



Testimony for Public Hearing
For the
En Banc Transportation Hearing
August 28, 2014

Good afternoon Chairman Powelson and Commissioners, I am Dean Bollendorf, President of the Ambulance Association of Pennsylvania and with me today is Ed Heltman, Vice President.

The AAP is a member organization that advocates the highest quality patient care through ethical and sound business practices, advancing the interests of our members in important legislative, educational, regulatory and reimbursement issues. Through the development of positive relationships with interested stakeholders, the AAP works for the advancement of emergency and non-emergency medical services delivery and transportation in this evolving healthcare delivery environment.

Our nearly 250 members are based throughout the Commonwealth and include all delivery models of EMS and transportation including not-for-profit, for-profit, municipal based, fire based, volunteer, and air medical. The ambulance services provided by our members are licensed and regulated by the Department of Health's Bureau of EMS. Many of our members also operate wheelchair vans and the vast majority of wheelchair van operations are regulated by the Public Utility Commission.

Thank you for the opportunity to present testimony during today's En Banc Transportation hearing. We have concentrated our focus of comments to the enforcement of the Commission's transportation regulations and the medical exemption.

We, respectfully, urge the Public Utility Commission to prioritize an update of the medical exemption under 52 Pa. Code Section 41.11. The current enforcement of the transportation regulations by the Public Utility Commission, including the medical exemption under 41.11, while well intentioned, is problematic for several reasons:

- 1) The wording of Section 41.11 is not the same as the wording on the Commission's assessment forms as to what is necessary to meet the medical exemption. The wording of Section 41.11 is also vastly different from recent case law.
- 2) In order to meet the medical exemption, ambulance services operating wheelchair vans are placed in a precarious position, because in order to comply with the changing interpretations of the medical exemption as set forth in the assessment form and recent case law, recent case law and the assessment form (but not Section 41.11) suggest that a patient must need medical monitoring, a second attendant on the wheelchair van, and possibly oxygen. But, the EMS System Act which took full effect in

April of 2014, prohibits any entity from transporting a patient in a wheelchair van if that patient requires medical monitoring, and recent bulletins from the Bureau of EMS also prohibit an EMS Agency from administering oxygen on the wheelchair van. Any person and the organization that the person works for who transports a patient requiring medical monitoring in a wheelchair van can be subject to sanctions and possible revocation of their EMS Agency license.

3) EMS Agencies who are certificated carriers are in a position of non-compliance with the PUC regulations and tariff requirements if they are a participating provider with any insurance company and get paid by the insurance company for wheelchair van service. Insurance companies are simply not willing to negotiate rates with EMS Agencies. This is problematic for EMS Agencies with common carrier paratransit authority because each insurance company pays at a different rate for wheelchair van service, and paratransit carriers are only permitted to charge one rate for all individuals and organizations. While a paratransit carrier could certainly solve the problem with insurance carriers by applying for contract carrier authority, then these providers would lose the ability to pick up individuals unless they are part of a contract. Plus, once a carrier obtains common carrier authority, then Commission has steadfastly disallowed the carrier to obtain contract carrier authority, stating that according to “66 Pa. C.S. §2504, dual operation by motor

carriers is not permitted.” Actually, what 66 Pa.C.S. § 2504 states is that persons and corporations cannot hold common carrier and contract carrier certificates of public convenience “unless for good cause shown, the commission shall find that such certificate and permit may be held consistently with the public interest.” This refusal of the Commission to ever let a carrier have contracts with insurance companies for wheelchair van services which are different from its tariffs and the inability of the carriers to get the insurance companies to pay the published tariff rates forces even certificated common carriers to have to declare every transport paid by an insurance company as being exempt under the medical exemption. Think of all the revenue the Commission could be missing out on in its assessments by insisting that a tiered rate structure cannot be in the public’s interest.

4) As we mentioned, recent case law and the Commission’s current assessment form indicates that there must a second attendant on the wheelchair van in order to meet the medical exemption, even though this language is not found in Section 41.11. Having to place a second attendant on a wheelchair van increases the cost of wheelchair van service, making it unaffordable to provide and placing the EMS Agency in conflict with contractual obligations with the insurers and healthcare facilities.

A significant percentage of the paratransit transports performed by EMS Agencies are provided to the geriatric population, who are on a fixed income. Pricing to cover the cost of a second attendant negatively affects this population by creating a barrier to care and a public policy perspective. The rate paid by the insurers, minus the co-payment or deductible will not cover the cost to provide this service.

The medical exemption and even the proposed changes to the medical exemption for “transportation of the ill and injured” are inadequate and conflict with current EMS law and regulations, and there is a lack of consistency in the enforcement, as well as difficulty for our members to understand what is necessary to meet the exemption giving the recent changes to the medical exemption by the drafters of the Commission’s assessment form and the Administrative Law Judges.

The medical exemption creates a conflict with the Emergency Medical Services System Act (Act 37 of 2009) as it places EMS Agencies in conflict with the Department of Health and the new ambulance law and regulations, and puts EMS Agencies in a position of dual regulation by both the Department of Health and the Public Utility Commission. The AAP strongly recommends that the Commission allow the Department of Health to take the lead on licensing wheelchair/stretchers vans and medical transportation to health care facilities.

We believe the current and proposed changes to the policy statement encourage unintentional, illegal activity by licensed EMS Agencies, EMS providers, as well as common carriers in the Commonwealth. The proposed changes to the policy statement say that to meet the medical exemption criteria:

(1) The transportation is performed by a carrier providing paratransit service utilizing basic life support equipment. The vehicle shall be operated by a driver and at least one additional person with medical training, such as an emergency medical technician, sufficient to provide basic life support services.

(2) The passengers are non-ambulatory persons, including patients, who, because they are injured or ill and require transportation to or from health care facilities, as defined in this section.

Anyone meeting this proposed change to the medical exemption will likely be in violation of Section 8139 of the Emergency Medical Services System Act, 35 Pa.C.S. § 8139, as well as the Section 1027.51(c) of the new EMS Regulations, 28 Pa. Code § 1027.51(c). What this means is that certificated paratransit carriers claiming to exclude income from wheelchair or stretcher van transports

on their assessment reports as meeting the medical exemption as well as any other entity that does not have a common carrier certificate of public convenience from the Commission and claims to meet the medical exemption would be guilty of the unlawful operation of an ambulance, which is both a misdemeanor of the third degree and subjects the person and organization to sanctions and fines by the Department of Health.

The requirements to meet the medical exemption would, in fact, double the labor cost as well as the cost of equipment and supplies. EMS Agencies struggling to retain seasoned staff for EMS would not have the ability to offer this service and more patients would not be able to afford the transportation. The current medical exemption in 51 Pa. Code § 41.11 says nothing about the need or the requirement for there to be two persons in order to meet the medical exemption. Instead the Commission decided to add this requirement into the directions on the assessment form and put it in its inspection manual.

The Department of Health is the agency that regulates emergency medical services, certifies EMS Agencies, and the licensing of EMS vehicles regardless of the destination location. The AAP suggests the PUC allow the Department of Health to take the lead on licensing wheelchair/stretchers and medical transportation of the person to or from

a facility, a physician's office or any other location to receive or from which the person receives or received health care services.

The origins of this 2-person rule come from the Chappell and Triage cases. The Chappell case was decided in 1981 and the Triage case in 1982. The first EMS Act was not enacted until 1985 and the EMS System Act was enacted in 2009. Thus, neither of these courts had the ability utilize or comply with EMS laws or regulations for guidance, because none existed at that time. In Chappell, the court suggested that future clarification by the Legislature would be helpful. Chappell equated "injured or ill persons" to "patients", and for the definition of "patient" looked to the Health Care Facility Act (HCFA). No revision has been made to the Public Utility Code to aid the interpretation of the injured or ill person exception and now Act 37 of 2009 does, in fact, define injured or ill as a patient and we believe, supersedes the requirements in the Commission's policy statement regarding medical exemptions.

The AAP suggests that the portion of the proposed medical exemption not look at the ambulatory status of the patient. Instead, the AAP recommends that whether a patient meets the Commission's medical exemption should be based on the patient's need to seek medical attention and not the ambulatory status of the patient. There are, in fact,

many patients who meet Medicare's need and reasonableness requirements for ambulance reimbursement even though they are ambulatory. This means that if the proposed changes to the medical exemption are adopted, an ambulance service could transport a patient via ambulance and properly bill Medicare for the transport, but the transport would not meet the Commission's medical exemption, making such a transport regulated by both the Department of Health and the PUC. Thus, the ambulance service would be in violation of the Commission's regulations by receiving a reimbursement from Medicare for the ambulance transport which is different than the ambulance provider's tariffs. This example highlights just how completely unworkable the proposed changes to the medical exemption really are.

EMS is in a unique position with experience and the expertise to manage medical transportation, not only because EMS ensures cost effectiveness but EMS also provides trained personnel to determine the best mode of transportation for the patient population. Thus, ensuring fiscal efficiency, improving safety, and ensuring the applicable clinical services are provided in all cases. This is especially true and highly effective in rural Pennsylvania.

The Department of Health is the agency that regulates emergency medical services and medical transportation, certifies EMS Agencies,

and the licensing of EMS vehicles regardless of the destination location. To avoid these types of unworkable inconsistencies and dual regulation of ambulance and medical transportation services by EMS Agencies, the AAP suggests that the PUC allow the Department of Health to take the lead on licensing wheelchair/stretchers and medical transportation of the person to or from a facility, a physician's office or any other location to receive or from which the person receives or received health care services.

We think that this could be accomplished by adopting a medical exemption that exempts EMS Agencies from Regulation by the Commission. We suggest that the medical exemption state in relevant part:

If the following circumstances are present and the services are provided by an EMS Agency regulated by the Pennsylvania Department of Health, the Commission will regard that operation as beyond the regulatory jurisdiction of the Commission under the ill or injured exemption to the definition of "common carrier by motor vehicle" in 66 Pa. C.S. § 102 (relating to definitions):

- (1) The transportation is performed by an EMS Agency regulated by the Pennsylvania Department of Health utilizing wheelchair or stretcher vehicles.
- (2) The passengers are injured or ill and require transportation to or from a facility, as this term is defined in the EMS System Act and its supporting Regulations (or the corresponding definition in any future Pennsylvania EMS law or regulation).

Thank you for allowing the AAP to provide testimony on the enforcement of the transportation regulations. We would be happy to answer any questions that you may have.