



**Senate Aging & Youth Committee
Virtual Hearing**

**Testimony on Testing and Limitation in Liability for Long-Term Care Providers for the
Coronavirus**

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Good Morning Chairwoman Ward, Chairwoman Collett, and members of the Senate Aging and Youth Committee. Thank you for your commitment to older adults across Pennsylvania and the diverse providers that ensure their health and safety in a variety of settings.

I am Adam Marles, the President and Chief Executive Officer of LeadingAge PA, which represents more than 360 nonprofit providers of senior housing, health care, and community services across the Commonwealth. These providers serve more than 75,000 older Pennsylvanians and employ over 50,000 dedicated caregivers, all of whom are affected by the crisis caused by the coronavirus pandemic, whether or not they live or work in a community with positive cases of COVID-19.

It seems like a lifetime ago we began hearing reports out of Italy and Washington State about the infection rates and susceptibility of aging residents in long-term care facilities. Yet here we are, 111 days following the first confirmed case in Pennsylvania, without access to adequate testing in some parts of the state, inconsistent availability of recommended personal protective equipment (PPE), and providers still facing extraordinary liability exposure.

The novel coronavirus has placed long-term care operators at the center of debates and criticism for maintaining restrictions that sometimes appear to be in contrast to an individual's rights, but are meant only to keep residents safe. For long-term care operators these restrictions are best practices to reduce infections and save lives. Many of our members took steps to limit visitation, use more extensive PPE, and begin point prevalence testing of residents and staff, if supplies allowed, before guidance and requirements were released by state or federal governing agencies. These early and restrictive steps have been illustrated in a variety of studies to have saved thousands of lives across Pennsylvania's long-term care continuum. For these reasons, it is imperative that long-term care providers receive reopening guidance soon to help support them as they maintain the delicate balance of providing safety to residents while reopening to visitation, communal dining, broader resident activities and use of in house beauty salons.

When we last spoke, on May 7, we discussed some of the early stressors facing facilities trying to make ends meet as PPE costs soared and balances of cash on hand plummeted. Funding was needed to support hero pay, paid time off, PPE, and supplemental cleaning supplies. On behalf of all LeadingAge PA members, I sincerely thank you for answering those cries and unanimously supporting CARES Act funding to all nursing facilities. Your support and efforts acknowledged that the coronavirus doesn't discriminate, and ensured that all facilities would receive desperately needed payments to help cover expenses.

Early rounds of CARES Act Funding are slated for deposit in provider accounts next week. Many providers spent these dollars weeks and months ago. Those few, fortunate enough to not need the funds to fill previous budget holes will use this funding toward the unfunded mandate of point prevalence survey testing in their nursing home as announced on June 8, 2020. Since

Secretary Levine's order requires testing of all staff and residents of nursing facilities, members have struggled to establish partnerships with laboratories capable of providing adequate testing kits and returning results within reasonable periods of time. One member was limited to 50 kits a day by their local lab, meaning their residents and staff would be sampled over a week's period of time and not provide meaningfully actionable strategies if a positive result was returned. Providers are left scrambling as days tick towards the July 24 deadline to have all staff and residents tested.

While a dearth of information existed about this completely unknown virus in the beginning, by mid-April, we learned that individuals could be infected with the virus and show no symptoms. These asymptomatic carriers could unknowingly bring the infection into a long-term care community, allowing it to wreak havoc on the medically complex residents who reside there. Baseline testing of all staff and residents allows a community to assess their current risk of transmission within their community and adjust resident care and locations appropriately to best mitigate further spread. Multiple members have shared their experience with point prevalence survey testing strategies. Some have found relief in all negative results, while others have found a smattering of both staff and residents testing positive but without symptoms.

Testing is a critical component of protecting health and safety of residents and staff as our members begin to reopen their doors, but it is important to keep in mind that even universal testing will not give members a complete picture of the prevalence because as with any test, there are sometimes false results. Again, despite their best efforts, members will have incomplete knowledge and an imperfect assessment of their risk from COVID-19 even when universal testing is conducted.

Each of Pennsylvania's facilities have been conducting screenings on staff and residents daily to record fevers, or any change in condition, or development of symptoms. These screening tools were to be used to keep the virus from entering communities, and detect early positive cases, should the virus find a vector. These screening tools are the same tools we are being told to use as Pennsylvania resumes a semblance of normal conduct in reopening. They aren't foolproof. The CDC reports a study of 1,099 individuals hospitalized for positive coronavirus tests, only 44%¹ exhibited a fever at admission. Some of the tools and 'best practices' being recommended to our healthcare providers for infection prevention are not good enough, and expose them, through no fault of their own, to lawsuits for outcomes that could not have been prevented given the circumstances of this pandemic.

The Pennsylvania Department of Health recently announced a partnership with CVS to offer testing in nursing homes. CVS has received a tiered response list from DOH to begin outreach to Phase 1 nursing facilities. Facilities were assigned to tiers based on current outbreak status,

¹ <https://www.cdc.gov/coronavirus/2019-ncov/hcp/clinical-guidance-management-patients.html>; accessed 6/22/20

historic outbreak status, geography, and other data sources. The partnership promises 50,000 tests and necessary PPE to conduct testing for residents and staff.

We are grateful for this partnership for facilities that are able to receive tests. It would seem testing supplies through this program will fall far short of those necessary to test all 80,000 residents in nursing homes, not to mention the more than 100,000 staff taking care of them. DOH imposed a mandatory testing requirement for all nursing facilities, but only some will receive these tests from the state. Other nursing homes are paying between \$110 and \$150 per test to comply with Secretary Levine's order. The partnership between DOH and CVS offers a token selection of complimentary tests. Supplies are limited, arrive early; it's somewhat reminiscent of the golden ticket from Willy Wonka's wondrous chocolate factory. That is, it's good for marketing, but it leaves the majority disappointed with the outcome.

Long-term care communities continue to await guidance from the Department of Health about how their precautions may relax as Pennsylvania transitions to almost exclusively 'green' in our reopening plan. Pennsylvania's long-term care providers must remain extraordinarily cautious about allowing visitation, resuming resident activities, and returning to meals in the dining rooms. Residents are anxious to see their friends, participate in group worship, play bingo, and hopefully see their families. We share these concerns, particularly with respect to the health impacts of social isolation. For some residents, these are precious final days that cannot be spent with loved ones. Other states are beginning to release best practices or considerations for beginning outdoor visitation programs with families or services animals to bolster happiness and mental health. Pennsylvania should follow suit and support our frontline heroes with guidance that communicates to all the importance of remaining cautious in long-term care settings, while outlining the safest ways to accommodate these real needs for social interaction.

Rapidly evolving science indicates our previously-held 'understanding' of the novel coronavirus was very limited. Limited information leads to 'best practices' founded on false assumptions. Healthcare practitioners are scientists using the best available information to make critical policy and treatment decisions. As information changes, treatment protocols and infection prevention policies evolve. COVID-19 continues to sweep the globe, nation, and state with the speed and devastation of a raging fire.

We work with our members who struggle to parse conflicting and intersecting information about transmissibility after infection, testing validity, testing protocols, and payment and treatment standards. Lack of consistency and pervasive change creates a perfect storm for civil lawsuits. Providers acting in good faith need to be protected from plaintiff's attorneys who are already actively bringing claims in Pennsylvania. We are not asking for safe harbor from criminal misconduct or gross negligence, merely limitations on civil liability exposure during the COVID-19 pandemic.

Individual health care practitioners received protections under Governor Wolf's executive order. The order fell short of protecting their employers. Top performing organizations across the commonwealth have struggled to procure adequate PPE and to access testing that may have limited the spread of this disease prior to large scale infection. These providers' efforts should be recognized for their diligence and commitment to residents and staff in the face of nearly insurmountable adversities, not be used to generate lawsuits for failure to achieve outcomes that were impossible under the circumstances.

Healthcare providers need your help. We need your support for COVID-19-related civil liability protections. We need the House and Senate to protect healthcare providers from frivolous suits and staggering liability insurance premium increases. Many members have received their policy renewals, with premium spikes near half a million dollars, before any suit was filed in Pennsylvania. Even top quality providers are afraid of lawsuits, whether or not their residents or staff have contracted the coronavirus. Defending a frivolous claim can easily cost \$50,000-\$100,000, regardless of the veracity of the accusation. Liability protections are the number one concern of our members, right now. They deserve to know the commonwealth and their Senators are fighting to protect them and the care they are providing.

Finally, LeadingAge PA has undertaken a number of activities to support PPE for healthcare providers across Pennsylvania. Since mid-March we have devoted a team member to work exclusively on procurement of PPE, supply chain management, and vendor verification. These efforts have delivered more than half a million units of booties, gowns, masks, and gloves with current access to larger stores. We have participated in collaborative multinational efforts that have delivered just under half a million units to the Pennsylvania Emergency Management Association stockpiles.

Providers have invested tremendous staff hours and dollars to create a patchwork of vendors to keep staff and residents protected. In addition to the costs accrued for unanticipated staff hours spent innovating and searching for products, the cost for supplies tripled, quadrupled, and kept climbing. Costs for N95 masks before the pandemic averaged less than a dollar each, and spiked at nearly \$8 each. While a three-month increase in PPE costs of \$700,000 sounds extreme for one member, another has reported costs exceeding \$2.5 million in additional PPE costs through April alone. Without any end in sight, their costs for PPE could easily strike \$10 million. These extraordinary expenses continue to grow in addition to hero pay for frontline workers and increased costs for liability insurance.

Availability has improved, and the majority of providers have enough PPE for a week or two at a time. If however, an asymptomatic COVID-19 positive person happens to enter a facility and spark new cases, providers do not have what they need to keep up with the significant burn rate that is necessary to prevent spread. Even as the state reopens, the threat to long-term care is very real, and the need to keep focus on ensuring providers have what they need remains critical.

For more than three months, our members and their staff have provided the best possible care while working tirelessly to also provide the best possible quality of life for those in our communities all with limited PPE, limited testing, limited guidance, and limited financial resources. I'm urging you to be part of the solution. Please help make sure that our seniors are prioritized in any future response. Moreover, as our state and federal partners debrief from this unprecedented pandemic, demand that long-term care representatives be at the table as the state prepares for what I fear could occur again.

Thank you for the opportunity to offer comments on the status of COVID-19 in our communities and for allowing me to share our members' needs. On behalf of our membership, thank you for the work you do to support and protect seniors and senior service providers across Pennsylvania. I look forward to working with the committee to forge a meaningful and supportive path forward for our Commonwealth's long-term care providers.