7717 Library

The State of South Carolina
# OFFICE OF THE ATTORNEY GENERAL

HENRY MCMASTER
ATTORNEY GENERAL

April 29, 2004

The Honorable John D. Hawkins
Senator, District 12
Post Office Box 142
Columbia, South Carolina 29202

Dear Senator Hawkins:

You have requested an advisory opinion from this Office concerning the State Medicaid reimbursement plan for optometry services in South Carolina. You indicate that this request has been made at the behest of Dr. Alva Pack, an optometrist and constituent of yours from Spartanburg County. Dr. Pack's primary concerns are summarized as follows:

1. Is SC statutory law 40-37-160 valid and can it be enforced if valid against the Medicaid Division of the South Carolina Department of Health and Human Services (Medicaid/DHHS)? What authority polices Medicaid to enforce such laws as Section 40-37-160?

2. Is federal law, specifically 42 U.S.C. Section 1396d and Sandifer v. Cherry, 744 F.2d 1157 (5th Cir.1984), which held that optometrists should receive equal pay for equal services, valid and enforceable in South Carolina?

3. If Medicaid/DHHS is in violation of state and federal law, who determines whether any retroactive payment will be made to optometrists who were not equally paid for equal services?

4. Which entity has the ultimate authority to determine which medical services that optometrists are licensed to perform and, consequently, which services are subject to equal reimbursement from the state Medicaid plan–State Medicaid/DHHS, the federal Center for Medicare and Medicaid Services Region III, or the South Carolina Board of Examiners in Optometry?

As a preliminary matter, we note that only the administrative remedies available, if any, or a court of competent jurisdiction, and not this Office, can serve as a finder of fact and conclusively determine the outcome of these issues with respect to Dr. Pack's current situation. See Op. S.C. Atty. Gen., dated January 7, 2004. This opinion is advisory only, reflecting our analysis as to what

Request (Keith)
REMBERT C. DENNIS BUILDING • POST OFFICE BOX 11549 • COLUMBIA, S.C. 29211-1549 • TELEPHONE: 803-734-3970 • FACSIMILE: 803-253-6283

we believe a court would conclude the governing law to be. Moreover, we note also that with respect to issues concerning federal Medicaid law, while we may express an opinion regarding these provisions, federal Medicaid authorities at the Department of Health and Human Services are in a far better position than we to render such interpretations.

## Law/Analysis

### Validity of South Carolina Code Section 40-37-160

We have consistently advised that any act of the General Assembly is presumed to be valid and constitutional in all respects. See, Ops. S.C. Atty. Gen. June 4, 2003; October 14, 1988. While this Office may comment upon constitutional issues, only a court may actually declare a statute invalid. Furthermore, a court recognizes it may not declare an Act of the General Assembly void unless the Act's constitutionality is clear beyond all reasonable doubt. Thomas v. Macklen, 186 S.C. 290, 195 S.E. 539 (1937); Townsend v. Richland County, 190 S.C. 270, 2 S.E.2d 777 (1939). All doubt is thus resolved in favor of a statute's validity. Therefore, unless and until a court declares Section 40-37-160 of the Code of Laws to be invalid or unconstitutional, such statute is valid and must continue to be enforced.

Of course, this presumption of validity does not address the question of interpretation and applicability of § 40-37-160. Such Section provides in relevant part:

> All agencies of the State and its subdivisions, and all commissions, clinics, and boards administering relief, public assistance, public welfare assistance, social security or health services under the laws of this State, shall accept the services of licensed optometrists for all services that they are licensed to perform relating to any person receiving benefits from such agencies or subdivisions. All of the governmental agencies or agents, officials or employees thereof, including the public schools, may counsel with and advise the persons needing eye care as to the type of service needed and as to those qualified to render such service, but no attempt shall be made to steer an individual seeking vision care to either an optometrist or a physician. The patient shall be given free choice in his selection of a specialist to serve his vision-care needs, in examinations, vision screening, or other vision services. Provided, that an exception shall be made in emergency cases of obvious eye injury or disease where delay in obtaining the services of a physician might endanger the patient's visual health. Provided, further, that in recognized instances of disease or anomalies disclosed in the original physical evaluation by the State agency, such cases may be referred directly to specialists, ophthalmologists or optometrists as deemed appropriate by the evaluating agency.

> There shall be no differential in the fee schedule for vision-care services, whether performed by an optometrist or a physician, that is, for like services common to both professions. (emphasis added).

To ascertain the application of this statute, several fundamental rules of statutory interpretation are pertinent. First and foremost, is the cardinal rule that the primary purpose in interpreting statutes is to ascertain the intent of the General Assembly. State v. Martin, 293 S.C. 46, 358 S.E.2d 697 (1987). A statute must receive a practical, reasonable, and fair interpretation consonant with the purpose, design and policy of the lawmakers. Caughman v. Cola. Y.M.C.A., 212 S.C. 337, 47 S.E.2d 788 (1948). Words must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation. State v. Blackmon, 304 S.C. 270, 403 S.E.2d 660 (1990). However, our Supreme Court has cautioned against an overly literal interpretation of a statute which may not be consistent with legislative intent. In Greenville Baseball, Inc. v. Bearden, 200 S.C. 363, 20 S.E.2d 813 (1942), the Court recognized that:

> [i]t is a familiar canon of construction that a thing which is within the intention of the makers of a statute is as much within the statute as if it were within the letter. It is an old land well established rule that the words ought to be subservient to the intent and not the intent to the words. Id., at 368-369.

The plain language of Section 40-37-160 states that "there shall be no differential in the fee schedules for vision-care services, whether performed by a optometrist or a physician." In addition to other entities, this statutory mandate is directed to "[a]ll agencies of the State ... administering relief, public assistance, public welfare assistance, social security or health services under the laws of this State." Such broad language clearly encompasses the Medicaid Division of the South Carolina Department of Health and Human Services. Accordingly, Section 40-37-160 requires that Medicaid/DHHS must provide equal fee reimbursement to optometrists for services which "are common to both professions."

It is important to recognize the legislative intent and policy considerations underlying the mandate of Section 40-37-160 that optometrists be paid equally for eye-care services common to both professions. Such legislative intent is underscored by the language of the statute itself: [t]he patient shall be given free choice in his selection of a specialist to serve his vision care needs." Indeed, a patient's "freedom of choice" to select an eye-care services provider reflects the clear policy basis for analogous statutes in other states. One such statute, Section 1066 in Chapter 12 of Title 37 of the Louisiana Revised Statutes, is titled "Freedom of Choice." Louisiana Statutes Annotated-Revised Statutes Section 37:1066. Accordingly, in our opinion, the purpose of Section 40-37-160 is to ensure that Medicaid patients are given the freedom to choose either an optometrist or an ophthalmologist as their eye-care provider without financial penalty.

From information provided to this Office by the South Carolina Department of Health and Human Services, as well as by Dr. Pack, it is our understanding that, effective November 1, 2003,

the South Carolina Medicaid Division has recently changed its fee schedules for eye-care services in the 92000 series (under CPT code numbers), which are procedures that are commonly performed by both ophthalmologists and optometrists, to provide equal reimbursement to optometrists for such services. [See "Medicaid Bulletin," dated September 4, 2003, issued by Robbie Kerr, Director of Medicaid/DHHS]. We are informed that this policy change was made after it came to the Department's attention that the fee schedules at the time were not in compliance with Section 40-37-160. Since the fee schedules have now been changed and currently comply with the requirements of Section 40-37-160, it appears the Department has taken the appropriate action commensurate with the mandate of § 40-37-160. Thus, any policy which allegedly discriminated against optometrists is no longer in effect. Accordingly, the Department's current reimbursement policy is consistent with the requirements of Section 40-37-160 of the Code.

**Application of Relevant Federal Law**

It is also our opinion, that the South Carolina Medicaid reimbursement plan for eye-care services appears in accord with relevant federal law. The provisions of the federal statutes which regulate state Medicaid programs, and are funded by both the states and the federal government pursuant to 42 U.S.C. §1396, are found in Subchapter XIX of Chapter 7 in Title 42 of the United States Code of Laws. As we understand it, the federal statutes control to the extent that the Secretary of the U.S. Department of Health and Human Services possesses the discretion pursuant to 42 U.S.C. §1396c to terminate federal funding if the state Medicaid plan is not in compliance with Subchapter XIX. It is also our understanding that the Medicaid laws and applicable regulations in themselves in no way preclude the state from enacting a statute similar to § 40-37-160.

Based upon our reading of Subchapter XIX, the only optometric service which is generally required to be reimbursed by state Medicaid plans, pursuant to 42 U.S.C. §1396a, are exams to determine blindness eligibility:

> A state plan for medical assistance **must**:
> .....
>
> (12) provide that, in determining whether an individual is blind, there shall be an examination by a physician skilled in the diseases of the eye or by an optometrist, whichever the individual may select ... (emphasis added).

42 U.S.C. §1396a(a)(12). One other provision requires a state Medicaid plan to reimburse an optometrist for physician services which he is legally licensed to perform, but such is limited to situations in which the state at one time reimbursed for such services--but no longer does so:

> In the case of any State the State plan of which (as approved under this subchapter)--

> (1) does not provide for the payment of services (other than services covered under section 1396a(a)(12) of this title) provided by an optometrist; but
>
> (2) at a prior period did provide for the payment of services referred to in paragraph (1);
>
> the term "physicians' services" (as used in subsection (a)(5) of this section) shall include services of the type which an optometrist is legally authorized to perform where the State plan specifically provides that the term "physicians' services", as employed in such plan, includes services of the type which an optometrist is legally authorized to perform, and shall be reimbursed whether furnished by a physician or an optometrist.

42 U.S.C. §1396d(e). This provision appears to protect the expectations of the state Medicaid recipient who is provided eye-care services through his optometrist of choice, by allowing the optometrist to continue to provide and be reimbursed for such services. As noted above, it is our understanding that the South Carolina Medicaid plan has been modified as of November 1, 2003 to reimburse optometrists for these services. Accordingly, in our opinion, 42 U.S.C. 1396d(e) does not appear applicable to reimbursements for eye-care services under the South Carolina Medicaid plan.

You have also referred to a federal case, Sandifer v. Cherry, 744 F.2d 1157 (5th Cir.1984), which appears relevant to the issue at hand. The Fifth Circuit based its holding upon interpretation of a Louisiana "freedom of choice" statute, see, L.S.A.-R.S. 37:1066, supra, by the Supreme Court of that State pursuant to a certified question request. See Sandifer v. Cherry, 455 So.2d 1350 (La.1984). The Fifth Circuit concluded:

> The Louisiana Medical Assistance Plan and the Medical Assistance Program Manual presently provide for Medicaid reimbursement to ophthalmologists (and other physicians) for eye care services that are within the scope of practice of optometrists, but deny reimbursement to optometrists for most of those same services. The Louisiana Supreme Court has held that these provisions violate the Louisiana statutes that prohibit state officials from limiting or restricting the freedom of patients to choose to receive eye care services from an optometrist, physician or surgeon. Therefore the defendants must amend the Plan and the Manual so as to provide that optometrists who perform eye care services that are within the scope of optometric practice will receive Medicaid reimbursement to the same extent, and according to the same standards, as physicians who perform those same eye care services. The defendants must put optometrists on a precisely equal footing with ophthalmologists and other physicians with regard to reimbursement for services that optometrists are qualified to perform under Louisiana law. We do not undertake to determine which eye care services are reimbursable, but the defendants must assure the equal treatment of optometrists and physicians that is mandated by state law.

744 F.2d at 1158. (emphasis added).

By a letter dated May12, 2003 [this letter was included in the information provided by Dr. Pack to this Office], the Assistant Director of the American Optometric Association asserted that the South Carolina Medicaid plan was unlawful under Sandifer. While S.C. Code Ann. Section 40-37-160 is similar in purpose and function to the Louisiana "freedom of choice" statute, and thus it is entirely possible that a court would reach a similar conclusion with respect to § 40-37-160, we must caution that Sandifer is not binding precedent in South Carolina. Nonetheless, a court could determine that the plain language of § 40-37-160 requires that the South Carolina Medicaid Division "must assure the equal treatment of optometrists and physicians that is mandated by state law." As stated above, however, it is our understanding that the South Carolina Medicaid Division currently reimburses for services common to optometrists and physicians equally, in compliance with Section 40-37-160.[1]

**Retroactive Payment for Pre-November 1, 2003 Filings**

This Office has been informed by Medicaid/DHHS that the November 1, 2003 changes made to the reimbursement schedule were made prospectively only, and that the Department cannot make retroactive payment for optometric services performed, but not covered, under the state Medicaid plan before the policy change. Medicaid/DHHS has also informed us that, pursuant to its regulations governing the appeal of an agency decision, an appeal of any particular reimbursement decision must be filed within thirty (30) days of the issuance of such a decision. S.C. Code of Regulations Section 125-152(A). The aforementioned policy decisions have been rendered pursuant to the statutory authority granted to DHHS for the administration of the South Carolina Medicaid program. See S.C. Code Ann. §44-6-30(1) [primary power of DHHS is to "Administer Title XIX of the Social Security Act (Medicaid)]; S.C. Code Ann. §44-6-40(5) [DHHS has duty to "formulate for consideration and promulgation criteria, standards, and procedures that ensure assigned programs are administered effectively, equitably, and economically and in accordance with statewide policies and priorities"].

It is our longstanding policy in the issuance of opinions, to defer to the administrative agency charged with the enforcement of a particular area of law. Op. S.C. Atty. Gen., October 27, 1999. In cases such as here, where an administrative decision has been made by the agency charged with enforcement, and there exists an administrative appeal procedure available to challenge such a policy, provided such appeal is made in a timely manner, we will defer to the administrative authority or discretion of the officer, agency, or public body. Griggs v. Hodge, 229 S.C. 245, 92 S.E.2d 654 (1956); Op. S.C. Atty. Gen., March 30, 1988 (deference given to agency's construction and interpretation); Op. S.C. Atty. Gen. January 15, 2004. Additionally, our courts give considerable

---

[1] However, with respect to federal Medicaid law, it does not appear that the South Carolina Medicaid Plan was in violation of federal law either prior to November 1, 2003 or currently.

deference to an agency's interpretation of its own regulations and the courts generally do not "second guess" such interpretation unless clearly erroneous. U.S.C. v. Batson, 271 S.C. 242, 246 S.E.2d 882 (1978). Thus, in an opinion, this Office does not second guess an agency's policy decisions and interpretations of its own enabling statutes; we generally will leave such review to the courts. Op. S.C. Atty. Gen. Sept. 12, 1985.

Based upon the long-standing policy of this Office, we would advise that administrative appeals of DHHS decisions concerning Medicaid reimbursement are available under procedures outlined in the South Carolina Code of Regulations, Section 126-150 et seq., and the Administrative Procedures Act, S.C. Code Ann. 1-23-310 et seq. See S.C. Code Ann. 44-6-190 [Appeals from decisions made by the Department of Health and Human Services heard pursuant to the S.C. Administrative Procedures Act]. An administrative law judge, as a finder of fact, and ultimately a court, would be the appropriate forum to decide whether Dr. Pack is entitled to retroactive reimbursement from the State for certain eye-care services rendered prior to November 1, 2003. Following exhaustion of administrative remedies, the final decision of the agency may be further reviewed on appeal to the circuit court, the Court of Appeals, and the State Supreme Court, respectively, pursuant to Section 1-23-380 of the Code. It is the role of the courts, and not this Office, to order that retroactive reimbursement be paid in any particular case.

We have been informed by Dr. Pack and Medicaid/DHHS that an administrative hearing has been held recently regarding retroactive payment on the contested reimbursement decisions. If the applicable administrative procedures are followed, relief may thus be sought using the appropriate remedies provided by South Carolina law.

**Ultimate Authority on State Medicaid Reimbursement Policy**

The South Carolina Department of Health and Human Services is bestowed authority by state statute to administer the state Medicaid program, which is funded jointly by South Carolina and the federal government. S.C. Code Ann. §44-6-30(1). Section 44-6-70 of the Code more specifically authorizes DHHS develop a state Medicaid plan:

> A state plan must be prepared by the department for each program assigned to it and the department must also prepare resource allocation recommendations based on such plans. The resource allocation recommendations must be approved pursuant to state and federal law. The state plans must address state policy and priority areas of service with specific attention to the following objectives:
> .....
>
> (b) Achievement of a balanced health care delivery system assuring that regulations, coverage, and reimbursement policies assure that while the most appropriate care is given, tailored to the client's needs, it is delivered in the most cost-effective manner.
> .....

While the federal Department of Health and Human Services possesses authority pursuant to 42 U.S.C. §1396c to terminate federal funding for the state Medicaid plan if the State does not comply with federal law, it is state law which requires S.C. DHHS to administer the state plan "pursuant to state and federal law." It appears that the Center for Medicare and Medicaid Services, Region III, a division of the federal DHHS, has oversight as to the South Carolina Medicaid program and its compliance with applicable federal law. In terms of state law compliance, however, S.C. DHHS ultimately administers and determines policy for the state Medicaid program pursuant to § 44-6-30(1).

We are aware of no express authority provided the South Carolina Board of Examiners in Optometry to establish policy for the State Medicaid program. However, the Optometry Board does possess authority, pursuant to S.C. Code Ann. §40-37-50, to "prescribe regulations and bylaws for its proceedings and government and for the practice of optometry." This provision clearly gives the Board the power to define the scope of procedures which optometrists are licensed to perform in South Carolina in accordance with state statutes governing the practice and regulation of optometry.

Accordingly, in view of the fact that § 40-37-160 requires all state agencies [including Medicaid/DHHS] to "accept the services of licensed optometrists for all services that they are licensed to perform relating to any person receiving benefits from such agencies," it would appear that the Department of Health and Human Services is required to recognize those eye-care services which the Board of Optometry has authorized licensed optometrists to provide. This Office thus advises that South Carolina Medicaid/DHHS is obligated pursuant to Section 40-37-160 generally to reimburse optometrists equally for services common to both optometrists and physicians. Moreover, it is also reasonable to conclude that considerable deference be given to any determination by the South Carolina Board of Examiners in Optometry with respect to the scope and practice of licensed optometrists. In other words, Medicaid/DHHS should look to the scope of licensed optometry practice, as defined by the Optometry Board, as well as state statutes governing the practice of optometry, as applied and interpreted by the Optometry Board, for guidance when creating a State Medicaid plan which reimburses both optometrists and ophthalmologists for eye-care services common to both professions.

## Conclusion

Based upon the foregoing authorities, we advise that a court would likely conclude that the South Carolina Department for Health and Human Services/Medicaid is required, pursuant to § 40-37-160, to provide equal fee reimbursement to optometrists for eye-care services which are common to both licensed optometrists and medical doctors. When formulating a plan for the South Carolina Medicaid program, the Department should look to the scope of practice for licensed optometrists, as defined by the South Carolina Board of Examiners in Optometry, to determine such common services. It is the understanding of this Office that as of November 1, 2003, the Department has implemented a reimbursement policy which conforms to these statutory requirements. With respect to retroactive reimbursement for common services performed before the November 1, 2003 policy

change, we advise that such reimbursement must be sought through the governing administrative and civil remedies available under state law rather than from an opinion of this Office. A party aggrieved by an agency decision with respect to reimbursement must appeal within thirty days of the issuance any such decision, pursuant Section 126-152(A) of the South Carolina Code of Regulations Only the appropriate quasi-judicial or judicial authorities, rather than this Office through the issuance of its opinion, possess the authority to order that retroactive payment be made by the DHHS/Medicaid to an aggrieved party or to a litigant.

Very truly yours,

Robert D. Cook
Assistant Deputy Attorney General