

COMMONWEALTH OF KENTUCKY
FRANKLIN CIRCUIT COURT
DIVISION I
CIVIL ACTION NO 13-CI-86

ENTERED
MAY 28 2013
FRANKLIN CIRCUIT COURT
SALLY JUMP, CLERK

KENTUCKY SPIRIT HEALTH PLAN, INC.

PLAINTIFF

V.

OPINION & ORDER

COMMONWEALTH OF KENTUCKY,
FINANCE & ADMINISTRATION CABINET, et al.

DEFENDANTS

INTRODUCTION

This matter came to this court on Cross-Motions for Summary Judgment. Having reviewed the record, considered the arguments of counsel, and being otherwise sufficiently advised, the Court hereby **GRANTS** the s motion for summary judgment filed by the Commonwealth for the reasons stated below.

FACTUAL BACKGROUND

Kentucky Spirit is a Managed Care Organization (MCO) that contracted with the Cabinet for Health and Family Services (CHFS) to provide Medicaid services to eligible citizens in certain regions of the state. Kentucky Spirit receives a monthly capitation payment from the Commonwealth based on its number of enrolled members. Through contracts with local providers, members receive medical care and the providers bill Kentucky Spirit for their services for reimbursement. The MCO Contract requires Kentucky Spirit to offer coverage to local public health departments in designated regions. 59 local departments are covered by Kentucky Spirit, and governed by a master contract with the Department of Public Health known as the Ancillary Services Provider Agreement (ASPA). Before November 1, 2011 Medicaid operated under a "fee-for-service" model. Under that system, local health departments provided services that fell

under Preventive Health Services, defined by 907 KAR 1:360 (recodified in 2011 as 907 KAR 11:360) to Medicaid-eligible children through public health department operated clinics that are physically located in schools. Services performed by registered nurses (RNs) and licensed practical nurses (LPNs) were covered. These services were billed at rates set by the Medicare Physician Fee Schedule.

Beginning in November 2011, Kentucky switched to Managed Care and Kentucky Spirit bid on and won the contract to administer Medicaid for Kentucky. In the summer of 2012, Kentucky Spirit disputed CHFS' prior practice of covering Preventive Health Services performed by local health departments in the school setting. Kentucky Spirit denied these services were Covered Services under the MCO Contract. Kentucky Spirit contends Preventive Health Services are only covered when in locations set up for complex procedures and medical systems, i.e. public health departments, with a physician on site to oversee operations. On August 28, 2012 CHFS determined that school-based Preventive Health Services performed by local health departments are Covered Services under the MCO Contract, and that SPA 03-21 authorized RNs to perform such services, but not LPNs. Kentucky Spirit appealed this decision to the Finance and Administration Cabinet, who affirmed the CHFS decision. Kentucky Spirit then filed this suit in Franklin Circuit Court.

STANDARD OF REVIEW

Summary judgment is granted when the court concludes there is no genuine issue of material fact for which the law provides relief. CR 56.03. Only when it appears from the facts that the nonmoving party cannot produce evidence at trial in favor of a judgment on his behalf should summary judgment be granted. Steelvest, Inc. v. Scansteel Serv. Ctr., Inc., 807 S.W.2d 476 (Ky. 1991). The record must be viewed in the light most favorable to the party opposing the

motion for summary judgment and all doubts are to be resolved in his favor. Id. A summary judgment movant has the initial burden of showing that no genuine of material fact exists, whereupon the burden shifts to the party opposing the motion. A properly supported summary judgment motion cannot defeated without presenting at least some affirmative evidence showing that there is a genuine issue of material fact for trial. Hibbits v. Cumberland Valley Nat'l Bank and Trust Co., 977 S.W.2d 252 (Ky. Ct. App. 1998). Kentucky law provides that when an administrative agency is interpreting its own statute, rules or regulations where they are ambiguous, the courts should afford the agency deference when the interpretation is reasonable and consistent with the settled rules of construction. Cabinet for Human Resources v. Jewish Hospital, 932 S.W.2d 388 (Ky. App. 1996)

DISCUSSION

1. Kentucky Spirit's Case Is An Original Action Subject to *De Novo* Review.

The Cabinet seeks for this Court to find as a matter of law that Kentucky Spirit appealed the decision of the Finance Cabinet and therefore the rules of agency deference apply, arguing "a lawsuit which seeks judicial review to invalidate an agency order is an appeal no matter what the aggrieved party may call it." (Defendant's Reponse to Plaintiff's Motion for Summary Judgment, p. 5). KRS 45A.245 conflicts with this interpretation, stating an appeal of a Finance and Administration Cabinet determination is final unless the contractor sues pursuant to KRS 45A.245(1), which specifies:

Any person, firm or corporation, having a lawfully authorized written contract with the Commonwealth at the time of or after June 21, 1974, may bring an action against the Commonwealth on the contract, including but not limited to actions either for breach of contracts or for enforcement of contracts or for both. Any such action shall be brought in the Franklin Circuit Court and shall be tried by the court sitting without a jury. All defenses in law or equity, except the defense of governmental immunity, shall be preserved to the Commonwealth.

Kentucky Spirit's complaint is styled as a request for declaratory and injunctive relief, specifically seeking a ruling on whether reimbursement is location dependent, and whether RNs at schools are properly supervised by physicians, in effect asking this Court to construe and enforce the terms of its contract with the Commonwealth. (Complaint, p. 4-5). Construction and enforcement of a contract is clearly covered by KRS 45A.245(1) and requires an original action to be filed in Franklin Circuit Court. Because this is an original action, and not an appeal of the agency's determination on this matter, this Court finds that *de novo* review is appropriate. See Geupel Construction Co. v. Commonwealth, 136 S.W.3d 43 (Ky. App. 2003). The facts of this case lend further support to this conclusion. Section 40.9 of the Contract expressly selected the remedy provided by KRS 45A.245. That Section allows CHFS and FAC to attempt to resolve the dispute subject to Kentucky Spirit's Model Procurement Code rights.

While the Court finds that *de novo* review is appropriate, the Court further finds that the Cabinet's determination that the disputed services are covered under the MCO contract was factually and legally correct. As explained below, Kentucky Spirit's argument that the services to school children are not covered unless they are provided in a health department building misconstrues the applicable contract provisions and the governing administrative regulations.

2. CHFS Long-Standing Interpretation Of Medicaid Regulations Precludes Kentucky Spirit's Unilateral Re-Interpretation Of Those Regulations.

Kentucky Spirit's second argument is that, based on its own reading of the Medicaid regulations, CHFS is in violation of the regulations by using Medicaid reimbursements for school health services. Kentucky Spirit provides a detailed argument based on a highly technical reading of the contract and the administrative regulations. More to the point, the Kentucky Spirit claim in this regard is in direct conflict with the long-standing interpretation by CHFS of

the scope of Medicaid covered services for children. Under the longstanding interpretation of CHFS, the fact that covered public health services are delivered in the school building rather than the public health department building is immaterial to determining coverage under Medicaid.

Prior to 2011, local health departments provided the exact same services which fall under Preventive Health Services as defined by what is now 907 KAR 11:360 to Medicaid-eligible children in school-based clinics, administered by RNs and LPNs, billed at rates set by the Medicare Physician Fee Schedule, which were routinely reimbursed without complaint. Kentucky Spirit is not free to disregard this longstanding interpretation of Medicaid eligibility and unilaterally re-interpret these regulations to the detriment of local public health departments that have relied on this administrative interpretation to their detriment.

First, the doctrine of contemporaneous construction prevents an agency, or contractors delegated to carry out agency tasks, from unilaterally revoking a long standing interpretation of a statute made by an agency. GTE v. Revenue Cabinet, 889 S.W.2d 788, 792 (Ky. 1994). In GTE v. Revenue Cabinet, the Kentucky Supreme Court defined the doctrine of contemporaneous construction: “This Court has held that interpretation of a statute made by an administrative agency, once made and applied over a long period of time, cannot be unilaterally revoked by the agency.” Id. at 792. “Practical construction of an ambiguous law by administrative officers continued without interruption for a very long period is entitled to controlling weight.” Grantz v. Grauman, 302 S.W.2d 364 (Ky. 1957). “The doctrine of contemporaneous construction precludes the use of internal policy changes by administrators to reverse and overturn long-standing interpretations that have, over time, become part and parcel of the fabric of the law being administered.” Revenue Cabinet v. Lazarus, Inc., 49 S.W.3d 172, 174 (Ky. 2001). *See also* Revenue Cabinet v. Humana, Inc., 998 S.W.2d 494 (Ky. App. 1999).

The fact that CHFS made payments for services at school-based sites to Medicaid-eligible children administered by RNs shows that the CHFS interpreted these regulations to cover such operations. CHFS notes that its longstanding understanding of the MCO Contract, KAR 11:360, and the ASPA all require Kentucky Spirit to offer participation in the Managed Care program to public health departments, without restrictions on where Medicaid recipients receive services. (Defendant's Response to Plaintiff's Motion for Summary Judgment, p. 7). Much like the agency itself, Kentucky Spirit, as a contractor of the agency, is barred by the doctrine of contemporaneous construction from altering the agency's interpretation of its own statute and regulations. If Kentucky Spirit disagrees with the Cabinet's past policy on scope of coverage, it is free to contest that interpretation in court (and obtain prospective relief), or to seek to obtain an unambiguous change in policy through contract negotiations. But it is not free to unilaterally change this interpretation of the law, and then to retroactively impose the new interpretation on providers who relied in good faith on the Cabinet's past interpretation in providing services and incurring costs.

Second, agencies, as a matter of comity, should be given deference in interpreting their own statutes and regulations in highly technical matters such as application of the Medicaid reimbursement rules, because the agency has special expertise in that subject matter. *See Cabinet for Human Resources v. Jewish Hospital*, 932 S.W.2d 388 (Ky. App. 1996). Kentucky Spirit's attempt to restrict Preventive Health Services must fail here based on agency deference.

Third, the rules of contractual construction favor the Commonwealth, as this longstanding interpretation formed part of the basis of the bargain when Kentucky Spirit bid on the contract to provide Managed Care to these programs. In general, a contract's terms are not

liable to definition from extrinsic sources, but when a term is ambiguous or open to two or more interpretations, extrinsic evidence may be used to resolve the ambiguity.

Here the historical record clearly shows Medicaid reimbursements to local health departments for Preventive Health Services to Medicaid-eligible children in schools. Kentucky Spirit claimed in this Court's hearing that it was ignorant of any previous payment practices. Yet Kentucky Spirit is a sophisticated actor in this field, with Medicaid contracts in sixteen states, and a long history operating in the state of Kentucky. Sophisticated actors are assumed in the law to understand contracts they are bidding on. Any minor ambiguities are to be resolved in the government's favor when the contract at issue is a government contract. Louisville & Jefferson County Metropolitan Sewer Dist. v. St. Matthews Sanitary Ass'n, 208 S.W.2d 490, 491 (Ky. 1948). "Where the public interest is affected, an interpretation is preferred which favors the public." Codell Construction Co. v. Com. of Ky., 566 S.W.2d 161, 164 (Ky. App. 1978). Here the public interest clearly weighs in favor of maintaining Medicaid coverage as it existed under the previous fee-for-service system.

This is not a situation in which the Cabinet previously denied coverage, and lured Kentucky Spirit into a contract, and then argued for a new interpretation to extend coverage. Rather, it is a situation in which the Cabinet historically extended coverage, and Kentucky Spirit now seeks to unilaterally impose a changed interpretation denying coverage.

The Court recognizes that there is exclusionary language in the contract which, taken out of context, provides some support for Kentucky Spirit's argument. It is clear that under both the past practice of the Cabinet, and the MCO contract, Medicaid will not reimburse for the services of a school nurse whose salary is paid for by the local board of education. Kentucky Spirit takes this language and seeks to argue that no Preventive Health Services provided by any nurse on

school property is eligible for reimbursement under Medicaid. This argument defies common sense, and is utterly inconsistent with the past practices of the Cabinet and local health departments. Likewise, the Kentucky Spirit's argument that higher reimbursement rate is justified only if the services are offered at a health department facility under the immediate personal supervision of a physician is misplaced. Nurses in public health departments are subject to physician supervision whether they are physically in the building or not, and local health departments incur many of the same direct and indirect costs for these Preventive Health Services regardless of the location of the physical site on which the services are rendered. In fact, the costs may be greater when the services are provided off-site, and likewise, the public benefit is also greater when Preventive Health Services are obtained by more Medicaid eligible children.


Finally, CHFS' construction of these Medicaid regulations is correct because it is the interpretation most consistent with legislative intent. The legislature directs courts to construe Medicaid statutes in favor of expanded coverage, rather than more restricted coverage in the mission statement of the statute. As stated in KRS 205.560(1), the administrative regulations adopted to define the scope of coverage are required to insure "the greatest amount of medical care as defined in KRS 205.510 consonant with funds available." The intent of the Kentucky legislature in the switch from fee-for-service to Managed Care Medicaid services was meant neither to expand coverage nor restrict it. (CHFS Oral Argument, *Kentucky Spirit v. CHFS*, Franklin Circuit Court, May 6, 2013). The ASPA also requires local health departments to "make necessary and appropriate arrangements to assure the availability of Covered Services to Covered Persons during business hours consistent with State/local health departments." (AR, p. 106). A school is the most logical location for Preventive Health Services by local health

departments to Medicaid-eligible school children. To restrict Preventive Health Services to only local health department buildings with physicians present in the building would mean an increased number of students would go without preventive medical care such as immunizations and end up costing the taxpayers, and Kentucky Spirit, far more as a result of increased serious illness and injury.

CONCLUSION

For the reasons stated above, this Court hereby **GRANTS** the Commonwealth's Motion for Summary Judgment, and **DENIES** the summary judgment motion of Kentucky Spirit. The parties are directed forthwith to make the disputed payments to the local health departments, and to make appropriate adjustments in the payments made by the Commonwealth to Kentucky Spirit under its contract with the state.

So **ORDERED** this 28th day of May, 2013. This is a final and appealable order and there is no just cause for delay.


PHILLIP J. SHEPHERD, JUDGE
Franklin Circuit Court, Division 1

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