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STATE OF OREGON
LEGISLATIVE COUNSEL COMMITTEE

December 1, 2015

Senator Chip Shields
900 Court Street NE S421
Salem OR 97301

Re: Statutory or contract authority of the Oregon Health Authority to reclaim amounts paid to coordinated care organizations

Dear Senator Shields:

You requested a legal opinion as to whether:

> 1. The Oregon Health Authority (OHA) has the statutory authority to reclaim dollars paid to coordinated care organizations (CCO).
>
> 2. The existing contracts between the OHA and the CCOs permit such actions.

Short answer

Our legal research and review of the contract language leads us to conclude that the answer to both questions is no. However, these questions may be at issue in pending litigation between FamilyCare, Inc. and the OHA, and facts or arguments may be revealed during the course of that litigation that might lead a court to a different conclusion.

Legal analysis

Statutory authority under Oregon law

ORS 414.625 requires the OHA to adopt, by rule, criteria for the certification of CCOs, including a requirement that CCOs operate "within a fixed global budget." ORS 414.025 (6) defines a "global budget" as:

> . . . a total amount established *prospectively* by the Oregon Health Authority to be paid to a coordinated care organization for the delivery of, management of, access to and quality of the health care delivered to members of the coordinated care organization. (Emphasis added.)

Therefore, the OHA's retroactive adjustment to the CCO capitation rates and the OHA's recovery of the amounts paid to CCOs based on the retroactive adjustment do not appear to be supported by Oregon law.[1]

[1] ORS 414.735 provides that "[i]f insufficient resources are available during a contract period" to pay for all covered services, the "reimbursement rate for providers and plans established under the contractual agreement may not be reduced." Instead, the OHA must obtain the Legislative Assembly's approval for a reduction in the scope of services sufficient to absorb the reduction in resources.

Federal law

Federal regulations permit states to enter into comprehensive risk contracts with managed care organizations (MCO).[2] Contracts may include risk corridor arrangements, withhold arrangements and incentive arrangements. The capitation payments to MCOs under risk contracts must be actuarially sound.[3]

In a risk corridor arrangement, "States and contractors share in both profits and losses under the contract outside of [a] predetermined threshold amount, so that after an initial corridor in which the contractor is responsible for all losses or retains all profits, the State contributes a portion toward any additional losses, and receives a portion of any additional profits."[4] Capitation payments made under a risk corridor arrangement that exceed approved capitation payments are not considered actuarially sound.

The current CCO contracts, both the amended and unamended versions, refer to the operation of a CCO risk corridor.[5] Current federal regulations governing risk corridor arrangements do not provide for any retroactive adjustments to the rates.[6]

The Centers for Medicare and Medicaid Services (CMS) published proposed regulations and amendments to its current regulations governing managed care contracts on June 1, 2015. The proposed regulations include a provision that would allow a "retrospective risk adjustment."[7] However, those provisions are not yet in effect. Therefore, we could find no legal authority under existing federal law for the OHA to reclaim amounts paid to CCOs based on a retroactive adjustment to the rates.

CCO contract terms

The current CCO contract provides that "CCO Payment Rates may be changed only by amendment to this Contract pursuant to Exhibit D, Section 20 of this Contract."[8] Exhibit D, section 20 of the contract states that the "OHA will send to Contractor the necessary Contract amendments no later than 15 days before the proposed effective date of the amendment; and 30 days for review of a rate sheet before the proposed effective date of the amendment of the CCO Payment Rates." [9]

The amendments to the 2015 contracts allow the OHA to adjust future payments to reflect changes in the rates that are made by an amendment to the contract "that has retroactive effect." However, the contract amendments do not change the requirement that the OHA submit changes in payment rates to CCOs at least 30 days before the effective date of the modified rates. Therefore, both the current and amended contracts envision that rates be established prospectively and do not appear to support the OHA's reclaiming of amounts paid to CCOs based on a retroactive adjustment to rates.

The contract has always allowed the OHA to recover an overpayment if the CCO was not entitled to the payment. However, the OHA's claim to recover the difference between the

[2] 42 C.F.R. 438.6(b). CCOs are the same as managed care organizations.
[3] 42 C.F.R. 438.6(c)(2)(i).
[4] 42 C.F.R. 438.6(c)(1)(v).
[5] This appears to be inconsistent with the terms and conditions of Oregon's demonstration project ("the waiver"). The terms and conditions authorize only a withhold arrangement and an incentive arrangement.
[6] *See* 42 C.F.R. 438.6.
[7] Rate Development Standards, 80 Fed. Reg. 31, 258 (proposed Jun. 1, 2015) (to be codified at 42 C.F.R. 438.5).
[8] Health Plan Services Contract at 125, http://www.oregon.gov/oha/OHPB/docs/2015_CCO_Model_Contract.pdf (visited November 30, 2015).
[9] *Id.* at 148.

contracted rate and the retroactively adjusted rate is quite different from an overpayment. In this situation the CCO was entitled to the payments received under the terms of the contract existing at the time the payments were executed. The OHA's retroactive adjustment to the rate amounts to a retroactive amendment to the contract, which, as explained in the preceding paragraph, appears to be in violation of the contract terms.

It is worth noting that the OHA recently sent out contracts for 2016 and that in the new contracts, the OHA has deleted the requirement that amendments to the payment rates be sent in advance of the proposed effective date of the amended rates.[10] The new contracts also make three other changes that authorize the OHA authority to reclaim amounts paid. Specifically, in the 2016 contracts:

- Section I.A. is revised to add the sentence, "In the event CMS fails to approve the proposed 2016 CCO Payment Rates prior to the Effective Date, OHA shall pay Contractor at the proposed CCO Payment Rates, subject to adjustment upon OHA's receipt of CMS approval or modification of the proposed CCO Payment Rates."
- Exhibit D, section 10.e(2)(d) adds a provision allowing the OHA to terminate a contract if the CCO "has failed to . . . meet the applicable requirements of . . . 1903(m) . . . of the Social Security Act." Section 1903(m) of the Social Security Act requires capitation rates to be actuarially sound.[11]
- Exhibit D, section 20.b(4) was added to permit the OHA to amend a contract "[t]o the extent such changes are required to obtain CMS approval of this Contract or the CCO Payment Rates."

We hope you find this helpful. Please do not hesitate to contact us if you have additional questions or concerns.

The opinions written by the Legislative Counsel and the staff of the Legislative Counsel's office are prepared solely for the purpose of assisting members of the Legislative Assembly in the development and consideration of legislative matters. In performing their duties, the Legislative Counsel and the members of the staff of the Legislative Counsel's office have no authority to provide legal advice to any other person, group or entity. For this reason, this opinion should not be considered or used as legal advice by any person other than legislators in the conduct of legislative business. Public bodies and their officers and employees should seek and rely upon the advice and opinion of the Attorney General, district attorney, county counsel, city attorney or other retained counsel. Constituents and other private persons and entities should seek and rely upon the advice and opinion of private counsel.

Very truly yours,

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By
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[10] 2016 CCO Model Contract template, Exhibit D, section 20.b(4).
[11] Codified at 42 U.S.C. 1396b(m)(2)(A)(iii).
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