

No. 2007-16

## AN ACT

HB 1367

Amending the act of June 13, 1967 (P.L.31, No.21), entitled "An act to consolidate, editorially revise, and codify the public welfare laws of the Commonwealth," further providing for medical assistance payments for institutional care; providing for pharmaceutical and therapeutics committee; further providing for definitions, for authorization, for amount, for repayment, for regulations and for time periods; and providing for the Senior Care and Services Study Commission.

The General Assembly of the Commonwealth of Pennsylvania hereby enacts as follows:

Section 1. Section 443.1 of the act of June 13, 1967 (P.L.31, No.21), known as the Public Welfare Code, amended July 7, 2005 (P.L.177, No.42), is amended to read:

Section 443.1. Medical Assistance Payments for Institutional Care.—The following medical assistance payments shall be made in behalf of eligible persons whose institutional care is prescribed by physicians:

(1) Payments as determined by the department for inpatient hospital care consistent with Title XIX of the Social Security Act (49 Stat. 620, 42 U.S.C. § 1396 et seq.). To be eligible for such payments, a hospital must be qualified to participate under Title XIX of the Social Security Act and have entered into a written agreement with the department regarding matters designated by the secretary as necessary to efficient administration, such as hospital utilization, maintenance of proper cost accounting records and access to patients' records. Such efficient administration shall require the department to permit participating hospitals to utilize the same fiscal intermediary for this Title XIX program as such hospitals use for the Title XVIII program;

(2) The cost of skilled nursing and intermediate nursing care in State-owned geriatric centers, institutions for the mentally retarded, institutions for the mentally ill, and the cost of skilled and intermediate nursing care provided prior to June 30, 2004, in county homes which meet the State and Federal requirements for participation under Title XIX of the Social Security Act and which are approved by the department. This cost in county homes shall be as specified by the regulations of the department adopted under Title XIX of the Social Security Act and certified to the department by the Auditor General; elsewhere the cost shall be determined by the department;

(3) Rates on a cost-related basis established by the department for skilled nursing home or intermediate care in a non-public nursing home, when furnished by a nursing home licensed or approved by the department and qualified to participate under Title XIX of the Social Security Act and provided prior to June 30, 2004;

(4) Payments as determined by the department for inpatient psychiatric care consistent with Title XIX of the Social Security Act. To be eligible for such payments, a hospital must be qualified to participate under Title XIX of the Social Security Act and have entered into a written agreement with the department regarding matters designated by the secretary as necessary to efficient administration, such as hospital utilization, maintenance of proper cost accounting records and access to patients' records. Care in a private mental hospital provided under the fee for service delivery system shall be limited to thirty days in any fiscal year for recipients aged twenty-one years or older who are eligible for medical assistance under Title XIX of the Social Security Act and for recipients aged twenty-one years or older who are eligible for general assistance-related medical assistance. Exceptions to the thirty-day limit may be granted under section 443.3. Only persons aged twenty-one years or under and aged sixty-five years or older shall be eligible for care in a public mental hospital. This cost shall be as specified by regulations of the department adopted under Title XIX of the Social Security Act and certified to the department by the Auditor General for county and non-public institutions;

**[(5) On or after July 1, 2004, and until such time as regulations are adopted pursuant to subclause (iii), payments to county and nonpublic nursing facilities certified to participate as providers under Title XIX of the Social Security Act for nursing facility services shall be calculated and made as specified in the department's regulations in effect on July 1, 2003, except as may be otherwise required by:**

**(i) the Commonwealth's approved Title XIX Plan for nursing facility services;**

**(ii) regulations promulgated by the department pursuant to section 454; and**

**(iii) regulations promulgated by the department pursuant to section 204(1)(iv) of the act of July 31, 1968 (P.L.769, No.240), referred to as the Commonwealth Documents Law, specifying the methods and standards which the department will use to set rates and make payments for nursing facility services effective July 1, 2006. Notwithstanding any other provision of law, including section 814-A, the promulgation of regulations under this subsection shall, until June 30, 2006, be exempt from the following:**

**(A) Section 205 of the Commonwealth Documents Law.**

**(B) Section 204(b) of the act of October 15, 1980 (P.L.950, No.164), known as the "Commonwealth Attorneys Act."**

**(C) The act of June 25, 1982 (P.L.633, No.181), known as the "Regulatory Review Act."]**

***(5) After June 30, 2004, and before June 30, 2007, payments to county and nonpublic nursing facilities enrolled in the medical assistance program as providers of nursing facility services shall be calculated and made as specified in the department's regulations in effect on July 1, 2003,***

*except that if the Commonwealth's approved Title XIX State Plan for nursing facility services in effect for the period of July 1, 2004, through June 30, 2007, specifies a methodology for calculating county and nonpublic nursing facility payment rates that is different than the department's regulations in effect on July 1, 2003, the department shall follow the methodology in the Federally approved Title XIX State plan.*

(6) For public nursing home care provided on or after July 1, 2005, the department shall recognize the costs incurred by county nursing facilities to provide services to eligible persons as medical assistance program expenditures to the extent the costs qualify for Federal matching funds and so long as the costs are allowable as determined by the department and reported and certified by the county nursing facilities in a form and manner specified by the department. *Expenditures reported and certified by county nursing facilities shall be subject to periodic review and verification by the department or the Auditor General.* Notwithstanding this paragraph, county nursing facilities shall be paid based upon rates determined in accordance with [paragraph (5)] *paragraphs (5) and (7).*

(7) *After June 30, 2007, payments to county and nonpublic nursing facilities enrolled in the medical assistance program as providers of nursing facility services shall be determined in accordance with the methodologies for establishing payment rates for county and nonpublic nursing facilities specified in the department's regulations and the Commonwealth's approved Title XIX State Plan for nursing facility services in effect after June 30, 2007. The following shall apply:*

(i) *For the fiscal year 2007-2008, the department shall apply a revenue adjustment neutrality factor and make adjustments to county and nonpublic nursing facility payment rates for medical assistance nursing facility services. The revenue adjustment factor shall limit the estimated aggregate increase in the Statewide day-weighted average payment rate over the three-year period commencing July 1, 2005, and ending June 30, 2008, from the Statewide day-weighted average payment rate for medical assistance nursing facility services in fiscal year 2004-2005 to 6.912% plus any percentage rate of increase permitted by the amount of funds appropriated for nursing facility services in the General Appropriation Act of 2007. Application of the revenue adjustment neutrality factor shall be subject to Federal approval of any amendments as may be necessary to the Commonwealth's approved Title XIX State Plan for nursing facility services.*

(ii) *The department may make additional changes to its methodologies for establishing payment rates for county and nonpublic nursing facilities enrolled in the medical assistance program consistent with Title XIX of the Social Security Act, except that if during a fiscal year an assessment is implemented under Article VIII-A, the department shall not make a change under this subparagraph unless it adopts regulations as provided under section 814-A.*

**(8) As a condition of participation in the medical assistance program, before any county or nonpublic nursing facility increases the number of medical assistance certified beds in its facility or in the medical assistance program, whether as a result of an increase in beds in an existing facility or the enrollment of a new provider, the facility must seek and obtain advance written approval of the increase in certified beds from the department. The following shall apply:**

**(i) Before July 1, 2009, the department shall propose regulations that would establish the process and criteria to be used to review and respond to requests for increases in medical assistance certified beds, including whether an increase in the number of certified beds is necessary to assure that long-term living care and services under the medical assistance program will be provided in a manner consistent with applicable Federal and State law, including Title XIX of the Social Security Act.**

**(ii) Pending adoption of regulations, a nursing facility's request for advance written approval for an increase in medical assistance certified beds shall be submitted and reviewed in accordance with the process and guidelines contained in the statement of policy published in 28 Pa.B. 138.**

**(iii) The department may publish amendments to the statement of policy if the department determines that changes to the process and guidelines for reviewing and responding to requests for approval of increases in medical assistance certified beds will facilitate access to medically necessary nursing facility services or are required to assure that long-term living care and services under the medical assistance program will be provided in a manner consistent with applicable Federal and State law, including Title XIX of the Social Security Act. The department shall publish the proposed amendments in the Pennsylvania Bulletin and solicit public comments for thirty days. After consideration of the comments it receives, the department may proceed to adopt the amendments by publishing an amended statement of policy in the Pennsylvania Bulletin which shall include its responses to the public comments that it received concerning the proposed amendments.**

**(iv) This subparagraph shall apply to any requests for approval of an increase in medical assistance certified beds pending or submitted on or after the effective date of this subparagraph. This subparagraph shall expire upon the department's adoption of final regulations or September 30, 2011, whichever occurs first.**

Section 2. The act is amended by adding a section to read:

**Section 460. Pharmaceutical and Therapeutics Committee.—Any Commonwealth pharmacy program that establishes or maintains a preferred drug list and receives supplemental rebates under section 1927 of the Social Security Act (49 Stat. 620, 42 U.S.C. § 1396r-8) shall establish a pharmaceutical and therapeutics committee. The pharmaceutical and therapeutics committee shall serve in an advisory capacity to the secretary for the purpose of developing and maintaining a preferred drug list and**

*developing and maintaining drug utilization review controls for prescription drugs and medical devices. The committee shall publicize their meetings pursuant to 65 Pa.C.S. Ch. 7 (relating to open meetings), and the committee's deliberations, recommendations and decisions shall be considered official action and shall be open to the public.*

Section 3. Sections 801-A, 802-A, 804-A, 813-A, 814-A and 815-A of the act, added September 30, 2003 (P.L.169, No.25), are amended to read:

Section 801-A. Definitions.—As used in this article—

“Assessment” means the fee implemented pursuant to this article on every nursing facility.

“County nursing facility” means a long-term care nursing facility that is licensed by the Department of Health under the act of July 19, 1979 (P.L.130, No.48), known as the “Health Care Facilities Act,” and controlled by the county institution district or county government if no county institution district exists. The term does not include intermediate care facilities for the mentally retarded controlled by the county institution district or county government.

“Medical assistance provider” means a person or entity enrolled by the Department of Public Welfare as a provider of services in the medical assistance program.

“Nursing facility” means a non-Federal, nonpublic long-term care nursing facility licensed by the Department of Health pursuant to the act of July 19, 1979 (P.L.130, No.48), known as the “Health Care Facilities Act.” The term does not include intermediate care facilities for the mentally retarded.

“Program” means the medical assistance program.

Section 802-A. Authorization.—In order to generate additional revenues for medical assistance recipients to have access to medically necessary nursing facility services, the department shall implement a monetary assessment on each nursing facility *and, beginning July 1, 2007, may implement a monetary assessment on each county nursing facility* subject to the conditions and requirements specified in this article[.] *and any approved Federal waiver obtained under section 812-A. In each year in which the department implements an assessment on county nursing facilities, any requirement or obligation imposed on or relating to nursing facilities in sections 803-A, 804-A, 805-A, 806-A, 807-A, 808-A, 809-A, 810-A, 811-A, 812-A, 813-A and 814-A shall be deemed to apply equally to county nursing facilities.*

Section 804-A. Amount.—The aggregate amount of the assessment and the assessment rate shall be determined in accordance with this article and implemented on an annual basis by the secretary, in consultation with the Secretary of the Budget, and shall be approved by the Governor. In each year in which the assessment is implemented, the assessment rate shall be fixed so as to generate at least fifty million dollars (\$50,000,000) in additional revenue subject to the maximum aggregate amount that may be assessed [pursuant to the six percent (6%) indirect guarantee threshold

set forth in] *under* 42 CFR 433.68(f)(3)(i) (relating to permissible health care-related taxes after the transition period) *or any other maximum established under Federal law.*

Section 813-A. Repayment.—No nursing facility shall be directly guaranteed a repayment of its assessment in derogation of 42 CFR 433.68(f) *(relating to permissible health care-related taxes after the transition period)*: Provided, however, That in each fiscal year in which an assessment is implemented, the department shall use the State revenue collected from the assessment and any Federal funds received by the Commonwealth as a direct result of the assessments to maintain and increase program payments to medical assistance nursing facility providers to the extent permissible under Federal and State law or regulation and without creating an indirect guarantee to hold harmless, as those terms are used in 42 CFR 433.68(f)(i) *(relating to permissible health care-related taxes after the transition period)*. *If the department implements an assessment on county nursing facilities, the department shall allocate assessment revenues available to maintain and increase program payments to both county and noncounty nursing facilities in a manner that is consistent with Federal law and without creating a direct or an indirect guarantee to hold any nursing facility harmless.* The secretary shall submit any State Medicaid plan amendments to the United States Department of Health and Human Services that are necessary to make the payment increases.

Section 814-A. Regulations.—(a) The department may issue such regulations and orders as may be necessary to implement the nursing facility assessment program in accordance with the requirements of this article.

(b) During each fiscal year in which an assessment is implemented pursuant to this article, the department shall not adopt new regulations or revise existing regulations that limit, restrict or reduce eligibility for medical assistance nursing facility services or program participation or reimbursement for medical assistance nursing facility providers without publishing a notice of proposed rulemaking and adopting a final-form regulation after public notice and comment in accordance with 45 Pa.C.S. (relating to legal notices) and the act of July 31, 1968 (P.L.769, No.240), known as the “Commonwealth Documents Law,” and subject to review pursuant to the act of June 25, 1982 (P.L.633, No.181), known as the “Regulatory Review Act.” Notice of proposed rule making shall not be omitted pursuant to section 204 of the “Commonwealth Documents Law,” and no final-form regulation subject to this section may take effect pursuant to emergency certification by the Governor under section 6(d) of the “Regulatory Review Act.”

(c) *Notwithstanding subsection (b) and subject to compliance with the requirements of section 6(d) of the “Regulatory Review Act” relating to emergency certification by the Attorney General or by the Governor, the department may adopt emergency-certified regulations if all of the following apply:*

*(1) The regulations are necessary for the department to comply with changes in applicable Federal statutes or regulations relating to:*

- (i) eligibility for medical assistance nursing facility services; or*
- (ii) program participation or reimbursement for medical assistance nursing facility providers.*

*(2) A delay in adoption of regulations will result in either the loss of Federal funds or replacement of Federal funds with State funds in an amount in excess of one million dollars (\$1,000,000).*

*(3) Before publishing the regulations under section 6(d) of the "Regulatory Review Act", the department publishes advance notice in the Pennsylvania Bulletin announcing its intent to adopt regulations pursuant to section 6(d) and solicits public comments for at least fourteen days.*

*(4) The department publishes responses to the comments it received during the fourteen-day public comment period upon adoption of the regulations under section 6(d) of the "Regulatory Review Act."*

Section 815-A. Time periods.—The assessment authorized in this article shall not be imposed prior to July 1, 2003, or after June 30, [2007] 2012.

Section 4. The act is amended by adding an article to read:

#### **ARTICLE VIII-D**

#### **SENIOR CARE AND SERVICES STUDY COMMISSION**

##### **Section 801-D. Definitions.**

*The following words and phrases when used in this article shall have the meanings given to them in this section unless the context clearly indicates otherwise:*

*"Commission." The Senior Care and Services Study Commission.*

##### **Section 802-D. Senior Care and Services Study Commission.**

*(a) Declaration of policy.—The General Assembly recognizes that the health care needs of Pennsylvania's current and future senior population should be assessed.*

*(b) Establishment.—There is established a Senior Care and Services Study Commission.*

*(c) Purpose.—The purpose of the commission shall be all of the following:*

*(1) Reviewing the current care and service offerings and resources available for Commonwealth residents over the age of 65 years.*

*(2) Projecting future need for the various levels of senior care and services through 2025.*

*(3) Evaluating the ability of the current assessment and delivery systems to meet the projected service needs.*

*(4) Projecting the resources necessary to meet the projected need and making policy recommendations as to how the projected need can best be met considering the resource limitations that may exist at the time the commission completes its work under this article.*

*(d) Composition.—*

- (1) *The commission shall consist of all of the following members:*
- (i) *The Secretary of the Budget or a designee.*
  - (ii) *The Secretary of Health or a designee.*
  - (iii) *The Secretary or a designee.*
  - (iv) *The Secretary of Aging or a designee.*
  - (v) *One member appointed by the President pro tempore of the Senate.*
  - (vi) *One member appointed by the Minority Leader of the Senate.*
  - (vii) *One member appointed by the Speaker of the House of Representatives.*
  - (viii) *One member appointed by the Minority Leader of the House of Representatives.*
  - (ix) *The following members appointed by the Governor:*
    - (A) *Two Commonwealth residents aged 65 or older who use long-term living services.*
    - (B) *One individual representing nonprofit nursing facilities.*
    - (C) *One individual representing for-profit nursing facilities.*
    - (D) *One individual representing county nursing facilities.*
    - (E) *One individual representing hospital-based nursing facilities.*
    - (F) *One individual representing home and community-based service providers.*
    - (G) *One individual representing area agencies on aging.*
    - (H) *One representative of an organized labor group representing employees providing long-term living services.*
    - (I) *One physician whose practice is focused in long-term care settings.*
    - (J) *One individual representing other long-term living stakeholders as may be determined by the Governor.*
- (2) *Appointments under paragraphs (1)(v), (vi), (vii), (viii) and (ix) shall be made within 60 days of the effective date of this section.*
- (3) *Upon appointment of the last member under paragraph (2), the commission shall transmit notice to the Legislative Reference Bureau for publication in the Pennsylvania Bulletin of the date of the last appointment. The date of the last appointment shall be considered the date of the establishment of the commission.*
- (e) *Election of chairperson.—The members of the commission shall elect a chairperson of the commission from among themselves.*
- (f) *Terms of members.—*
- (1) *The terms of those members who serve by virtue of the public office they hold shall be concurrent with their service in the office from which they derive their membership.*
  - (2) *Except as provided in paragraph (1), members shall serve until their successors are appointed if they represent the interest of the membership class for which they were appointed.*



*(g) Meetings.—The first meeting of the commission shall be held within 30 days of establishment of the commission. Subsequent meetings shall be held at least quarterly, but more frequent meetings may be convened either at the call of the chairperson or by request of a simple majority of the commission members.*

*(h) Initial review.—The commission shall complete the initial review required under subsection (c)(1) within three months of its establishment.*

*(i) Public input sessions.—Within three months of issuing the findings under subsection (h), the commission shall hold no fewer than three public input sessions across this Commonwealth for the purpose of receiving public comment on current or proposed programs serving seniors.*

*(j) Projections.—The commission shall obtain the projections under subsection (c)(2) and (4) no later than one year from its establishment. Nothing in this subsection shall prohibit the commission, if a majority of the members agree, from using a Commonwealth-procured study initiated prior to the establishment of the commission to obtain this information.*

*(k) Final report.—The commission shall publish a final report as required under subsection (c)(1), (2), (3) and (4) no later than 18 months following its establishment and shall submit the report to the Governor and the General Assembly. The final report of the commission and any information and data compiled by the commission in accordance with this article shall be made available on the publicly accessible Internet website operated by the Department of Aging when the commission submits its final report to the Governor and the General Assembly.*

*(l) Expenses.—The commission is authorized to incur expenses deemed necessary to implement this article.*

**Section 803-D. Expiration.**

*The commission shall expire following issuance of its report under section 802-D(k) or three years after the establishment of the commission, whichever occurs first.*

Section 5. This act shall take effect immediately.

APPROVED—The 30th day of June, A.D. 2007.

EDWARD G. RENDELL