

Juliet Marsala, MS, MBA, Deputy Secretary, Office of Long-Term Living

Good morning, Chairwoman Madden, Chairman Mentzer, members of the House Aging and Older Adults Services committee, and staff. I appreciate the opportunity to testify today. As the Deputy Secretary of the Department of Human Services (DHS) Office of Long-Term Living (OLTL), and a person with lived experience as a family caregiver, I understand that the decisions made regarding House Bill 2320 will have significant financial implications for nursing facility providers. However, this bill will also greatly impact all Pennsylvanians who need nursing home level of care.

Office of Income Maintenance (OIM) Deputy Secretary Hoa Pham has already provided testimony addressing federal regulations around timeliness standards, the Commonwealth's responsibilities for processing applications, and the critical importance of determining Medicaid eligibility accurately to ensure we are responsible stewards of Commonwealth resources. DHS recognizes the need to help Pennsylvanians access critical services quickly. My testimony today will offer additional considerations, highlight the Department's concerns with this bill in its current form, and outline the ways we are providing additional supports to address some of the issues the bill seeks to remedy.

Currently, in our long-term services and support programs (LTSS), OLTL serves approximately 400,000 Pennsylvanians who are aging or living with disabilities and require services to support their health, wellbeing, and desire to live and age with dignity, self-determination, and respect. Nursing facilities are a critical part of OLTL's LTSS system, providing essential care for more than 42,000 individuals needing long-term care in DHS' Medicaid programs who face barriers to community living or prefer facility-based services.<sup>3</sup>

Almost 90% of individuals served by OLTL live in the community, with a strong desire to remain in the communities of their choice. The Commonwealth's 10-year strategy to support the needs of older Pennsylvanians, Aging Our Way, confirmed this as a common goal through a stakeholder engagement process that included input from thousands of Pennsylvanians across all 67 counties. While there will

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always be a need for nursing facilities, we must recognize that the overwhelming majority of Pennsylvanians want home and community-based services. For decades, aging and disability advocates have pushed states to rebalance LTSS policies and programs to prioritize these services in line with individuals' stated preferences.

Pennsylvania has made great strides, with 76% of every Medicaid dollar spent by OLTL supporting community-based services. Furthermore, in aggregate, it costs approximately \$15,000 less per year for every individual served in a community setting versus a nursing home. This estimate is based on current rates and does not include the additional 7% rate increase nursing facilities will receive starting January 1, 2025.

HB 2320 appears to undermine these efforts by creating an inequitable pathway to Medicaid coverage that favors facility and institutional settings. Additionally, it may violate the Commonwealth's responsibility to provide the most integrated and least restrictive settings appropriate to the needs of qualified individuals with disabilities, as outlined by the U.S. Constitution, the Pennsylvania Constitution, federal regulations, court rulings on civil rights, and federal privacy law.

#### The Olmstead Decision

The U.S. Supreme Court's 1999 landmark decision in *Olmstead v. L.C.* (Olmstead Decision) found the unjustified segregation of people with disabilities is a form of unlawful discrimination under the Americans with Disabilities Act (ADA). This *Olmstead* decision has resulted in states being required to have and uphold *Olmstead* plans to ensure the elimination of this discrimination and unnecessary institutionalization of adults. While the *Olmstead* decision initially addressed adults who have a serious and persistent mental illness, additional court rulings have made it clear that the *Olmstead* decision applies to all persons with disabilities. As such, it is important for states to consider changes to the long-term services and supports systems – including HB 2320 – through this lens.

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Section 504 of the Rehabilitation Act of 1973 Final Rule (Section 504)

On May 9, 2024, the U.S. Department of Health and Human Services (HHS) Office for Civil Rights (OCR) published a final rule, entitled *Nondiscrimination on the Basis of Disability in Programs or Activities Receiving Federal Financial Assistance*. This rule, which took effect on July 8, 2024, updates, clarifies, and strengthens HHS' implementation of Section 504 by requiring states that receive federal Medicaid funds to "administer programs and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities." The rule mandates the provision of community-based services when appropriate, and specifically prohibits practices that could result in unnecessary segregation or a serious risk of segregation. Prohibited practices include: Establishing policies or practices that limit or condition access to the most appropriate integrated settings; Providing greater benefits or more favorable terms in segregated settings compared to integrated settings; Establishing more restrictive rules and requirements for people in integrated settings compared to segregated settings; and, Failing to provide community-based services, resulting in institutionalization or serious risk of institutionalization.

As written, HB 2320 creates a potential presumptive Medicaid eligibility pathway only for individuals residing in nursing facilities. The bill does not offer a comparable pathway for payments to providers of home and community-based services. Consequently, HB 2320 would create more favorable terms for Medicaid eligibility in segregated settings, while imposing more restrictive rules and requirements for individuals in integrated settings. This would result in different and inequitable pathways for those living in community settings compared to those in segregated settings. Therefore, HB 2320 must be evaluated through the lens of Section 504 to ensure compliance with its requirements.

Rhode Island Example

You may hear from testifiers today that other states have implemented similar Medicaid pendency and timely reimbursement legislation for nursing facility admissions. There are two things to

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remember when evaluating these examples: 1. Every state's Medicaid program is designed to address the unique needs of that state's population and system; and 2. When evaluating other state examples, one must consider the state's entire system rather than how they handle a single issue.

Rhode Island General Law 40-8-6.1, titled "Provider Care During Pendency of Application<sup>1</sup>," has been cited as an example of Medicaid pendency legislation. Rhode Island has 84 nursing facilities serving 8,000 total residents, compared to Pennsylvania's 605 facilities serving approximately 42,000 Medicaid residents and approximately 65,000 total residents. This represents a significant difference in the scale and financial resources required to support each state's system. Rhode Island's statute, which provides for pending payments to providers, limits those payments to "complete" applications, which are defined as:

*"An application for Medicaid benefits filed by, or on behalf of, an individual receiving care and services from a long-term-care provider (LTC provider), including attachments and supplemental information as necessary, that provides sufficient information for the secretary or designee to determine the applicant's eligibility for coverage. An application shall not be disqualified from status as a complete application hereunder except for failure on the part of the Medicaid applicant, or his or her authorized representative, to provide necessary information or documentation, or to take any other action necessary to make the application a complete application."*

HB 2320, by contrast, does not limit payments to complete applications, nor does it include the same restrictions that Rhode Island has placed on pending payments.

In addition, while the populations and financial risks differ, it is important to note that Rhode Island has a balanced approach to Medicaid eligibility determinations. This includes similar pathways for

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<sup>1</sup> General Laws of Rhode Island Section 40-8-6.1 (2020) - Provider care during pendency of application. :: 2020 Rhode Island General Laws :: US Codes and Statutes :: US Law :: Justia

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both facility admissions and admission to their home- and community-based services programs, with limits on how long services can be delivered while an application is pending.<sup>2</sup> Even if HB 2320 were amended to more closely mirror Rhode Island's approach, the legislation would still require significant investment by the Department, as well as federal waivers and approvals, in order to implement it in Pennsylvania. HB 2320 addresses the nursing facility pathway while leaving the Commonwealth lacking a plan to meaningfully address the community pathway. It is crucial that all applications for Medicaid long-term care benefits be treated equally during the Medicaid eligibility process. Disparate pathways would violate constitutional equal protection rights afforded to all Medicaid long-term care applicants.

Community HealthChoices and Living Independence for the Elderly programs

Pennsylvania's long-term care services are part of a mandatory managed care program called Community HealthChoices (CHC). Nursing facility services are provided to eligible participants through managed care organizations (MCOs), which are paid a capitated rate for providing coverage to the participant. Alternatively, managed care is also available through Living Independence for the Elderly (LIFE) provider organizations under the LIFE program. Eligible LTC nursing facility residents receive managed care through either CHC or LIFE.

The proposal under this bill to pay for coverage of nursing facility residents prior to an eligibility determination would not work with the mandatory managed care model. This is because an MCO or LIFE provider organization is not assigned to an individual, nor paid to provide coverage, before the individual is determined eligible and enrolled in their chosen plan or program. The bill does not address how to handle cases where only part of the enrollment process has been completed. If an individual is deemed Medicaid-eligible before the full determination process is finalized, payment for nursing facility service would not qualify for the Federal Medical Assistance Percentage (FMAP) match, as the care

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<sup>2</sup> <https://www.aarp.org/content/dam/aarp/ppi/2019/12/expediting-medicaid-financial-eligibility-determinations.doi.10.26419-2Fppi.00085.001.pdf>

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would have been provided before enrollment in a managed care plan. Additionally, the Medicaid State Plan does not allow for retroactive managed care payments.

Supporting Pennsylvanians with Medicaid Applications

The Department recognizes the challenges that Pennsylvanians and their families face when they unexpectedly need to rely on Medicaid's essential safety net for long-term services and supports. While strides have been made to streamline and improve the application process, some complexities remain. To support Pennsylvanians with completing Medicaid applications, OLTL has introduced new Beneficiary Support Services (BSS) as part of Pennsylvania's Independent Enrollment Broker (PA-IEB). As of July 1, 2024, BSS offers in-person visitation and case management services, providing individuals and families with guidance on what is needed to complete Medicaid applications and how to submit the necessary financial documents. Additionally, BSS can connect individuals or their designees to community resources, such as free legal services, to help overcome barriers. The primary focus of BSS is to support Pennsylvanians throughout the entire application process, including selection and enrollment in OLTL or other Department programs. These services are available to both community members and nursing facility residents applying for critical OLTL programs. I am excited about this new resource, and OLTL will continue to evaluate and refine the support offered to meet the ongoing needs of Pennsylvanians.

In closing, DHS recognizes the importance of increasing access to care for all Pennsylvanians, ensuring individuals receive the right service, in the right settings, as expeditiously as possible. However, as we continue to address the challenges within our systems and pursue ongoing improvements, we remain committed to implementing changes equitably, in full compliance with state and federal laws. Additionally, we remain focused on aligning with the vision Pennsylvanians hold for the future of long-term services and supports.

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**I am grateful to both Chairs and the committee members for your consideration of this important matter and providing the opportunity to testify today.**