

SAXTON & STUMP LLC

Dated: December 7, 2020

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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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|------------------------------|---|-----|
| LEADINGAGE PA, | : | |
| | : | |
| and | : | |
| | : | |
| THE PENNSYLVANIA HEALTH CARE | : | |
| ASSOCIATION, | : | |
| | : | |
| and | : | No. |
| | : | |
| PENNSYLVANIA COALITION OF | : | |
| AFFILIATED HEALTHCARE AND | : | |
| LIVING COMMUNITIES | : | |
| | : | |
| Petitioners, | : | |
| | : | |
| v. | : | |
| | : | |
| COMMONWEALTH OF | : | |
| PENNSYLVANIA, DEPARTMENT OF | : | |
| HUMAN SERVICES | : | |
| | : | |
| Respondent | : | |

PETITION FOR REVIEW
(IN THE NATURE OF A COMPLAINT FOR
DECLARATORY JUDGMENT AND MANDAMUS)

AND NOW, come Petitioners, LeadingAge PA (“LeadingAge”), the Pennsylvania Health Care Association (“PHCA”), and the Pennsylvania Coalition of Affiliated Healthcare and Living Communities (“PACAH”) (together, the “Associations” or “Petitioners”), by and through their counsel, Saxton & Stump,

LLC, to hereby file this Petition for Review in the Nature of a Complaint for Declaratory Judgment and Mandamus with this Honorable Court pursuant to 42 Pa.C.S. § 761(a)(1), and in support thereof aver the following:

INTRODUCTION

The Associations are pursuing this action on behalf of their members as a result of the Department's failure to comply with a non-discretionary, statutory obligation to distribute Medicaid funds received from the federal government to nursing facilities throughout the Commonwealth. The Medicaid funds were paid as a direct result of assessments paid by the Associations' nursing facility members and were intended to combat the healthcare crisis caused by COVID-19 and to benefit the Commonwealth's senior citizens residing in nursing facilities who are most at-risk of suffering from the current COVID-19 pandemic.

I. THE PARTIES

1. LeadingAge is a statewide trade association representing over 365 nonprofit, long-term care nursing facilities throughout Pennsylvania.

2. LeadingAge maintains its offices at 1100 Bent Creek Boulevard, Mechanicsburg, Pennsylvania 17050.

3. PHCA is a statewide trade association representing over 400 long-term care facilities and senior service providers throughout Pennsylvania.

4. PHCA maintains its offices at 315 North Second Street, Harrisburg,

Pennsylvania, 17101.

5. PACAH is a statewide trade association representing over 143 long-term living and support providers throughout Pennsylvania, including county-owned nursing facilities.

6. PACAH maintains its offices at 2789 Old Post Road, Harrisburg, Pennsylvania, 17110.

7. The Department of Human Services (the “Department” or “Respondent”) is a Commonwealth agency whose responsibilities include administering the Commonwealth’s Medicaid program, including providing Medicaid payments to nursing facilities and to Managed Care Organizations (“MCOs”) for nursing facility services.

8. As part of their mission, the Associations routinely communicate and negotiate with the Department of Human Services on important issues impacting their members, including issues related to funding for their services.

9. When necessary, the Associations also litigate disputes with the Department on behalf of their members.

10. The Associations are bringing this action as the designated representatives for their members.

11. The Associations have standing to pursue claims on their members’ behalf as their members are suffering an immediate or threatened injury and their

members have a substantial, direct, and immediate interest in this litigation.

II. JURISDICTION

12. This Honorable Court has jurisdiction over this Petition for Review (the “Petition”) pursuant to 42 Pa.C.S. § 761(a)(1).

13. The Petition is addressed to the Court’s original jurisdiction over matters involving claims against the Commonwealth and is in the nature of a complaint for declaratory judgment and in mandamus.

III. FACTUAL AND LEGAL BACKGROUND

A. Petitioners’ Members Pay the Department Assessments Pursuant to Pennsylvania’s Nursing Facility Assessment Law.

14. The Department’s non-discretionary, statutory obligation arises from an amendment to the Public Welfare Code in 2003.

15. Act 25 of 2003 amended the Public Welfare Code to establish the Nursing Facility Assessment program to assist the Commonwealth in generating necessary federal funding for its Medicaid obligations (the “Assessment Law”; 62 P.S. §§ 801-A, *et. seq.*).

16. Beginning in 2003, the Assessment Law authorized the Department to impose monetary assessments on certain non-public and county-operated (by subsequent amendment) licensed nursing facilities operating in Pennsylvania.

17. The stated purpose of the Assessment Law is “to generate additional revenues for medical assistance recipients to have access to medically necessary

nursing facility services.” 62 P.S. § 802-A.

18. Although the Assessment Law process acts like a self-imposed tax on nursing facilities, the Assessment Law was the result of a collaborative effort between the Associations, the Department, and the General Assembly.

19. The Associations recognized the Assessment Law was necessary in order for certain federal funding to be available for nursing facility services that would otherwise be unavailable.

20. The Assessment Law and the assessments paid by the nursing facilities significantly enhance the ability of the State to obtain federal funding to support Medicaid.

21. The Assessment Law creates an important distinction between nursing facilities and other healthcare providers who receive Medicaid funding.

22. Unlike some healthcare providers receiving Medicaid funding who look solely to the Commonwealth to fund their share of the Medicaid costs, nursing facilities contribute their own funds in order to increase the federal funds available for their Medicaid payments.

23. Pursuant to the Assessment Law, the Department imposes an assessment amount on nursing facilities in accordance with a mathematical model agreed upon by the Department and the Associations and in compliance with federal regulations.

24. For Fiscal Year 2019-2020, the Department published an initial Notice in the Pennsylvania Bulletin on June 29, 2019 (49 Pa.B. 3412) describing the methodology it intended to use to calculate the assessment amounts.

25. In the June 29, 2019 Notice, the Department estimated the total amount collected from the nursing facilities for the assessments to be \$489.855 million.

26. For Fiscal Year 2019-2020, the Department published a Notice in the Pennsylvania Bulletin on February 15, 2020 (50 Pa.B.999), stating no public comments were received in response to its June 29, 2019 Notice and confirming the assessment rates and methodology used to calculate the assessment amounts.

27. In the February 15, 2020 Notice, the Department again stated it estimated it would collect \$489.855 million in assessments from the nursing facilities based upon the assessment formula.

28. The nursing facilities pay the assessments to the Commonwealth, which the Commonwealth then uses to receive funds from the federal government to cover the federal government's share of Medicaid.

B. Petitioners' Members Provide Nursing Home Care Covered by Medicaid.

29. Medicaid is a medical assistance program that is funded by both the state and federal governments.

30. Pennsylvania participates in the Medicaid program and nursing home care is a service covered by Pennsylvania's approved Medicaid plan.

31. The federal government’s share of the Medicaid expenses is known as the Federal Medical Assistance Percentage (“FMAP”).

32. The FMAP share of costs varies by state depending on the state’s per capita income (lower per capita income equates to a higher FMAP payment).

33. Nationally, the FMAP share can range from 50% to 83%.

34. At the beginning of 2020, the FMAP rate for Pennsylvania was 52.25%.

35. The FMAP rate for Pennsylvania was amended in October 2020 to 52.2125%.

C. The Assessment Law Places Restrictions on the Department’s Use of Funds Received from the Federal Government.

36. The Assessment Law requires the Department to create “a restricted account in the General Fund for the receipt and deposit of moneys from the assessment [and] any Federal financial participation received by the Commonwealth as a direct result of the assessment.” as well as any federal funds received as a result of the assessments. 62 P.S. § 806-A.

37. The funds deposited into the restricted account “are hereby appropriated to the department to fund nursing facility services provided by medical assistance nursing facility providers....” Id.

38. Further, the Assessment Law requires the Department to “use the State revenue collected from the assessment and **any Federal funds received by the Commonwealth** as a direct result of the assessments **to make program payments**

through fee-for-service or managed care **to medical assistance nursing facility providers.**” 62 P.S. § 813-A (emphasis added).

39. These payments represent a return on the nursing facilities’ investment of their assessments and are in addition to funding the General Assembly appropriates to them as part of the Commonwealth’s budget.

40. Under normal circumstances, the process outlined by the Assessment Law has operated efficiently; however, like many other things, the circumstances created by COVID-19 have altered this process.

D. The Federal Government’s Share of Medicaid was Increased Due to COVID-19.

41. In late winter and early spring of this year, Congress passed several measures in an effort to control the negative impacts of the COVID-19 pandemic.

42. One such measure was the Family First Coronavirus Response Act (the “Act”), which provided relief related to COVID-19 testing, unemployment compensation, and sick leave. Families First Coronavirus Response Act, Pub. L. No. 116-127, H.R. 6201, 116th Cong. (2020).

43. Relevant to this dispute, section 6008 of the Act also included a provision that temporarily increased the FMAP by 6.2%.

44. As a result of this increase in FMAP, the federal government’s share of Medicaid expenses for services rendered in Pennsylvania increased from approximately 52.2125% to 58.4125% (the “Enhanced FMAP”).

45. The Enhanced FMAP will continue until the last day of the last quarter in which the federal declaration of emergency related to COVID-19 expires.

46. The Secretary of Health and Human Services has recently ordered the federal public health emergency related to COVID-19 will continue until at least January 21, 2021, meaning Enhanced FMAP will be available at least through the first quarter of 2021.

47. Based upon the mathematical model used to calculate the nursing facility assessment amounts, it is estimated that the Enhanced FMAP derived from the assessments will result in an additional \$153 million in funds for Medicaid payments to nursing facilities for 2020 alone.

48. The \$153 million Enhanced FMAP funds are directly related to the assessments paid by nursing facilities pursuant to the Assessment Law.

49. In other words, but for the nursing facilities providing the assessment funds to the Commonwealth, the Commonwealth would not receive nearly as much in FMAP contributions from the federal government related to nursing facilities, let alone the Enhanced FMAP funds.

50. The Commonwealth will receive far in excess of \$153 million in Enhanced FMAP funds to be used for other Medicaid-supported services — the \$153 million of the total Enhanced FMAP funds only relates to the amount of Enhanced FMAP generated from the nursing facility assessments.

E. The Department Refuses to Provide Enhanced FMAP Funds to Nursing Facilities.

51. The Assessment Law clearly requires the Department to distribute all funds derived from the federal government as a result of the assessments to the nursing facilities. See 62 Pa.C.S. §§ 806-A, 813-A.

52. However, to date, the Department has refused to abide by its statutory obligation and has refused to agree to use the Enhanced FMAP funds to provide supplemental payments for nursing facility services despite their desperate need for additional funding to combat COVID-19 and protect their patients.

53. At a time when they need assistance the most, the Department is unlawfully withholding over \$153 million in additional payments from certain nursing facilities.

54. Instead of using the Enhanced FMAP funds to provide additional payments to the notoriously underfunded nursing facilities caring for Medicaid recipients, the Department is playing a shell game — it is using the Enhanced FMAP funds in lieu of other payments that were already appropriated to the nursing facilities and using those funds to fill budget holes for other programs.

55. Nursing facilities are all too familiar with budget shortfalls, as the costs of care greatly exceed Medicaid funding even in “normal” years.

56. For example, a single, average nursing facility in Pennsylvania caring for 100 residents who receive Medicaid benefits is under-reimbursed by almost

\$1.75 million annually.

57. This year the discrepancy is greater due to the increased mandates and costs associated with responding to the COVID-19 pandemic.

58. The Department's refusal to distribute the federal funds is particularly egregious here because the funds were only received as a result of assessments paid by the nursing facilities.

59. In other words, the Department is taking money earned from the contributions of cash-strapped nursing facilities and using the funds derived from those contributions to support other programs instead of nursing facility services.

60. The Department is well aware that nursing facilities have borne the brunt of the pandemic's impact and that they have a long path ahead to ensure the proper treatment and protection of their patients.

61. The increased funding provided by the Enhanced FMAP is crucial to help the nursing facilities help the state's most vulnerable population during this public health emergency.

62. Nonetheless, the Department is disregarding the dire need of the nursing facilities and their patients by shuffling funding sources in a manner that results in the nursing facilities not receiving a penny of the more than \$150 million in Enhanced FMAP funds.

63. The Department is treating the Enhanced FMAP funds as its own

piggybank and disregarding the substantial need of the Commonwealth's most vulnerable citizens.

64. In doing so, the Department is making its own appropriation decisions with respect to how nursing facilities are funded, and its decisions contravene existing statutory law enacted to ensure nursing facilities receive the benefit of any federal funding derived from the assessments they paid.

65. The Department's refusal to distribute the Enhanced FMAP funds to nursing facilities has no basis in law.

66. Accordingly, the Associations are pursuing this action on behalf of their members as a result of the Department's failure to comply with a non-discretionary, statutory obligation to distribute certain funds received from the federal government to nursing facilities.

COUNT I
VIOLATION OF THE ASSESSMENT LAW
(DECLARATORY JUDGMENT)

67. Paragraphs 1 through 66 above are hereby incorporated by reference as if fully set forth herein.

68. Prior to the passage of the Act, the General Appropriations Act of 2019 set forth the amount appropriated by the General Assembly to fund nursing facility services for State Fiscal Year 2019-2020.

69. Subsequent to the passage of the Act, the General Assembly passed an

interim budget for the State Fiscal Year 2020-2021.

70. The Department is not permitted to deviate from the amount allocated by the General Assembly for nursing facility services.

71. The Department is not entitled to retroactively reduce funding the General Assembly already appropriated to nursing facility services.

72. Prior to the passage of the Act, the Department published and approved the formula used to determine the nursing facility assessments as required by the Assessment Law. See 62 P.S. § 804-A.

73. The nursing facilities paid the assessment amounts in accordance with the agreed upon model.

74. As a result of the Act and the assessments paid by the nursing facilities, an additional \$153 million in Enhanced FMAP funds will be generated for 2020, in addition to the amounts already appropriated to support nursing facilities.

75. Additional Enhanced FMAP funds will be received at least through the first quarter of 2021 as well.

76. The Assessment Law requires the Department to place the Enhanced FMAP funds in a restricted account within the Commonwealth's General Fund.

77. The Assessment Law requires the Department to use the Enhanced FMAP funds, which were received as a direct result of the assessments paid by the nursing facilities, to provide payments to the nursing facilities.

78. The Enhanced FMAP payments to the nursing facilities can only be made through a supplemental payment process, as the rates, at least for 2020, have already been agreed upon and established by the federal government and the MCOs.

79. Pursuant to the Assessment Law, the Department is not permitted to commandeer funds received as a result of the assessments paid by the nursing facilities for any other purpose other than to provide payments to the nursing facilities.

80. Because the assessment methodology and amounts were already agreed upon and used to obtain FMAP and Enhanced FMAP Funds and the General Assembly already allocated a specific amount of funding for nursing services, it is improper for the State to offset its contributions by substituting the Enhanced FMAP funds for its own obligations.

81. Petitioners seek declaratory judgment in their favor, pursuant to the Declaratory Judgments Act, 42 Pa.C.S. § 7531, *et. seq.*, and an order directing the Enhanced FMAP funds be used to provide supplemental payments to the nursing facilities in accordance with the Assessment Law.

WHEREFORE, Petitioners respectfully request the following relief from this Honorable Court:

(1) An Order declaring the Department is obligated to issue supplemental payments from funds derived from the additional FMAP federal funding to

Petitioners' members, without set-off, deduction, or reduction in payments from any other funding source.

(2) An award of fees, costs, and such other relief as this Court deems just and appropriate.

COUNT II
VIOLATION OF THE ASSESSMENT LAW
(MANDAMUS)

82. Paragraphs 1 through 81 above are hereby incorporated by reference as if fully set forth herein.

83. The Department used funds provided by nursing facility assessments to generate federal funding for nursing facility services.

84. As a result of the passage of the Act, the federal government has agreed to increase its share of the federal funding to be used to pay for nursing facility services — the Enhanced FMAP.

85. The Assessment Law requires the Department to pay any federal funds received as a result of the assessments to the nursing facilities.

86. Because the Enhanced FMAP was derived from the nursing facility assessments, the Department must use those funds to issue payments to the nursing facilities.

87. Based upon the model used to calculate the assessments paid by the nursing facilities, the Enhanced FMAP generated by the assessments will result in

\$153 million in additional federal funding.

88. Additional Enhanced FMAP funds will be received at least through the first quarter of 2021 as well.

89. The Enhanced FMAP funds received by the Department are owed to and must be paid to Petitioners' members as supplemental payments in addition to the funding the Department and State previously agreed to provide to nursing facilities.

90. The Assessment Law does not provide any discretion to the Department to allocate the Enhanced FMAP funds to any other purpose.

WHEREFORE, Petitioners respectfully request the following relief from this Honorable Court:

(1) An Order declaring the Department is obligated to issue supplemental payments from funds derived from the additional FMAP federal funding to Petitioners' members, without set-off, deduction, or reduction in payments from any other funding source.

(2) An award of fees, costs, and such other relief as this Court deems just and appropriate.

Respectfully submitted,

SAXTON & STUMP LLC

Dated: December 7, 2020

By: /s/ Matthew W. Rappleye
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Counsel for Petitioners

CERTIFICATE OF COMPLIANCE

I certify that this filing complies with the provisions of the *Case Records Public Access Policy of the Unified Judicial System of Pennsylvania* that require filing confidential information and documents differently than non-confidential information and documents.

Submitted by: Saxton & Stump, LLC

Signature: /s/ Matthew W. Rappleye

Name: Matthew W. Rappleye

Attorney No.: 81746

VERIFICATION

I, Adam Marles, hereby aver and state that I am the President and Chief Executive Officer of LeadingAge PA; that I have the authority to execute this Verification on its behalf; and that I have read the foregoing document, which has been drafted by counsel. The factual statements contained therein are true and correct to the best of my knowledge, information, and belief although the language is that of counsel and, to the extent that the content of the foregoing document is that of counsel, I have relied upon counsel in making this verification.

This statement is made subject to the penalties of 18 Pa.C.S.A. § 4904, which provides that if I make knowingly false statements, I may be subject to criminal penalties.

Date: December 4, 2020

By: 
Adam Marles
President and CEO, LeadingAge PA

VERIFICATION

I, Zach Shamberg, hereby aver and state that I am the President and Chief Executive Officer of the Pennsylvania Health Care Association; that I have the authority to execute this Verification on its behalf; and that I have read the foregoing document, which has been drafted by counsel. The factual statements contained therein are true and correct to the best of my knowledge, information, and belief although the language is that of counsel and, to the extent that the content of the foregoing document is that of counsel, I have relied upon counsel in making this verification.

This statement is made subject to the penalties of 18 Pa.C.S.A. § 4904, which provides that if I make knowingly false statements, I may be subject to criminal penalties.

Date: December 4, 2020

By:


Zach Shamberg
President and CEO, Pennsylvania Health
Care Association

VERIFICATION

I, Chase Cannon, hereby aver and state that I am the Executive Director of the Pennsylvania Coalition of Affiliated Healthcare and Living Communities; that I have the authority to execute this Verification on its behalf; and that I have read the foregoing document, which has been drafted by counsel. The factual statements contained therein are true and correct to the best of my knowledge, information, and belief although the language is that of counsel and, to the extent that the content of the foregoing document is that of counsel, I have relied upon counsel in making this verification.

This statement is made subject to the penalties of 18 Pa.C.S.A. § 4904, which provides that if I make knowingly false statements, I may be subject to criminal penalties.

Date: December 4, 2020

By: Chase Cannon
Chase Cannon
Executive Director, Pennsylvania Coalition
of Affiliated Healthcare and Living
Communities

CERTIFICATE OF SERVICE

I, Matthew W. Rappleye, Esquire, hereby certify that on this date, I served a true and correct copy of the foregoing Petition for Review in the Nature of a Complaint for Declaratory Judgment and Mandamus, upon the following parties, by depositing the same in the United States mail, certified with return receipt requested, addressed as follows:

Kenneth J. Serafin, Esq.
Chief Counsel
Governor's Office of General Counsel
Department of Human Services
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Harrisburg, PA 17120

Office of Attorney General
Civil Law Division
Litigation Section
15th Floor, Strawberry Square
Harrisburg, PA 17120

/s/ Matthew W. Rappleye

Date: December 7, 2020