospitals and other insurers.

The bills establish an "any willing (selected) insurer" standard, but only for some hospitals – an invitation to trouble and complaints down the road.

- Some describe the bills as "any willing insurer:" Providers have to contract with any insurer that wants them, and under pretty good terms for insurers.

- If that were true, I'd sign up. But again, the bills only give this advantage to some insurers, and only for forcing some hospitals to contract – as a practical matter, it is Highmark in its contract with UPMC.

- If you go this route, why not extend this to all insurers with all hospitals and other providers? It isn't only Highmark whose policyholders want a robust network at terms the insurer wants.

- If you go that far, what happens when providers say they want the same – the "any willing provider" language we (and Highmark) have long opposed?

- Health insurers distinguish themselves largely based on the quality and savings of their provider networks. These bills give Highmark an unnecessary and undeserved advantage – and open you up to requests down the road for reciprocal treatment from providers.

The bills' opportunities lost

People have said that if you oppose these bills, you must want government to do nothing. Not true.

Government should be active and energized. Highmark transformation into an IDS built around West Penn can be transformative – in a good way – for consumers in western Pennsylvania, but only if government is engaged.

First, the time is ripe for setting meaningful parameters around the contracting practices of IDSs and health care and health insurance monopolies.

- The bills don't do this. They only regulate hospitals that are part of IDSs, and they therefore miss the chance to deal with the more encompassing concerns of regulating IDSs, mega-hospitals and mega-insurers.

- I'll cite IDSs as an example: Why not focus on the contracts between their insurance and hospital affiliates, with regulatory review of them? Why not focus on how hospitals in an IDS contract with other insurers – not insurers whose goal is to take patients from them, but whose goal is to bring patients to them?

Second, this is the time to educate consumers about their options in health care and health insurance, and to get Highmark, UPMC and everyone else to honestly and openly work together to prepare consumers for a new marketplace.

- If the rollout of PPACA has taught us anything, it is that change doesn't work without considerable education and preparation – and government needs to take an active role in that.

- We've seen letters from consumers, namely Highmark policyholders – sincere and intelligent ones, not canned grassroots, concerned with losing access to UPMC providers if Highmark doesn't get some help. They need to learn about Highmark's plans for its own health system, about the options they have and the portability of their coverage.

- Highmark policyholders need to realize they are not locked into Highmark or its network. They can go to other insurers, not just UPMC Health and its own limited network, but insurers like Aetna, United and Cigna with more expansive networks. And they can go to UPMC providers even if not in Highmark's networks – although at out-of-network costs to Highmark.

- Highmark will, if dedicated, build a strong hospital system out of West Penn. It certainly has the money and the policyholder base. Consumers will benefit from that and from a new diversity in western Pennsylvania – not only two strong hospital systems, but several different insurers offering not just competing but contrasting coverages.

- But that only happens if consumers understand the options, the decisions they face, and the value of having decisions to make. That's been missing, and consumers have been left with the legitimate fear that 2015 will be a stark end to the care and coverage they want.

- That's not true, but the people with the loudest megaphones – Highmark and UPMC – need to explain this, not just attack each other. And government and the rest of the marketplace need to step up our own communications.

This is an enormous task, with considerable risks and rewards, in western Pennsylvania and throughout the Commonwealth, since any law will apply across the board.

We hope we've given you ideas of what not to do, and more important, what to do, to improve health care and health insurance in western Pennsylvania and across the state. We look forward to working with you and all other parties on this.