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Menno Haven v. Board of Assessment

MENNO HAVEN, INC., d/b/a MENNO VILLAGE & PENN HALL, INC., d/b/a PENN HALL, Appellant,  
v. BOARD OF ASSESSMENT and REVISION OF TAXES OF FRANKLIN COUNTY, PENNSYLVANIA,  
BOROUGH OF CHAMBERSBURG, and CHAMBERSBURG AREA SCHOOL DISTRICT, Appellees  
Court of Common Pleas of the 39th Judicial District of Pennsylvania,  
Franklin County Branch  
Civil Action - Law, No. 2004-3112

*Tax; Real Estate Tax; Tax Exemption; Purely Public Charity Act; Institutions of Purely Public Charity Act;  
Equitable Estoppel; Uniformity; Improper Notice*

1. To determine if an organization qualifies as a purely public charity and is entitled to a real estate tax exemption, the organization must first prove that it meets the five-part test set forth in Hospital Utilization Project v. Commonwealth, 507 Pa. 1, 487 A.2d 1306 (1985), to qualify as a purely public charity.
2. If the HUP test is satisfied, then the organization must prove that it satisfies the standards set forth in the Institutions of Purely Public Charity Act to qualify for a real estate tax exemption.
3. Because the Court finds that Menno Haven does not donate or render gratuitously a substantial portion of its services, Menno Haven cannot satisfy the HUP test or qualify as a purely public charity.
4. Because the Court finds that Menno Haven does not benefit a substantial and indefinite class of persons who are legitimate objects of charity, Menno Haven cannot satisfy the HUP test or qualify as a purely public charity.
5. Because the Court finds that Menno Haven does not satisfy the HUP test and cannot qualify as a purely public charity, it is not necessary for the Court to determine whether Menno Haven satisfies the standards set forth in the Institutions of Purely Public Charity Act to qualify for a real estate tax exemption.
6. However, the Court finds that Menno Haven does not satisfy the requirements set forth in the Institutions of Purely Public Charity Act because Menno Haven does not donate or render gratuitously a substantial portion of its services.
7. Menno Haven failed to satisfy all of the requirements necessary to prevail on an equitable estoppel claim because it failed to provide any evidence of justifiable reliance; therefore, this argument must fail.
8. Menno Haven failed to prove that the Chief Assessor systemically, deliberately, or purposefully discriminated against Menno Haven; therefore, Menno Haven's uniformity argument must fail.
9. Menno Haven failed to prove that it was prejudiced by any notice error that may have occurred; therefore, Menno Haven's lack of notice argument must fail.

Appearances:

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OPINION

### Factual and Procedural History

These proceedings arise out of four appeals brought by the Chambersburg Area School District and joined by the Borough of Chambersburg, Franklin County, and Greene Township (hereinafter "Taxing Authorities"), in which the Taxing Authorities requested that tax parcel nos. 02-1C-10E, 09C12Q 025EX, 02-1C-02EX, and 02-1C-022, consisting generally of the Menno Haven Nursing Center and the Penn Hall Nursing Center, be placed on the tax rolls for 2005.

Menno-Haven, Inc. and Menno Haven Penn Hall, Inc. (hereinafter "Menno Haven") operate two Continuing Care Retirement Communities (hereinafter "CCRC") licensed by the Department of Insurance. [1] One CCRC is commonly known as the Penn Hall campus and is located on Philadelphia Avenue in Chambersburg, Pennsylvania. The other CCRC is commonly known as the Menno Haven campus and is located on Scotland Avenue in Chambersburg, Pennsylvania.[2] Both CCRCs offer three levels of care. The first level of care is referred to as independent living and is designed for individuals who are able to independently care for themselves but would like to live within a CCRC. The second level of care is known as assisted living and is designed for individuals who are unable to fully care for themselves at the independent living level of care. The next level of care is known as skilled nursing and is designed for those individuals who need constant medical supervision and care. The current population of Menno Haven is approximately 1300 residents.[3]

The skilled nursing level of care on both campuses is at issue in this appeal. The skilled nursing facilities have been tax-exempt since the time of their construction. Menno Haven Scotland has been tax exempt since 1967. In 2001, Menno Haven sought a tax exemption for its independent living and assisted living facilities.[4] Sometime after that, the Taxing Authorities determined that the skilled nursing facilities no longer qualify for real estate tax exemption and initiated proceedings to revoke their tax-exempt status. A hearing regarding the tax-exempt status of the skilled nursing facilities was held before the Franklin County Board of Assessment and Revision of Taxes on October 18, 2004. The Franklin County Board of Assessment and Revision of Taxes found that the skilled nursing facilities are taxable.[5] Menno Haven is appealing this decision, so the issue before this Court now is whether Menno Haven's skilled nursing facilities qualify as a purely public charity and are entitled to real estate tax exemption.

### Discussion

After reviewing the applicable case law, the Court has determined that the proper method for analyzing this issue is to 1) determine if Menno Haven meets the five-part HUP test set forth in Hospital Utilization Project v. Commonwealth, 507 Pa. 1, 487 A.2d 1306 (1985), to qualify as a purely public charity under the provisions of Article 8, Section 2(v) of the Pennsylvania Constitution, and if it is found to be a purely public charity, then 2) determine if Menno Haven meets the standards set forth in the Institutions of Purely Public Charity Act, 10 P.S. § 375, *et seq.*, (hereinafter "Act 55") to qualify for a real estate tax exemption. See Community Options, Inc. v. Bd. of Property Assessment, et al., 764 A.2d 645 (Pa.Cmwlt. 2000). Therefore, the Court will first address whether Menno Haven satisfies the HUP test and qualifies as a purely public charity.

The HUP test is a five-part test that summarizes the minimum constitutional requirements that an entity must meet in order to be a purely public charity. An entity qualifies as a purely public charity if it possesses the following characteristics: 1) advances a charitable purpose, 2) donates or renders gratuitously a substantial portion of its services, 3) benefits a substantial and indefinite class of persons who are legitimate objects of charity, 4) relieves government of some of its burden, and 5) operates entirely free from private profit motive. Hosp. Utilization Project, 507 Pa. at 21-22, 487 A.2d at 1317. An entity seeking tax exemption must satisfy all five parts of the test. For purposes of a request for real estate tax-exempt status, an organization does not qualify as a purely public charity solely because it is a non-profit corporation, and it is irrelevant whether the organization has been recognized as a tax-exempt charity for federal income tax purposes. 10 P.S. § 375. See Lutheran Home at Topton v. Schuylkill County Bd. of Assessment Appeals, 782 A.2d 1, 4 (Pa.Cmwlt. 2001).

#### **I. Does Menno Haven satisfy the HUP test?**

After reviewing the letter briefs submitted to the Court following the trial, the Court concludes that

only parts two and three of the HUP test are at issue in this case; therefore, the Court will only address those two parts of the test.[6]

*A. Does Menno Haven donate or render gratuitously a substantial portion of its services?*

David Bishop, Menno Haven's Chief Financial Officer, testified during trial that Menno Haven operates and accounts for all three levels of care within each CCRC as one entity and that they are unable to break the accounting down into separate levels of care; therefore, the Court must review the financial operations of the entire CCRC in order to determine if it satisfies this prong. Furthermore, Menno Haven operates both CCRCs as one corporation and often consolidates the accounting for both CCRCs. Additionally, both CCRCs share the same board of directors, the same officers, and some of the same licenses. Residents may transfer between the campuses as space becomes available. Therefore, the Court will analyze Menno Haven Scotland and Penn Hall as if they were one entity.

Menno Haven's admission policy includes, among other things, verifying that the individual is the appropriate age, is physically suitable for whichever level of care the individual is applying for, and is able to satisfy the financial admission criteria.[7] During the trial, David Bishop testified that Menno Haven's written financial admission policy is only a rough guideline and is not strictly enforced; however, the Court found this testimony to lack credibility. Much of the other evidence and testimony admitted at trial supported the conclusion that the financial admission policy is typically followed and enforced whenever Menno Haven is reviewing an application for admission submitted by an individual from the community at large.[8] The Court acknowledges that a CCRC cannot admit only Medicaid residents and remain financially viable. The Court also acknowledges that a CCRC must maintain a balance between Medicaid and private pay residents. However, in order to satisfy this prong of the HUP test, the CCRC must maintain a balance that shows the CCRC is donating or rendering gratuitously a substantial portion of its services. In HUP, the Supreme Court confirmed that the facts and circumstances of a case determine whether a contribution satisfies the "substantial" requirement. In particular, the determination should be based on the totality of the circumstances. Hosp. Utilization Project, 507 Pa. at 19, 487 A.2d at 1315. There is no set percentage that an organization must meet in order to satisfy the "substantial" requirement, but rather it must appear from the facts that the organization is making a bona fide effort to service primarily those who cannot afford the usual fee. Id.

Menno Haven's financial admission policy states that an applicant for the independent living level of care must have sufficient resources available to pay 1) the full cost of the entrance fee, 2) the monthly service fees and other personal living expenses for two years, and 3) the per diem rate for a minimum of two years in assisted living. [9] If the application is for double occupancy, the assisted living financial criterion is doubled.[10] Monthly income can be considered as part of financial resources to meet the criteria.[11] An applicant for assisted living must have sufficient available resources to pay the daily per diem rate for a minimum of four years.[12] The per diem rate is based on the current rate plus a 5% increase compounded for each expected future year of care.[13] The applicant's available resources may include monthly liquid income and liquid assets.[14] An applicant for skilled nursing care must have financial resources adequate to meet the per diem rate for one and a half years.[15] Monthly income is considered as part of financial resources.[16] Residents admitted from another level of care within the Menno Haven community are not subject to the financial criteria.[17] Adult Day Care clients, upon meeting the financial criteria, will be given priority on the waiting list over the non-resident community.[18]

In 2004, in order to meet this financial admission policy, an applicant for the assisted living level of care needed resources equal to at least \$128,480 for a Level 1, single occupancy room. An applicant for the skilled nursing level of care needed resources equal to at least \$100,192 to \$107,857 to be considered for admission.[19]

In order to meet this financial admission policy, an applicant for the independent living must have sufficient resources to pay 1) the full cost of the entrance fee, 2) the monthly service fees and other personal living expenses for two years, and 3) the per diem rate for a minimum of two years in assisted living.[20] The entrance fee varies depending on the unit chosen. In 2004, the entrance fee ranged from a low of \$45,000 for a Menno Haven Scotland one-bedroom unit to a high of \$255,000 for a three-bedroom unit in Menno Haven Scotland or Penn Hall.[21] In the newest project, Northfield, the entrance fee ranges from \$173,500 for an Arborgate Villa to \$329,500 for a Longwood Deck View.[22] Bishop testified that the entrance fee consists of a partially refundable life lease payment and an interest-free loan repayable (without interest) upon vacating the unit by death of the resident or transition to another level of service. The entrance fee is non-refundable in the event that an occupant dies following the third year of residency.

[23] As units become vacant, the units become available for re-rent.[24] The entrance fee does not give the resident an ownership interest in the unit. Instead, the entrance fee gives the resident a guarantee of continuing medical care should his/her medical condition necessitate skilled nursing services. According to Menno Haven's expert, Mr. LeBreton, a portion of the entrance fee is actuarially determined to be available for application to the excess medical costs associated with an independent living unit resident that transitions to a skilled nursing facility.

During the trial, the Court asked Menno Haven to provide information about how the entrance fee is handled, but Menno Haven did not provide the Court with this information. Menno Haven's expert testified that part of the entrance fee is actuarially determined to be available for application to the excess medical costs associated with an independent living resident that transitions to a skilled nursing facility, but Menno Haven did not offer any testimony about what percent of the entrance fee is apportioned for this purpose. Nor did Menno Haven explain how the entrance fee is accounted for or what happens when a resident does not use the portion of the fee that is intended to cover excess medical costs. If a portion of the entrance fee is supposed to be available to pay for excess medical costs when a resident moves into skilled nursing, then this amount should be set aside in a reserve for that use. If this is in fact done, then Menno Haven would render fewer gratuitous services than it would appear at first glance because Menno Haven could cover the unreimbursed costs out of the amount set aside out of the entrance fee. The Court also notes that many residents pay the entrance fee but never go into the skilled nursing facility or never become unable to pay. These residents have prepaid an amount to defray the costs of their skilled nursing care and do not receive a refund when they leave the CCRC even though they paid for services they never received.

The Court is troubled by the knowledge that the entire entrance fee is obviously put into the General Fund and that no amount is set aside as a reserve to be available to cover excess medical costs. If Menno Haven does not use the portion of the entrance fee that is intended to cover excess medical costs for that purpose, then Menno Haven cannot complain when they experience unreimbursed costs. Nor can Menno Haven claim that the unreimbursed costs are charitable when Menno Haven was paid for the services and is suffering the shortfall because Menno Haven did not use the funds properly. The Court believes that if the entrance fee were properly handled, then Menno Haven would provide far less unreimbursed medical care. Because Menno Haven retains this fee even if a resident never needs to use it, the portion paid by that resident should be available to subsidize the medical care needed by others, which would further decrease the amount of unreimbursed medical care Menno Haven provides. The Court finds it troubling that Menno Haven is asking the Court to overlook the fact that Menno Haven charges its residents a fee to defray their unreimbursed medical costs and retains the fee whether or not the residents ever use it. Menno Haven cannot ask the Court to credit it for unreimbursed costs that exist only because Menno Haven has decided not to use the funds for their intended purpose.

In addition to the entrance fee, an independent living applicant must have sufficient resources available to pay two years worth of maintenance fees. Maintenance fees range from \$470 per month to \$675 per month depending on the unit chosen.[25] Maintenance fees in Northfield range from \$950 per month to \$1,050 per month.[26] These fees cover the maintenance of the grounds, buildings, and common areas. In addition to having sufficient resources to pay the entrance fee and two years worth of maintenance fees, an applicant must have sufficient resources to pay personal living expenses for two years and the daily per diem rate in assisted living for two years.

An independent living applicant also has the option to rent an apartment at an above-market rate rent. At Menno Haven Scotland and Penn Hall, the monthly rent ranges from \$1,925 for a one-person unit to \$2,950 for a two-person unit.[27] There is also a life lease/interest-free loan option that requires an entrance fee ranging from \$38,000 to \$131,000, coupled with monthly maintenance fees ranging from \$1,055 to \$2,080.[28]

A Menno Haven resident seeking admission to the skilled nursing facility is not expected to meet this financial criterion because it is Menno Haven's policy that a resident will not be discharged because of inability to pay. In fact, Menno Haven is contractually bound to admit its residents into the skilled nursing facility regardless of ability to pay because in exchange for paying the entrance fee, the resident received a promise of guaranteed admittance into the skilled nursing facility. There is language to this effect in several Menno Haven documents including in the application for admission.[29]

Menno Haven cites to Lutheran Home at Topton v. Schuylkill County Bd. of Assessment Appeals, 782 A.2d 1 (Pa.Cmwlth. 2001), in support of its contention that a strict financial admissions policy does not violate the second prong of the HUP test. The court in Lutheran Home at Topton held that a nursing home in which applicants were required to meet rather strict financial criteria before being admitted and in which residents were guaranteed the ability to remain within the community even if the resident became unable to pay did satisfy the HUP test. Lutheran Home's financial criteria demanded that an individual be able to

pay privately for services for a reasonable amount of time, with reasonable amount of time being defined as the time the individual expects to be at a certain level of care. Id. at 2-3. Additionally, the applicants were required to pay a \$100 deposit for processing the application. Menno Haven contends that Lutheran Home is similar to itself, but the Court disagrees with this contention. There are similarities in that both organizations permit residents to remain in the community if they become unable to pay and both organizations have financial admission requirements that require an applicant to have sufficient resources to privately pay for a certain period of time, but Menno Haven charges an entrance fee that Lutheran Home did not. The only upfront fee that a resident at Lutheran Home was required to pay was the \$100 deposit whereas most residents at Menno Haven are required to pay an upfront fee in the form of an entrance fee, which ranges from a low of \$38,000 to a high of \$329,500. Additionally, Lutheran Home was the base of operations for the Schuylkill Ministries of the Lutheran Home, which was comprised of the Volunteer Home Care program, Meals on Wheels, Community Volunteers in Action program, and several other programs. Menno Haven does not serve a similar role. Although Menno Haven does offer other services such as adult day care, Menno Haven charges a fee for these services. Because of these factual distinctions, the Court finds that the holding in Lutheran Home at Topton is not binding on this Court.

Although fifty-nine of Menno Haven's 233 skilled nursing residents (approximately 25%) are currently on Medicaid, most of them entered the skilled nursing facility from another level of care within the Menno Haven community. Between 2000 and 2004, only twenty-five out of 179 individuals entering the skilled nursing facilities (approximately 14%) were from outside of the Menno Haven community. Under the most generous interpretation of the definition of Day One Medicaid eligible, only fifteen of those twenty-five admissions were Day One Medicaid eligible, so approximately 8% of the total admissions between 2000 and 2004 (15 out of 179) were Day One Medicaid eligible from outside of the Menno Haven community.[30] Penn Hall accepted only one of those fifteen individuals. During 2004, only seven out of 194 residents at Menno Haven Scotland (approximately 3.6%) were Medicaid eligible, the remainder being private pay or Medicare eligible.[31] During 2004, there were no Day One Medicaid eligible patients at Penn Hall.[32]

The Court acknowledges that Medicaid pays the same per diem rate regardless of whether the resident comes from within the Menno Haven community or comes from the community at large. The Court also recognizes that Medicaid reimbursement does not pay the full costs associated with providing care to a resident. However, the Court feels that the most telling information is that related to Day One Medicaid eligible residents admitted from the community at large because Menno Haven is contractually bound to care for those skilled nursing residents coming from within the Menno Haven community regardless of their ability to pay the usual fee. The residents who come from within the Menno Haven community have already paid a large entrance fee to Menno Haven, which guaranteed their continuing care. Further, a portion of the entrance fee was actuarially determined to be available for application to the excess medical costs associated with an independent living resident who transitions to a skilled nursing facility. Therefore, the Court finds that Menno Haven is caring for the Medicaid eligible residents that come from within the Menno Haven community because of a contractual obligation to do so rather than because of a sense of charity or out of a bona fide effort to service those that cannot afford the usual fee. However, even including the Medicaid eligible residents who enter the skilled nursing facility from within the Menno Haven community, Menno Haven's 2004 Medicaid eligible population was quite low.

Menno Haven pointed to several other nursing homes that it believes are similar to it. One such nursing home is St. Margaret Seneca Place, which was held to be a purely public charity. See In re St. Margaret Seneca Place v. Board of Property Assessment, et al., 536 Pa. 478, 640 A.2d 380 (1994). St. Margaret Seneca Place had a resident population that was 48.5% Medicaid eligible. None of the residents came from independent living. None paid a hefty entrance fee. Additionally, St. Margaret Seneca Place had an open admissions policy in which a Medicaid recipient was never discriminated against.[33] If the next applicant was a Medicaid recipient, that applicant was accepted despite the financial loss that resident would cause the institution.

The Court does not believe that St. Margaret Seneca Place is comparable to Menno Haven because Menno Haven charges most of its residents a hefty entrance fee and primarily services residents from within the Menno Haven community. Further, Menno Haven's current population is at most 25-28% Medicaid eligible. In 2004, Penn Hall had no Day One Medicaid eligible residents and Menno Haven Scotland's population was 3.6% Medicaid eligible.[34] The Court finds that Menno Haven maintains a population that has far fewer Medicaid eligible residents than St. Margaret Seneca Place did. Further, most of St. Margaret Seneca Place's residents were admitted from the community at large. Menno Haven, on the other hand, only admits a low percentage of individuals from outside of their own community (25 out of 179 admissions between 2000 and 2004). Menno Haven accepts an even lower number of Day One Medicaid eligible residents from outside of the Menno Haven community (15 such people out of a total of 179 admissions). Therefore, the Court finds that Menno Haven voluntarily admits far fewer Day One Medicaid eligible residents from the greater community at large than St. Margaret Seneca Place did.

Because of these factual distinctions, the Court finds that St. Margaret Seneca Place is quite different from Menno Haven, and thus the holding in St. Margaret Seneca Place is not binding on this Court.

Further, Menno Haven did not offer any testimony about how much of the entrance fee is actuarially apportioned towards the excess medical costs associated with a resident who transitions to the skilled nursing facility and becomes unable to pay. Moreover, Menno Haven could not explain what happens to the amount that is apportioned towards the excess medical costs if a resident does not become unable to pay or if a resident never transitions into a skilled nursing facility. The Court becomes leery when a party cannot tell it what percentage of a fee is supposed to be set aside for continuing care, especially when that party is contractually obligated to provide continuing care. The Court is also troubled by the knowledge that Menno Haven is not handling the fees in accordance with their purpose.

Menno Haven is asking the Court to credit it for providing unreimbursed medical care to residents who come from within the CCRC and become unable to pay; however, in the Court's opinion, if Menno Haven set aside and properly applied the portion of the entrance fee that is designed to defray a resident's excess medical costs when the resident becomes unable to pay, then much of the care that Menno Haven describes as unreimbursed would in fact be covered by the amount set aside out of the entrance fee. If this fee were properly allocated, then Menno Haven would provide little unreimbursed care. In fact, in the Court's mind, if this fee were handled properly, then Menno Haven would have very few Medicaid residents except for those who are Day One Medicaid Eligible. Menno Haven does not return any portion of this fee to individuals who never become unable to pay or who never transition into the skilled nursing facility. The unused funds retained by Menno Haven should enable Menno Haven to cover the losses incurred by accepting Day One Medicaid Eligible residents and should enable Menno Haven to accept more Day One Medicaid Eligible residents. Therefore, if Menno Haven properly used the funds it receives from its residents, it would experience little or no unreimbursed medical costs.

During his testimony, Mr. LeBreton pointed to the case of In re RHA Pennsylvania Nursing Homes, 747 A.2d 1257 (2000), as one of the best two cases supporting Menno Haven's position. The Court finds that case is not factually similar to the instant case. 77.2% of RHA's residents were on Medicaid while currently only 25%-28% of Menno Haven's residents are Medicaid eligible. The Court finds that this factual distinction prevents the holding in RHA Pennsylvania Nursing Homes from being binding on this Court.

Menno Haven also asked the Court to find it similar to other CCRCs and skilled nursing facilities located in the local community. Menno Haven specifically pointed to Quincy United Methodist Home, Shook Home, and Falling Spring. After hearing testimony from officers from each of these organizations, the Court cannot find that Menno Haven is similar to these other facilities. Quincy's population is currently composed of 65.3% Medicaid recipients. Shook has a goal of having a 50% Medicaid recipient population and works diligently to maintain that average. Falling Spring (a county-run facility) has a population of 82% Medicaid recipients. Meanwhile Menno Haven's population is 25% to 28% Medicaid eligible residents, but the evidence shows that it tends to run significantly lower than that. Additionally, Menno Haven has more beds than the other three facilities but had fewer 2003 Medicaid days. Menno Haven has 233 nursing home beds. Quincy has 113 beds. Shook has 65 and Falling Spring has 186. In comparison, Menno Haven had 25,869 2003 Medicaid days while Quincy had 29,471; Shook, 10,362; and Falling Spring, 52,824. The other three homes are suffering financially because of their commitment to serving Medicaid recipients while Menno Haven is financially prospering. For example, Quincy only has six days worth of cash balances while Menno Haven had \$9,740,547 in cash balances as of December 31, 2004. Quincy, Shook, and Falling Spring maintain the statutory reserve amount while Menno Haven has a reserve of \$5,187,512. The Court recognizes that a nursing home does not need to be operating at a loss or be financially strapped in order to qualify as a purely public charity, but these diametrically opposite financial conditions show the Court that Menno Haven does not have the same commitment to charity as the other facilities do.

Moreover, the Court finds it persuasive that Menno Haven's Benevolent Care Fund has not been being used to benefit individuals who are unable to afford the usual fee. Menno Haven's Benevolent Care Fund had a book value of \$2,866,691 and a fair market value of \$3,123,717 as of December 31, 2004. Instead of distributing the funds on a case-by-case basis to benefit individuals in need, Menno Haven makes very few disbursements. In 2002 and 2003, no disbursements were made.[35] In 2004, \$100,000 (or 1/3 of 1% of the principal) was withdrawn and disbursed to the General Fund. All income generated by the Fund is deposited directly into the General Fund and contributes to Menno Haven's income. Menno Haven was unable to explain where the income from the Benevolent Care Fund is directed to because that money is mixed in with all of the other money in the General Fund. Menno Haven did testify that the General Fund is used to pay for things such as legal fees, advertising, marketing expenses, and other operational expenses of the corporation.

After reviewing the data and analyzing the totality of the circumstances, the Court finds that Menno Haven does not meet the "substantial" requirement in part two of the HUP test. Menno Haven does render a limited amount of gratuitous services, but that amount does not constitute a substantial portion of

Menno Haven's total services. Because the Court finds that Menno Haven fails to meet this part of the HUP test, Menno Haven does not qualify as a purely public charity and it is not entitled to a real estate tax exemption.

*B. Does Menno Haven benefit a substantial and indefinite class of persons who are legitimate objects of charity?*

The Court recognizes that a nursing home may have criteria for admission, including financial criteria, and still satisfy this prong of the HUP test. However, "the essential feature of a public use is that it is not confined to the privileged individuals, but is open to the indefinite public. It is this indefinite or unrestricted quality that gives it its public character." Donough's Appeal, 86 Pa. 306 (1878). The Court finds that Menno Haven does not benefit an indefinite class of people. Instead Menno Haven primarily serves the residents who already are in the Menno Haven community. A person from outside of the Menno Haven community only gains access to the services offered by Menno Haven if that person 1) has sufficient financial resources to meet the financial requirements for admission, 2) is Medicare eligible, or 3) applies at a time when Menno Haven is willing to accept a Day One Medicaid eligible person from outside of the CCRC community. After reviewing the statistics relating to Menno Haven's admissions between 2000 and 2004, it appears to the Court that in theory Menno Haven may be willing to admit Day One Medicaid eligible people from outside of the Menno Haven community, but in actuality Menno Haven does not often admit a Day One Medicaid eligible person from outside of the CCRC community. Therefore, the Court finds that Menno Haven primarily caters to "well-to-do elderly" and to those already within their community.

The Court also finds that Menno Haven does not benefit a substantial number of persons who are legitimate objects of charity because Menno Haven has a low population of Medicaid recipient residents. During 2004, only seven out of 194 residents (approximately 3.6%) at Menno Haven Scotland were Medicaid eligible, the remainder being private pay or Medicare eligible.[36] During 2004, there were no Day One Medicaid eligible patients at Penn Hall.[37] Currently Menno Haven has a Medicaid eligible population of 25%-28% but the Court is not convinced that this will be a continuing trend.

People who cannot afford to pay for medical care and people whose costs of medical care are only partially covered by Medicaid payments are legitimate objects of charity. In re St. Margaret Seneca Place, 536 Pa. at 487, 640 A.2d at 384. Therefore, Menno Haven's residents who are Medicaid recipients are legitimate objects of charity. But the Court does not believe that Menno Haven has a charitable intent in serving those clients. Menno Haven has already received a large amount of fees, including a hefty entrance fee, from these residents. The only reason why many of them are on Medicaid is because they depleted their financial resources paying Menno Haven's fees. Moreover, many of Menno Haven's clients never become Medicaid eligible. For those that do become Medicaid eligible, Menno Haven keeps them because Menno Haven is contractually bound to do so. In order to receive the hefty entrance fee from a resident, Menno Haven promised to keep that resident within the community even if he/she becomes unable to pay in the future. In the Court's mind, it is not charitable to serve a Medicaid resident because you are contractually bound to do so.

After reviewing the data and analyzing the circumstances, the Court finds that Menno Haven does not meet part three of the HUP test because Menno Haven does not serve a substantial and indefinite class of people who are legitimate objects of charity. Further, while Menno Haven may serve some legitimate objects of charity, there typically is not a charitable intent behind this decision. Because the Court finds that Menno Haven fails to meet this part of the HUP test, Menno Haven does not qualify as a purely public charity and it is not entitled to a real estate tax exemption.

## **II. Does Menno Haven satisfy Act 55?**

The applicable law states that if an entity fails to satisfy the HUP test and to qualify as a purely public charity, then there is no need to determine if the entity satisfies Act 55 and qualifies for a tax exemption. See Community Options, Inc. v. Board of Property Assessment, et al., 764 A.2d 645 (Pa.Cmwlth. 2000). Because this Court found that Menno Haven does not satisfy the HUP test and does not qualify as a purely public charity, there is no need for the Court to analyze Menno Haven's status under the Act 55 requirements. However, in case an appellate court does not agree with this Court's holding that Menno Haven fails to satisfy the HUP test, this Court will proceed to analyze whether or not Menno Haven would have satisfied the requirements under Act 55.

The requirements under Act 55 are 1) advance a charitable purpose, 2) operate entirely free of a private profit motive, 3) donate or render gratuitously a substantial portion of its services, 4) benefit a substantial and indefinite class of persons who are legitimate objects of charity, and 5) relieve the

government of some of its burden. 10 P.S. § 375. Some of these requirements are similar to the requirements under HUP, but there are some differences that could affect the Court's decision.

*A. Does Penn Hall qualify for Act 55's rebuttable presumption?*

10 P.S. § 376 provides that an institution of purely public charity possessing a valid exemption from the tax imposed by Article II of the act of March 4, 1971 (P.L. 6, No. 2), known as the Tax Reform Code of 1971, shall be entitled to assert a rebuttable presumption regarding that institution's compliance with criteria set forth in section 10 P.S. § 375. Menno Haven alleges that Penn Hall qualifies for this presumption because it has less than \$10,000,000 in annual program service revenue and it possesses a valid sales and use tax exemption from the Department of Revenue. Program service revenue is defined as income earned from the provision of goods or services, including government fees and contracts associated with the institution's charitable purpose, which is reported on the annual return. 10 P.S. § 373. In this case, the applicable annual return would be IRS form 990 (line 2). Menno Haven contends that Penn Hall reported \$9,332,885 in program service revenue in 2003 and \$9,738,575 in program service revenue in 2004.[38] Menno Haven then argues that because the presumption is met, the burden switches to the Taxing Authorities to establish that the Department of Revenue's finding in granting the sales and use tax exemption was flawed.

The Court disagrees with Menno Haven's argument that Penn Hall should be granted the presumption. For almost all purposes, both campuses of Menno Haven are treated as one corporation. Even David Bishop testified that the two corporations are "treated as one corporation." Additionally, both campuses share one license from the Department of Insurance. They share the same officers and directors. Residents may transfer between the campuses if space is available. Throughout the trial, Menno Haven asked the Court to consolidate the two campuses for purposes of calculating the amount of uncompensated goods and services. Yet at the same time, Menno Haven wants to separate the two campuses for purposes of analyzing whether they fit under this presumption. Menno Haven cannot choose to consolidate and unconsolidate the two campuses as it wishes to best suit itself. As the two campuses have been consolidated for every other purpose throughout the trial and, in reality, are run as one corporation, the Court will not consider Penn Hall separately from Menno Haven Scotland now. On the consolidated 2004 Form 990, the skilled nursing facilities at Menno Haven had program service revenues in the amount of \$23,763,006.[39] This amount is over \$10,000,000 so Menno Haven does not qualify for the presumption.

*B. Does Menno Haven advance a charitable purpose?*

This question was not in issue under the HUP test and it will not be decided any differently here. Menno Haven must meet at least one of the six purposes articulated in the statute, which it does because Menno Haven works to prevent and treat diseases and injuries, including mental retardation and mental disorders. Therefore, this prong of the Act 55 analysis is met.

*C. Does Menno Haven operate entirely free of a private profit motive?*

This question was not in issue under the HUP test and it will not be decided any differently here. Menno Haven must meet all four of the requirements articulated in the statute and it does. Neither the net earnings nor donations inure to the benefit of private shareholders or other individuals. Menno Haven applies or reserves all revenue, including contributions, in excess of expenses in furtherance of its charitable purpose. Menno Haven is reinvesting a fair portion of its income and contributions to expansion and new construction. Directors, officers, and employees are not compensated based primarily on the financial performance of the institution. The articles of incorporation or other governing legal document expressly prohibits the use of any surplus funds for private inurement to any person in the event of a sale or dissolution of the institution.

*D. Does Menno Haven donate or render gratuitously a substantial portion of its services?*

Menno Haven alleges that it satisfies this part of the Act 55 test under two different theories. Menno Haven alleges that it satisfies the 5% test as set forth in 10 P.S. § 375(d)(1)(v), and that it satisfies the written policy test as set forth in 10 P.S. § 375(d)(1)(i). The Court will first address the written policy test. The written policy test requires that an institution benefit the community by providing goods and

services to all who seek them without regard to their ability to pay for what they receive if all of the following apply: 1) the institution has a written policy to this effect, 2) the policy has been published in a reasonable manner, and 3) the institution provides uncompensated goods or services equal to at least 75% of the institution's net operating income but not less than 3% of the institution's net operating income. 10 P.S. § 375(d)(1)(i). After reviewing the evidence, the Court finds that Menno Haven does not have a written policy that satisfies this test.

Therefore, the Court will next address Menno Haven's argument that it satisfies the 5% test, which requires that an institution benefit the community by providing uncompensated goods or services which in the aggregate are equal to 5% of the institution's costs of providing goods or services. 10 P.S. § 375(d)(1)(v). Menno Haven's expert alleges that in 2004 Menno Haven provided uncompensated goods and services that totaled 8.70% of its total cost of goods and services.[40] Mr. LeBreton's calculation consisted of three components: 1) the shortfall between the cost of providing care to a Medicaid resident and the amount reimbursed by Medicaid, 2) the value of volunteer hours, and 3) unreserved write-offs (bad debts). The Taxing Authorities argue that these components cannot be included in the calculation because they are not in compliance with the generally accepted accounting principals (GAAP) and the Statement of Financial Accounting Standards No. 116.[41]

The Court will address each of these components in turn. For purposes of this analysis, the Court will adopt Act 55's definition of "goods or services," which states that "goods or services" are goods or services which promote any of the enumerated purposes under section 5(b) and which are valued in accordance with generally accepted accounting principals applicable to the institution. 10 P.S. § 373. Section 5(b) is the charitable purpose section of the Act 55 test and enumerates the following purposes: 1) relief of poverty, 2) advancement and provision of education, 3) advancement of religion, 4) prevention and treatment of disease, including mental retardation and mental disorders, and 5) government or municipal purposes. 10 P.S. § 375(b).

### 1. Medicaid Shortfalls

The testimony from David Bishop and Mr. LeBreton informed the Court that Mr. LeBreton's calculations were based on the amount of costs of services that Menno Haven reported on its MA-11 cost reports. Mr. Bishop also testified that the MA-11 cost reports were not prepared in compliance with GAAP. The definition of "goods or services" as set forth in Act 55 requires that they be valued in accordance with generally accepted accounting principals applicable to the institution. Because the documents Mr. LeBreton used as the foundation of his analysis were not prepared in accordance with GAAP, his calculations and conclusions are not applicable in an Act 55 analysis.

However, even if Mr. LeBreton's calculations were applicable in an Act 55 analysis, the Court questions his conclusion. Specifically, the Court is troubled by the amount of Medicaid shortfall Menno Haven would experience if Menno Haven utilized the entrance fee paid by many of its residents for its intended purpose.[42] The Court also rejects Menno Haven's allegations that it makes charitable donations through its Benevolent Care Fund. As discussed earlier in this opinion, Menno Haven makes very few disbursements from the principal and could not account for how the income from the Fund was spent. All of the income generated by the Benevolent Care Fund, along with the one disbursement made in 2004, is directed to Menno Haven's General Fund and is commingled with the funds in that account. Menno Haven could not say where the income from the Benevolent Care Fund was directed to after it was put into the General Fund. The only information provided to the Court was the General Fund is used to pay for things such as legal fees, advertising, marketing costs, and other operational expenses. These purposes do not satisfy any of the enumerated purposes in section 5(b) of Act 55, so if the funds were directed towards these purposes then they would not be allowable under Act 55. As Menno Haven could not account for how the income and principal of the Benevolent Care Fund was used, then the Court must assume that it was used like any of the other funds it was commingled with in the General Fund, which would mean that it could not be included in an analysis of uncompensated goods and services under Act 55. Therefore, the Court finds that the calculations of Mr. LeBreton are not in accordance with the requirements of Act 55 and that his conclusions lack credibility.

### 2. Volunteer hours

Act 55 states that "uncompensated goods and services" may include the "reasonable value of volunteer assistance donated by individuals who are involved or assist in the provision of goods or services by the institution." 10 P.S. § 375(d)(4)(vi). Act 55 also states that the value of volunteer assistance may not exceed the statewide average weekly wage as defined in section 105.1 of the

Workers' Compensation Act, divided by 40. 10 P.S. § 375(b).

Menno Haven contends that it received 51,692 self-reported hours of volunteer services in 2004. David Bishop testified that the volunteers answer telephones, provide transportation services for the residents, and perform other menial services. Bishop also testified that the volunteers are not required to have any special skills or training except for a driver's license if needed. In calculating the value of these volunteer services, Menno Haven calculated an average hourly rate of its staff and determined that this rate is \$17.19 per hour. The statewide average weekly wage was \$17.22 per hour for 2004, so Mr. LeBreton used the lower value in his calculations.

The Court finds that the calculation of Menno Haven's average hourly wage is flawed because Menno Haven included the salary paid to the President/ CEO and the CFO and the wages paid to skilled workers such as the RNs and LPNs in its calculation. The Court believes that including the wages paid to these higher paid and more skilled individuals skewed the results because an employee who answers the phone, works in the gift shop, or drives a van is not paid anywhere near what the President or an RN is paid and does not possess the same skill level. The Court finds that if Menno Haven had used the wages that are paid to employees who perform the type of services performed by the volunteers then Menno Haven would have calculated a much more reasonable value of volunteer services. As the statute requires that the valuation of the volunteer hours be reasonable, the Court rejects Menno Haven's valuation of the volunteer hours.[43]

The Court is also troubled by the knowledge that Menno Haven could not account for how the volunteer hours were divided between different tasks or between the different levels of care. From the testimony offered at trial, the Court cannot rule out the possibility that some, or many, of the volunteers worked as a clerk in the gift shop, as a switchboard operator, or as a helper to individuals living in the independent living. These types of tasks do not fit into any of the purposes articulated in section 5(b) and any volunteer hours spent performing these services cannot be included in an analysis under Act 55.

Further, the Court is concerned that the calculations offered by Menno Haven may not fit into the definition of "goods or services" because the value of the volunteer hours may not have been calculated in accordance with GAAP. During his testimony, Mr. LeBreton testified that the Financial Accounting Standards Board is recognized by the accounting industry as an authoritative source of guidelines in GAAP-related issues. The Financial Accounting Standards Board spoke to the issue of volunteer hours in its Statement of Financial Accounting Standards No. 116. The Financial Accounting Standards Board states that the contribution of services may only be recognized if the services require special skills, are provided by individuals possessing those skills, and would typically need to be purchased if they were not donated. [44] The Standards cited to examples such as doctors, lawyers, plumbers, and nurses. From Mr. Bishop's testimony, the volunteer services do not include any specialized services and the volunteers are not required to possess any special skills. Therefore, the services reported by Menno Haven may not be applicable under an Act 55 analysis.

### 3. Unreserved write-offs

Act 55 states that "uncompensated goods or services" may include the cost of goods or services provided to individuals who are unable to pay provided that reasonable and customary collection efforts have been made by the institution. 10 P.S. § 375(d)(1)(vii). Menno Haven claims that it had unreserved write-offs or bad debts related to uncollectible accounts receivable representing unpaid resident accounts. Mr. LeBreton testified that these unpaid accounts represent private-pay residents who fail to pay and amounts due from residents who do not qualify for Medicaid because assets were transferred to children prior to admission. The Court disagrees with Menno Haven's contention. As discussed earlier, Menno Haven is contractually bound to care for its residents who become unable to pay. There is no charitable intent behind the decision to do so. Further, if Menno Haven fails to 1) find during its review of an applicant's finances prior to admission that the applicant would not qualify for Medicaid or 2) fails to include in its contract with the residents that the resident cannot do anything that would jeopardize their eligibility for Medicaid, then that is Menno Haven's error and does not qualify as charity. Menno Haven never intended to perform a charitable act and did not want to perform a charitable act. Accepting defeat only after realizing success is impossible is not charity. See School District of the City of Erie v. Hamot Medical Center, 144 Pa.Cmwlth. 688, 602 A.2d 407 (1992). Moreover, the Court doubts the legislature intended institutions to stretch the concept of charity to include the idea that being forced to suffer a bad debt is akin to charity. Therefore, the Court rejects Menno Haven's contention that their unpaid resident accounts are charity.

*E. Does Menno Haven benefit a substantial and indefinite class of persons who are legitimate objects of charity?*

This part of the Act 55 test is different from the corresponding prong of the HUP test in that Act 55 gives its own meaning to the words and phrases in the text of prong. Act 55 defines "legitimate objects of charity" as those individuals who are unable to provide themselves with what the institution provides for them. 10 P.S. § 375(e)(2). Act 55 defines "substantial and indefinite class of persons" as persons not predetermined in number, provided that, where the goods and services are received primarily by members of the institution, membership cannot be predetermined in number and cannot be arbitrarily denied by a vote of the existing members. Act 55 also states that the use of admission criteria and enrollment limitations does not constitute predetermined membership or arbitrary restrictions on membership so as to violate this section. 10 P.S. § 375(e)(2). Under the broad definitions set forth in Act 55, Menno Haven meets this part of the test because its skilled nursing residents are unable to independently care for themselves and because admission to the skilled nursing facility cannot be denied by a vote of the existing residents.

*F. Does Menno Haven relieve the government of some of its burden?*

This question was not in issue under the HUP test and it will not be decided any differently here. In order to satisfy this prong, Menno Haven must satisfy at least one of the articulated criteria. Menno Haven satisfies more than one of them. Menno Haven provides a service that the government would otherwise be obligated to provide when it cares for Medicaid recipients. Menno Haven receives payments on a regular basis for services rendered under a government program that are less than the actual cost incurred by the institution.

### **III. Other Arguments**

During the course of trial, Menno Haven also raised three other issues that the Court will address briefly.

*A. Notice of the appeal hearing before the Board of Assessment*

Menno Haven alleges that it was not properly notified about the hearing that took place before the Board of Assessment on October 18, 2004; and therefore, the ruling made by the Board should be nullified. Menno Haven argues that they did not receive notice of the hearing. Menno Haven also argues that they were confused as to which appeal was going to be addressed at the meeting. Menno Haven thought that its appeal regarding the independent living and assisted living facilities was going to be addressed rather than the School District's appeal regarding the skilled nursing facilities. The Chief Assessor testified that he believes the letters were mailed because the letters are marked that they were mailed on September 28, 2004.[45] The Court finds that Menno Haven received notice that there would be a hearing on October 18, 2004 at 10:00 a.m. Further, Menno Haven was present at the meeting. The Court also finds that even if a technical error did occur, Menno Haven was not prejudiced by it. Therefore, the Court will not nullify the proceedings that occurred at the appeal hearing.

*B. Menno Haven's equitable estoppel argument*

Menno Haven alleges that it should be permitted to retain its tax-exempt status because it has been exempt since its construction by virtue of a determination made by the Franklin County Commissioners in 1967. The Commissioners determined in 1967 that Menno Haven Scotland was non-taxable; however, the continuation of the tax exempt status was contingent upon the operation of the institution remaining the same as it was described in the original detailed request.[46] Menno Haven has undergone drastic changes since 1967. One such change is that Menno Haven now owns and operates independent living and assisted living levels of care. Further, Menno Haven stated in its detailed request in 1967 that it would provide skilled nursing care to senior citizens without limitation or restriction, but as the Court pointed out earlier in this opinion, it finds that Menno Haven does not provide care without limitation or restriction.

Further, Menno Haven failed to satisfy all of the requirements necessary to successfully bring an equitable estoppel claim. Menno Haven has offered no proof that the Chief Assessor or the Taxing Authorities have done anything since these changes were made to Menno Haven's operations to encourage or induce Menno Haven to justifiably rely on a continuance of the tax-exempt status. Nor has

Menno Haven offered any proof that the Taxing Authorities were aware of the change in the admissions policy and allowed Menno Haven to proceed as a tax exempt organization for an extended period of time after becoming aware of the change. Therefore, the Court will dismiss this argument and will decide the case on the facts before it on this date.

### *C. Menno Haven's uniformity argument*

Menno Haven argued that it is being treated differently from the other non-profit skilled nursing facilities located in the community in violation of Article 8, Section 1 of the Pennsylvania Constitution. Menno Haven specifically refers to the Shook Home and Quincy United Methodist Home. Menno Haven alleges that Shook, Quincy, and Menno Haven are nearly identical in that they are all reimbursed similarly for Medicaid residents, all have admissions policies, and all strive to maintain a balance between Medicaid residents and private pay residents, but Menno Haven's facilities are considered to be taxable while the others are considered to be tax-exempt. Menno Haven argues that this is arbitrary, capricious, and unconstitutional.

In order to prevail on this argument, Menno Haven must prove that the Chief Assessor acted systemically, deliberately, and purposefully to discriminate against it. See Commonwealth v. Koppers Co., 397 PA. 523, 156 A.2d 334, app. dismissed, 364 U.S. 286, 81 S.Ct. 43, 5 L.Ed.2d. 38 (1960); Fisher Controls Co. v. Commonwealth, 476 Pa. 119, 381 A.2d 1253 (1997). There is no evidence of this on the record. After Menno Haven appealed the tax status of the independent living and assisted level facilities in 2001, the Taxing Authorities conducted an exhaustive review of Menno Haven's financial operations. This type of discovery and strict scrutiny is in line with the normal litigation process. During the course of discovery, the Taxing Authorities realized that Menno Haven was not operating the skilled nursing facilities as the Taxing Authorities believed it was. As a result, the Taxing Authorities challenged the tax-exempt status of the skilled nursing facilities. The Court finds that Menno Haven invited the Taxing Authorities to review its financial books, operations, and policies when it initiated a lawsuit that it should have known would require the Taxing Authorities to conduct an in-depth review of its operations. Since Menno Haven created the vehicle that led the Taxing Authorities to determine that Menno Haven should be placed on the tax roll, Menno Haven cannot now argue that they are being treated differently from the others. After hearing testimony from officers of the other local nursing homes, the Court finds that Menno Haven is drastically different from Shook and Quincy. Therefore, even if Menno Haven could argue that it is being treated differently from the others for tax purposes, that different treatment is warranted as the institutions are operated differently.

Menno Haven has not proven that the Taxing Authorities had the means to assess the operations of Shook and Quincy, that the Chief Assessor chose to not place Shook and Quincy on the tax rolls in an attempt to discriminate against Menno Haven, or that Menno Haven is indeed similar to Quincy and Shook. Because there is no evidence that the Chief Assessor systemically, deliberately, or purposefully discriminated against Menno Haven, this argument is dismissed.

### ORDER OF COURT

May 1, 2006, after reviewing the record, conducting a trial, and reviewing the applicable case law, the Court finds that Menno Haven's skilled nursing facilities failed to meet the requirements necessary to qualify for a real estate tax exemption. Therefore, the Court hereby orders that Menno Haven's appeal is dismissed and the ruling made by the Franklin County Board of Assessment and Tax Revision is affirmed. The Court further orders that Menno Haven's equitable estoppel, uniformity, and improper notice arguments are dismissed.

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[1] Both CCRCs share one license from the Department of Insurance. Ex. P-15.

[2] For purposes of this opinion, the Court will use the following terminology. The term Menno Haven will be used when the Court is referring to both CCRC campuses and the overall operation of both corporations. The term Penn Hall will be used when the Court is referring only to the Penn Hall campus located on Philadelphia Avenue. The term Menno Haven Scotland will be used when the Court is referring only to the Menno Haven campus located on Scotland Avenue.

[3] Ex. TA-45.

[4] The litigation on this issue is still ongoing.

[5] Ex. TA-31.

[6] Although Menno Haven addressed all five parts of the test in its letter brief to the Court, the Taxing Authorities only addressed parts two and three. Therefore, the Court believes that the Taxing Authorities agree that Menno Haven satisfies parts one, four, and five.

[7] See Ex. TA-26, P-42, TA-17.

[8] One such piece of evidence is an email sent from Victor Rice, an employee of Menno Haven who is involved in the application process, to David Bishop and Tim Johnson, in which Victor Rice states that an applicant had been denied admission solely because of lack of assets. Ex. TA-3.

[9] Ex. TA-17, P-42.

[10] Id.

[11] Id.

[12] Id.

[13] Id.

[14] Id.

[15] Id.

[16] Id.

[17] Id.

[18] Ex. TA-26.

[19] See TA-10, TA-58.

[20] Ex. P-42, TA-17.

[21] Ex. TA-10.

[22] Ex. TA-27.

[23] Ex. P-17B.

[24] By contract, Menno Haven is not required to refund an unused portion of the life lease to interest-free loan until Menno Haven re-rents the unit.

[25] Ex. TA-21, TA-58.

[26] Ex. TA-27.

[27] Ex. TA-58.

[28] Ex. TA-58.

[29] P-19A.

[30] "Day One Medicaid eligible" is defined as an individual who is eligible for nursing facility services under the Medicaid program of the Commonwealth, or becomes eligible for nursing facility services under the Commonwealth's Medicaid program within sixty days of the date of the individual's admission to a nursing facility. 55 PA. Code § 1187.21a(g)(I). An individual can also be Day One Medicaid eligible if that person converts to Medicaid after his/her Medicare entitlement runs out. Ex. P-21.

[31] Ex. TA-6.

[32] Id.

[33] This Court finds that Menno Haven does not have an open admissions policy.

[34] Ex. TA-6.

[35] Menno Haven alleged during the trial that they are unable to make withdrawals from the principal of the Benevolent Care Fund because of the way the Fund was established. Even if this allegation is true, Menno Haven does not use the income generated by the Fund to benefit needy individuals.

[36] Ex. TA-6.

[37] Id.

[38] Ex. P-8, P-9.

[39] Ex. P-11.

[40] See Bates pg. no. 101520.

[41] Ex. TA-60A.

[42] As the Court discussed earlier in this opinion, a portion of the entrance fee is actuarially determined to be available to pay for excess medical costs when a resident becomes unable to pay, but Menno Haven does not use the entrance fee for its intended purpose. Instead, Menno Haven puts the entire entrance fee in the General Fund and uses it for any purpose Menno Haven wishes. It is not used to pay for the shortfall between Medicaid reimbursement and the cost of providing care. Nor is it used to keep residents off Medicaid. Rather, Menno Haven would like to use the fee however it wishes and to consider the shortfall as charity, but this theory fails to include the portion of the entrance fee designed to cover this shortfall. This discussion is contained in pages 8 and 9 of this opinion.

[43] The Court does recognize that the valuation of the volunteer hours includes more than just the salary or hourly wage paid to an employee.

[44] See TA-32.

[45] Ex. P-3.

[46] Ex. P-2.