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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

HENRY MCMASTER
ATTORNEY GENERAL

May 5, 2004

The Honorable Lanny F. Littlejohn
Member, House of Representatives
402-B Blatt Building
Columbia, South Carolina 29211

Dear Representative Littlejohn:

You have requested an opinion concerning the State Medicaid reimbursement plan for eye-care services, specifically in the context of S.C. Code Ann. Section 38-71-440. You indicate that this request has been made on behalf of Dr. Alva Pack, an optometrist and constituent from Spartanburg County. You further indicate that you believe the legislative intent behind Section 38-71-440 was to "include Medicaid as a public health plan, in a literal reading of this section, to protect both its recipient and the provider who provides the Medical service." You have asked this Office to address the following questions:

1. What is the intent of the Federal Law that provides 70% of Medicaid's $3.7 billion dollar budget? Was it to include equal fees for equal services for both ODs and OD/MD in providing medical eye care common to both professions?

2. Was it the intent of the S.C. General Assembly for Medicaid to be policed by someone other than Medicaid's own employees who benefit from this $3.7 billion dollar budget?

3. Will you give an opinion on Section 38-71-440 in order to help the citizens of South Carolina in the future if questions arise again on fee discrimination by state and federal agencies concerning their freedom of choice for an eye health care provider?

4. Is S.C. Medicaid a health benefit plan/public health plan implemented in this State that provides medical eye care or vision benefits, or both, to covered persons including payments and reimbursements?

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

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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 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

Application of Relevant Federal Law

This Office is aware of no federal law which requires state Medicaid plans to reimburse optometrists and physicians equally for services common to both professions. The provisions of the federal statutes which regulate state Medicaid programs, and are funded jointly by the states and the federal government pursuant to 42 U.S.C. §1396, are found in Subchapter XIX of Chapter 7, 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 the federal requirements in Subchapter XIX. It is also our understanding that the Medicaid laws and applicable regulation in themselves in no way preclude the State from enacting statutes such as § 40-37-160, which give the patient "freedom of choice in his selection of a specialist to serve his vision-care needs."

However, we note that Section 44-6-70 of the South Carolina Code of Laws requires the South Carolina Department of Health and Human Services to administer the state Medicaid plan "pursuant to state and federal law." Thus, the Department is legally bound to administer the state Medicaid program in compliance with the relevant state and federal law.

Based upon the plain language of 42 U.S.C. §1396a, the only optometric service generally required to be reimbursed by state Medicaid plans is the exam to determine blindness eligibility. This provision states that

> 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, found in Subchapter XIX, requires a state Medicaid plan to provide equal reimbursement to an optometrist for physician services for which he is legally

licensed to perform; however, such provision appears limited only to state Medicaid plans which have, at some point in time, provided equal reimbursement. We quote this provision as follows:

> 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. (emphasis added)

42 U.S.C. §1396d(e). In short, Section 1396d(e) requires a State Medicaid plan to continue equal reimbursement to optometrists for eye-care services common to both professions if that particular State has initiated such a policy. In such instance, the State cannot terminate such reimbursements, once begun. The intent of this provision appears to protect the expectations of the state Medicaid recipient who is provided eye-care services by his or her optometrist of choice. It prohibits a state from subsequently changing its reimbursement policy to one which would force the Medicaid patient to find a new eye-care service provider.

It is the understanding of this Office that the South Carolina Medicaid plan currently reimburses optometrists equally for eye-care services commonly provided by optometrists and physicians. Although the State did not provide reimbursement to optometrists for such services in its plan prior to November 1, 2003, it is our understanding that once it was brought to the attention of state officials that § 40-37-160 might well mandate such equal treatment, the State's policy was changed as of November 1, 2003. Accordingly, inasmuch as South Carolina now reimburses optometrists for such services, it would appear that Section 1396d(e) mandates the state Medicaid plan to continue such reimbursements.

Also we note the federal court decision of Sandifer v. Cherry, 744 F.2d 1157 (5th Cir.1984). In Sandifer, the Fifth Circuit's conclusion was based upon the Louisiana Supreme Court's interpretation of that state's "freedom of choice" statute, L.S.A.-R.S. 37:1066. See Sandifer v. Cherry, 455 So.2d 1350 (La.1984). The Fifth Circuit Court of Appeals held that:

> [t]he 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. It is important to note that the Fifth Circuit did not reach its conclusion based upon federal statutory or constitutional grounds, but solely on the basis of the applicable Louisiana statute. Sandifer, however, specifically rejected any assertion pursuant to federal law that optometrists were entitled to equal pay for equal services. See, Sandifer v. Cherry, 718 F.2d 682 (5th Cir. 1983).

S.C. Code Ann. Section 40-37-160 appears similar in purpose to the Louisiana "freedom of choice" statute. The pertinent portion of Section 40-37-160 reads as follows:

> 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).

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.

Applicability of South Carolina Code Section 38-71-440 to Medicaid

It is our opinion that § 38-71-440 likewise requires optometrists and ophthalmologists to be reimbursed equally for eye-care services common to both professions. Section 38-71-440(A)(1) defines the term "health benefit plan" as follows:

> "Health benefit plan" means any public or private health plan implemented in this State that provides medical eye care or vision care benefits, or both, to covered persons including payments and reimbursements.

This broad definition of a "health benefit plan" would likely include the state Medicaid plan. The state Medicaid plan is a public health plan which provides medical eye-care benefits for persons who qualify for the program. Section 38-71-440 also encompasses "reimbursements" made under the plan to the providers of the covered services, specifically optometrists and ophthalmologists. Section 38-71-440, in relevant sub-sections (B), (C), and (I), provides as follows:

> (B) No health maintenance organization or health benefit plan which maintains or contracts with a network of ophthalmologists or optometrists, or both, to provide medical eye care or vision care benefits, or both, shall prohibit a participating optometrist from performing medical services within that optometrist's scope of practice set forth in Title 40, Chapter 37, in accordance with the terms of the health maintenance organization or health benefit plan and in accordance with subsections (C) and (I).
>
> (C) No health maintenance organization or health benefit plan which maintains or contracts with a network of ophthalmologists or optometrists, or both, to provide medical eye care or vision care benefits, or both, excepting all self-funded health benefit plans as defined under the Federal Employee Retirement Income Security Act (ERISA) of 1974, shall discriminate against optometry, as a class, or ophthalmology,

> as a class, with respect to the terms, conditions, privileges, and opportunity of participation **or compensation for the same eye care services** provided in this section.
>
> .....
>
> (I) Nothing in this plan may be construed to prohibit a health maintenance organization or health benefit plan from professionally credentialing and evaluating all individual optometrists or ophthalmologists within a network or plan in a nondiscriminatory manner. Nothing in this section may be construed to prohibit any health maintenance organization or health benefit plan from limiting the number of optometrists or ophthalmologists **in a nondiscriminatory manner** or to prohibit a health maintenance organization or health benefit plan from negotiating individually with optometrists or ophthalmologists for individual rates and eye care services **in a nondiscriminatory manner**. (emphasis added).

To ascertain the application of Section 38-71-440, certain basic 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. Furthermore, different statutes in pari materia, even if enacted at different times, must be construed together as one system and as explanatory of each other. Fishburne v. Fishburne, 171 S.C. 408, 172 S.E. 426 (1934).

The plain language of Section 38-71-440 requires that the South Carolina Medicaid plan, as a public health benefit plan, must not discriminate between optometrists and ophthalmologists in its reimbursement policy for the compensation of eye-care services within the scope of both professions. The conclusion that the General Assembly intended to prohibit "fee discrimination" between ophthalmologists and optometrists is further bolstered if Section 38-71-440 is read together with the relevant part of Section 40-37-160, *supra*:

> 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.

The mandate of Section 40-37-160 is specifically 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. Moreover, as stated above, the requirements of Section 38-71-440 apply to the South Carolina Medicaid Division as the administrative arm of a public health plan. Because the plain language of Sections 38-71-440 and 40-37-140 proscribes discriminatory reimbursement schedules for medical eye-care services, we conclude that the state Medicaid plan is required by state law to reimburse optometrists and ophthalmologists at an equal rate for services which are common to both professions.

Legislative Intent Behind "Non-Discriminatory Reimbursement Provisions

You have also inquired as to the legislative intent underlying the policy that optometrists be paid equally for eye-care services common to both professions. The legislative intent of § 40-37-160 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, *supra*. Accordingly, in our opinion, the purpose of § 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.

Reading Section 38-71-440 in conjunction with Section 40-37-160, it would appear that the primary legislative intent underlying § 38-71-440 similarly focuses upon the patient's freedom of choice. However, the inclusion of subsection 38-71-440(B), which expressly focuses upon the ability of the optometrist to perform "medical services within that optometrist's scope of practice set forth in Title 40, Chapter 37" without interference from the public health benefit providers or HMO administrators, appears to demonstrate also that Section 38-71-440 is designed to protect optometrists from discriminatory treatment. We therefore advise that § 38-71-440 may also be reasonably construed to ensure the ability of licensed optometrists to perform, and be paid equally, for services common to both professions.

Who "Polices" the Administration of the State Medicaid Program

You have also asked which entity is intended to "police" the state Medicaid program, presumably with regards to its compliance with the aforementioned statutory requirements. While

there is no one governmental entity charged solely with overseeing the administration of the state Medicaid program by the Department of Health and Human Services (DHHS), there are certainly legal procedures available to challenge an action of a state agency. Regarding violations of Section 38-71-440, subsection (J) of the statute provides one avenue of relief for aggrieved parties:

> Any person aggrieved by a violation of this section may file a complaint with the Department of Insurance. After notice to the health maintenance organization or health benefit plan and an opportunity for it to submit a written response to the complaint, the director of the department may make a written determination regarding the complaint. Any party aggrieved by the director's determination is entitled to administrative and judicial review pursuant to Article 3, Chapter 23, Title. The director or the administrative law judge, if a hearing before the Administrative Law Judge Division is requested, may impose sanctions that are authorized under current insurance laws if a violation of this section is found to have occurred.

S.C. Code Ann. §38-71-440(J). The Administrative Procedure Act (APA), S.C. Code Ann. §1-23-310, et seq., provides a mechanism by which "contested cases" may be heard. S.C. Code Ann. §1-23-600(B). Parties whose legal rights are adversely affected by a state agency in a "contested case" may be heard pursuant to these procedures. For example, optometrists adversely affected by reimbursement policies of the agency which administers the State's Medicaid program are provided a remedy pursuant to the APA.

Following exhaustion of administrative remedies, the administrative proceedings relating to a contested case against the South Carolina Department of Health and Human Services would be further subject to appellate review by the courts of this state under the state APA. See S.C. Code Ann. §1-23-380(A) ["A party who has exhausted all administrative remedies available within the agency and who is aggrieved by a final decision in a contested case is entitled to judicial review under this article, Article 1, and Article 5"]; §1-23-610(B); §1-23-390 [discretionary appellate review of an Administrative Law Judge decision by the South Carolina Supreme Court]. An aggrieved person, or class of persons, may also file a declaratory judgement action in a circuit court pursuant to the authority of § 15-53-20 in order to clarify the application of Section 38-71-440 and Section 40-37-160 to the state Medicaid program. See S.C. Code Ann. §1-23-380. In short, after all administrative remedies have been exhausted, the compliance of the South Carolina Medicaid plan with state law must ultimately be a matter for enforcement by the court system.

It is also worthy of mention that two other governmental entities exercise administrative oversight with respect to the South Carolina Medicaid program. First, as discussed above, the Secretary of the U.S. 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 plan is not deemed in compliance with federal requirements. The regional arm of the federal Department which oversees South Carolina Medicaid is the Center for Medicare and Medicaid Services, Region III. Secondly, the Governor of South Carolina possesses certain authority with respect to the South

Carolina Department of Health and Human Services in that the Governor appoints the Department's Director pursuant to S.C. Code Ann. §1-30-10(B)(1)(i). Accordingly, the Governor's Office generally has oversight over agency policy.

Conclusion

Based upon the foregoing authorities, we advise that we are aware of no federal law which expressly requires state Medicaid plans to reimburse optometrists and physicians equally for services common to both professions. However, 42 U.S.C. § 1396(c) specifically prohibits a state from terminating such equal reimbursement, once initiated. Further, South Carolina law, codified at §§ 40-37-160 and 38-71-440, prohibits any policy in the South Carolina Medicaid plan which reimburses optometrists at a lower rate than ophthalmologists for services common to both professions. Section 38-71-440 would likely be deemed applicable by a court to the state Medicaid program because such program is encompassed within the broad definition of "health benefit plan" as expressed in the statute.

We also are of the opinion that the express legislative intent underlying these statutory provisions is to afford patients the freedom of choice for medical eye-care services. Moreover, § 38-71-440(B) may also be reasonably construed by a court to protect optometrists from unequal treatment regarding services which they are licensed to perform. Finally, we advise that there are several governmental entities authorized to oversee the state Medicaid program. Parties aggrieved by policy decisions of state agencies may challenge those policies through the South Carolina Administrative Procedures Act and through the court system. Once administrative remedies have been exhausted, the aggrieved parties may seek redress in the courts.

Very truly yours,

Robert D. Cook
Assistant Deputy Attorney General