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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

HENRY MCMASTER
ATTORNEY GENERAL

July 1, 2004

The Honorable Lanny F. Littlejohn
South Carolina House of Representatives
210 Deerwood Dr.
Pacolet, South Carolina 29372

Dear Representative Littlejohn:

At the request of the Medicaid Division of the South Carolina Department of Health and Human Services and after our discussion with the Department of Insurance, I am writing to clarify a matter raised in our opinion dated May 5, 2004. The May 5 opinion dealt with the applicability of South Carolina Code Section 38-71-440 to the State Medicaid reimbursement plan for eye-care services. We advised that the state Medicaid plan could be reasonably construed as a public "health benefit plan," pursuant to the broad definition in Section 38-71-440(A)(1). We concluded that the Title 38 provisions dealing with equal fee reimbursement for eye-care services, when read together with the express language of Section 40-37-160 of the Code, require that the State Medicaid plan provide equal reimbursement to optometrists for like services. Section 40-37-160 is specifically directed to, among others, "[a]ll agencies of the State. . .administering relief, public assistance, public welfare assistance, social security or health services under the laws of this State." Clearly, this language would include the Medicaid Division of the South Carolina Department of Health and Human Services.

We remain convinced that the term public "health benefit plan," as defined in Section 38-71-440, likely encompasses the state Medicaid plan for purposes of the equal reimbursement principles found therein. However, we also find it necessary to clarify that the enforcement provision of Section 38-71-440(J) does not give the South Carolina Department of Insurance administrative review authority over related matters involving the state Medicaid program. We have been made aware of certain relevant information since the issuance of the May 5 opinion which demonstrate the need for such a clarification.

First and foremost, we have been informed that the Department of Insurance does not include Medicaid a "health benefit plan," as defined by Section 38-71-440(A)(1), but a "program-in-aid." See, Letter from Alicia W. Cornelius, Department of Insurance to Dr. Alva Pack, dated February 19, 2004. It is therefore the position of the Department of Insurance, the state agency entrusted with the

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enforcement of the provisions in Section 38-71-440 pursuant to subsection (J), that it possesses no jurisdiction over related matters involving the state Medicaid plan.

In much the same way as the courts, this Office typically defers to the administrative interpretation of the agency charged with the enforcement of the statute in question. See Ops. S.C. Atty. Gen. dated March 9, 2000; November 25, 1998. As we have emphasized in earlier opinions, "construction of a statute by the agency charged with executing it is entitled to the most respectful consideration [by the courts] and should not be overruled absent cogent reasons." Op. S.C. Atty. Gen. dated October 20, 1997 [quoting Logan v. Leatherman, 290 S.C. 400, 351 S.E.2d 146 (1986)]. If the administrative interpretation is reasonable, courts will defer to that construction, even if it is not the only reasonable one or the one the court would have adopted in the first instance. See, Op. S.C. Atty. Gen. dated March 12, 1997. Accordingly, while the literal language of Section 38-71-440 appears to encompass the state Medicaid plan as a "public health plan," our longstanding policy requires that we defer to the statutory interpretation of the Department of Insurance as to the enforcement of Section 38-71-440.

Secondly, we have been made aware of a pertinent federal regulation which appears to preclude the Department of Insurance from exercising any administrative review authority over decisions made by Medicaid/DHHS, even if the Department of Insurance were to construe Section 38-71-440 as granting it the authority to do so. 42 C.F.R. 431.10 provides, in relevant part, that:

> (a) Basis and purpose. This section implements section 1902(a)(5) of the Act, which provides for designation of a single State agency for the Medicaid program.
> . . . . .
>
> (e) Authority of the single State agency. In order for an agency to qualify as the Medicaid agency--
>
> (1) The agency must not delegate, to other than its own officials, authority to--
>
> (i) Exercise administrative discretion in the administration or supervision of the plan, or
>
> (ii) Issue policies, rules, and regulations on program matters.
>
> (2) The authority of the agency must not be impaired if any of its rules, regulations, or decisions are subject to review, clearance, or similar action by other offices or agencies of the State.
>
> (3) If other State or local agencies or offices perform services for the Medicaid agency, **they must not have the authority to change or disapprove any administrative decision of that agency, or otherwise substitute their judgment**

for that of the Medicaid agency with respect to the application of policies, rules, and regulations issued by the Medicaid agency. [emphasis added]

Because the Department of Health and Human Services is the single state agency entrusted with the administration of the Medicaid program, we are advised that any statute construed to give another state agency administrative review authority over the decisions of DHHS relating to Medicaid would directly conflict with 42 C.F.R. 431.10. As we noted in an opinion dated December 23, 2003, preemption has been held to occur when it is physically impossible to comply with both federal and state regulation, the nature of the subject matter requires federal supremacy and uniformity or if the Congress has clearly intended to displace state legislation. Florida Lime and Avocado Growers, Inc. v. Paul, 373 U.S. 132 (1963). Federal regulations preempt state law to the same extent as federal statutes. Fidelity Federal Savings and Loan Association v. de la Cuesta, 458 U.S. 141, 153 (1982). Accordingly, even if Section 38-71-440 were construed to give the Department of Insurance administrative review power over the State Medicaid plan, it would appear that 42 C.F.R. 431.10 would preclude such administrative review.

In conclusion, the May 5, 2004 opinion should not be construed in any way to compel administrative review by the Department of Insurance with respect to matters involving the administration of the State Medicaid program. The Department of Insurance does not interpret Section 38-71-440(J) as conveying to it administrative review authority over the decisions of Medicaid/DHHS, and we would defer to such administrative interpretation. Perhaps even more importantly, federal law appears to preclude such review. Accordingly, Section 38-71-440 is applicable to the state Medicaid plan only in support of the principle found in Section 40-37-160, that equal reimbursement should be given for eye-care services commonly provided by ophthalmologists and optometrists. The requirement of such equal reimbursement – the crux of the earlier referenced opinion – remains our opinion. We are writing herein simply to recognize the interpretation of the Department of Insurance to which we defer and to clarify that the South Carolina Department of Health and Human Services is the "single State agency" which has jurisdiction over the administration of the South Carolina Medicaid plan pursuant to 42 C.F.R. 431.10.

Very truly yours,

Robert D. Cook
Assistant Deputy Attorney General