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June 24, 2010

The Honorable Timothy Z. Jennings
New Mexico State Senator
P.O. Box 1797
3968 Cottonwood Lane
Roswell, NM 88202-1797

Re: Opinion Request – Payments to Managed Care Organizations

Dear Senator Jennings:

You requested an opinion addressing certain practices by the Human Services Department ("HSD") in connection with payments to managed care organizations ("MCOs") and health care providers who participate in programs HSD administers. You ask:

1. Is it illegal for HSD to: (a) retroactively change rates to increase payments made to MCOs under State Medicaid and State Coverage Insurance ("SCI") programs or (b) retroactively increase provider rates so that specific unspent appropriations will not revert to the general fund?

2. May appropriations intended for expenditure during one fiscal year be expended by an MCO under contract with HSD on services delivered in a subsequent fiscal year?

3. What recourse does the state have to remedy these issues if retroactive payments to contractors are not allowed under the New Mexico Constitution?

Regarding your first two questions, we conclude, based on the information available to us at this time, that: (1) it is not necessarily illegal for HSD to retroactively change rates to increase payments to MCOs or to retroactively increase provider rates; and (2) as long as appropriations to HSD are spent by HSD during the specified fiscal year, it does not matter that an MCO who receives the appropriated funds uses them for services delivered in a subsequent fiscal year. Because we are unable to conclude that the payments to contractors at issue are unconstitutional, we do not address your third question.

1. Retroactive Rate Changes

According to your request, HSD "retroactively" increased rates paid to MCOs on at least two occasions. First, you contend that the Interagency Behavioral Health Collaborative, of which HSD is a member, amended a contract with ValueOptions New Mexico that increased rates and resulted in an additional $11 million in managed care payments. Second, HSD allegedly retroactively increased managed care payments, totaling approximately $25 million, through Molina Healthcare of New Mexico to the University of New Mexico Hospital under the SCI program.

Under the Medicaid and SCI programs, HSD's practice is to enter into contracts with a managed care organization to provide health care and related services for qualified recipients. HSD has entered into such contracts with ValueOptions[1] and Molina Healthcare. See, e.g., Statewide Behavioral Health Services Contract between State of New Mexico Interagency Behavioral Health Purchasing Collaborative and Value Options New Mexico, Inc. (2008-2009) ("ValueOptions Contract"); Medicaid Managed Care Services Agreement between HSD and Molina Healthcare of New Mexico (2008-2012) ("Molina Healthcare Agreement").[2]

Under a typical contract, HSD agrees to pay the contractor a "capitated amount" for the provision of managed care benefits. See, e.g., ValueOptions Contract, § 7.6; Molina Healthcare Agreement, § 2.12(C). See also 8.305.3.9 NMAC (2009) (providing that HSD "shall award risk-based contracts to MCOs and … the [behavioral health single statewide entity] … and enter into prepaid capitation agreements…"). HSD's regulations governing Medicaid managed care and SCI define "capitation" as a set "per-member, monthly payment to an MCO that covers contracted services and is paid in advance of service delivery." 8.305.1.7(C)(1) NMAC (2009); 8.306.1.7(C)(1) NMAC (2009).[3] The MCO uses the compensation it receives from HSD to reimburse health services providers who participate in the program.

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[1] The state's contract with ValueOptions was entered into by the Interagency Behavioral Health Purchasing Collaborative, which oversees the provision of behavioral health care under the state's Medicare and SCI programs. HSD is responsible for awarding the behavioral health services contract on behalf of the Collaborative and providing oversight "as it relates to Medicaid behavioral health services, providers and members." See 8.305.3.9 and 8.305.3.10 NMAC (2009).

[2] The cited contracts, both of which are posted on HSD's website (www.hsd.state.nm.us), are used for illustrative purposes only. We do not know whether the rate increases you question were made under the cited contracts or other contracts involving ValueOptions and Molina Healthcare.

[3] Depending on the services involved, HSD may pay an MCO compensation in addition to the capitation amounts. For example, under the SCI programs, contractors are paid premiums by employers and members. See Molina Healthcare Agreement, § 2.12(G).

The contracts provide for changes in the capitation rates during the contract term. Adjustments are allowed "based on factors such as changes in the scope of work, ... inflation, significant changes in the demographic characteristics of the member population, or disproportionate enrollment selection of the Contractor by members in certain rate cohorts." See Molina Healthcare Agreement, § 2.12(E); ValueOptions Contract, § 7.6(F). See also ValueOptions Contract, § 7.9 (allowing modification of the contract if, among other things, the parties "determine that the existing negotiated rates are not sufficient to fund all services required" under the contract). In some cases, contractors are required to pay certain providers increased reimbursement amounts if HSD obtains additional funding for that purpose and passes it on to the contractors. See Molina Healthcare Agreement, § 2.12(O); ValueOptions Contract, § 7.6(F).

State contracts are limited by, among other things, the New Mexico constitution's limitations on "extra compensation." Specifically, Article IV, Section 27 provides, in pertinent part:

> No law shall be enacted giving any extra compensation to any public officer, servant, agent or contractor after services are rendered or contract made....

This provision precludes a state agency from paying a contractor an amount not stated in the contract as additional remuneration for the services specified in the contract. Cf. N.M. Att'y Gen. Op. No. 62-28 (1962) ("pay increases cannot be granted in regard to services already rendered"); N.M. Att'y Gen. Op. No. 57-17 (1957) (constitution prohibits the legislature from giving state employees a retroactive pay increase after their services have been rendered).

Article IV, Section 27 prohibits "**extra** compensation ... after services are rendered or contract made..." (emphasis added). "Extra" or retroactive compensation, for purposes of the constitutional prohibition, is compensation that is not agreed to before services are rendered. See N.M. Att'y Gen. Op. No. 57-17 (1957) (legislature could not, by emergency appropriation, "give retroactive pay increases to state employees" after those services "have already been rendered"); N.M. Att'y Gen. Op. No. 4440 (1944) (teachers could not be paid a bonus not called for in their contracts "as an additional emolument" for services already rendered). If, when it is made, a public contract specifies that the amounts paid the contractor may be adjusted under certain circumstances, then increased payments made according to those terms will not be "extra compensation" in violation of the constitution. See N.M. Att'y Gen. Op. No. 77-8 (1977) (school district may pay retiring employees for unused sick leave without violating Article IV, Section 27 if the benefit was established by contract as part of the compensation for services rendered).

As described above, it appears that HSD's contracts with MCOs generally allow adjustments in compensation. Without additional information suggesting that the rate

changes resulting in increased payments to MCOs that you describe were not authorized by contract, we are unable to conclude that they violated Article IV, Section 27.[4]

2. Reversion of Appropriated Amounts Paid to MCOs

According to your request, the legislature appropriated funding for fiscal years 2007 and 2008 to cover increased reimbursement rates paid to providers under MCO arrangements in the Medicaid program. You contend that HSD paid MCOs the appropriated amounts, but the MCOs did not spend the money during the specified fiscal years.

The New Mexico Constitution provides, in pertinent part: "[e]xcept interest or other payments on the public debt, money shall be paid out of the treasury only upon appropriations made by the legislature." N.M. Const. art. IV, § 30. The constitutional requirement for legislative appropriations means that a state agency cannot spend money appropriated for use in one fiscal year to meet the agency's obligations in subsequent fiscal years. See N.M. Att'y Gen. Op. No. 67-71 (1967) (Board of Finance could use appropriated funds only for emergencies that arose during the fiscal year covered by the appropriation).

In 2006, the legislature appropriated money from the general fund to HSD for increased Medicaid payments to physicians. See General Appropriation Act of 2006, Laws 2006, ch. 109, § 4(F). The appropriation was made for expenditure in fiscal year 2007. Id. § 3(C). In 2007, a similar appropriation was made to HSD for expenditure in fiscal year 2008 to increase Medicaid payments to providers. See General Appropriation Act of 2007, Laws 2007, ch. 28, §§ 3(C), 4(F). Both Acts direct that amounts appropriated to an agency that are not spent by the end of the fiscal year revert to the general fund. See General Appropriation Act of 2006, § 3(E); General Appropriation Act of 2007, § 3(E).

The 2006 and 2007 appropriations acts required HSD to spend its appropriations for increased provider payments by the end of the specified fiscal years. As discussed above, HSD's contracts with MCOs for Medicaid services require HSD to pay the MCO for its services. The MCO, in turn, uses the payments from HSD to reimburse participating health care providers. Consequently, HSD could spend the appropriated amounts for increased provider payments by making the payments directly or through its contractual payments to an MCO.[5]

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[4] Your request questions retroactive increases in provider rates "so that specific unspent appropriations would not revert to the general fund." We believe that as long as the provider rate increases were authorized under the contracts between HSD and the MCOs, it is immaterial that the money used to fund the increases would have otherwise reverted to the general fund.

[5] The managed care service contracts discussed in the text require the MCOs to pass on additional funding for increased reimbursements to specific service providers and reserve to HSD the right to direct payments to providers if the MCOs fail to comply with the

Any amount that HSD had not spent for increased provider payments by the end of the designated fiscal year would revert to the general fund. Because it applied only to appropriated amounts that remained unspent by HSD, the reversion requirement would not extend to appropriated amounts HSD paid during the fiscal year to MCOs, even if the MCOs used the amounts for increased provider payments in subsequent fiscal years.

If we may be of further assistance, please let us know. Your request to us was for a formal Attorney General's Opinion on the matters discussed above. Such an opinion would be a public document available to the general public. Although we are providing you our legal advice in the form of a letter instead of an Attorney General's Opinion, we believe this letter is also a public document, not subject to the attorney-client privilege. Therefore, we may provide copies of this letter to the public.

Sincerely,

ELIZABETH A. GLENN
Assistant Attorney General

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pass-through requirements. See Molina Healthcare Agreement, § 2.12(O); ValueOptions Contract, § 7.6(F).