PUBLIC INTEREST LAW
CENTER OF PHILADELPHIA
AFFILIATED WITH THE LAWYERS COMMITTEE FOR CIVIL RIGHTS UNDER LAW

January 28, 2013



**VIA EMAIL AND FIRST-CLASS MAIL**
Kyle Applegate, Esquire
Appeals Officer
Pennsylvania Office of Open Records
Commonwealth Keystone Building
400 North Street, 4th Floor
Harrisburg, PA 17120-0225
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**Re: PILCOP v. Department of Public Welfare, AP 2012-2017**

Dear Mr. Applegate:

This letter brief is submitted by the undersigned on behalf of Requester, the Public Interest Law Center of Philadelphia ("PILCOP").

## I. Introduction

This appeal involves a Request addressed to the Pennsylvania Department of Public Welfare ("DPW") for records in its "possession, custody, or control" concerning Pennsylvania's Medical Assistance (i.e., Medicaid) program in the five counties of Southeastern Pennsylvania ("SEPA"): Bucks, Chester, Delaware, Montgomery, and Philadelphia. In particular, the Request seeks information about the provision of dental services in SEPA by the Medicaid program. DPW provides Medicaid dental services in SEPA by contracting with managed care organizations ("MCOs"), which are sometimes also referred to as health maintenance

organizations or "HMOs," but which hereinafter in this brief will simply be referred to as the MCOs. During the period to which the Request applies, i.e., July 1, 2008 through June 30, 2012, there were five MCOs with which DPW contracted to provide Medicaid dental services in SEPA: Keystone Mercy Health Plan ("Keystone Mercy"), Health Partners of Philadelphia, Inc. ("Health Partners"), Aetna Better Health, Inc. ("Aetna"), United Healthcare Community Plan ("United") and Health America Pennsylvania, Inc. d/b/a Coventry Cares ("Coventry"). Four of these MCOs—all except United—have subcontracted most of their provision of dental services through the same dental subcontractor, DentaQuest, LLC ("DentaQuest").[1] The fifth MCO, United, also subcontracted most of its provision of dental services through a difference dental subcontractor, Dental Benefit Providers, Inc. ("DBP").

Of the somewhat more than 500,000 individuals enrolled in DPW's Medicaid program in SEPA, about 465,000 are enrolled through Keystone or Health Partners. Accordingly, a single dental subcontractor, DentaQuest, is responsible for contracting with dentists and other providers of dental services for the vast majority of SEPA Medicaid enrollees.[2]

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[1] A DentaQuest Regional Vice President has averred that Aetna, Keystone Mercy, and Health Partners subcontract with Dentaquest. Affidavit of Mark Haraway, at ¶ 2, attached as Exhibit D to Letter Brief of Christopher H. Casey, Esq., dated Jan. 14, 2013. Coventry's Vice President of Operations has additionally averred that Coventry subcontracts with DentaQuest. Affidavit of Nancy Hardy, at ¶ 7, attached as Exhibit 3 to Letter Brief of Karl S. Myers, Esq., dated Jan. 14, 2013.

[2] See Requester's Application for Authorization to Compel the Deposition of Michael Haraway, filed Jan. 17, 2013, at 4.

The broad thrust of the opposition by the five MCOs, DentaQuest, and DBP (collectively, the "Intervenors") to the Request herein is that the documents requested should be protected as "trade secrets" and "confidential proprietary information" to preserve competitive advantages of various of the MCOs. The OOR has recently rejected just such an argument in a legally and factually similar case involving mostly the same parties. See Eiseman v. DPW, 2012 PA O.O.R.D. LEXIS 1198, No. AP 2011-1098 (Pa. OOR Sept. 17, 2012). The instant case involves one additional fact that is simple and inescapable: a single company, DentaQuest, handles the subcontracts for four of the five MCOs, which account for the vast majority of the SEPA Medicaid program, and so there are effectively no secrets or confidences that foster competition in most of the program. DentaQuest, as the sole subcontractor for four MCOs, must know (a) what each MCO pays it; and (b) the fees DentaQuest pays to the dentists and other providers of dental services who serve the enrollees of four of the five MCOs. "Trade secret" and "confidential proprietary information" protections thus do not operate to foster competition among the MCOs accounting for the vast majority of Medicaid enrollees in the SEPA market.

## II. Discussion

The instant proceeding was initiated by a Request dated October 3, 2012 and is entitled PILCOP v. Department of Public Welfare, OOR Docket No. AP 2012-1017. But the instant proceeding must be understood and viewed by reference to a prior proceeding initiated by a request dated June 17, 2011, which was decided by

the OOR in Eiseman v. Department of Public Welfare, OOR Docket AP 2011-1098. Like the instant proceeding, the prior proceeding involved DPW's operation of the Medicaid program in SEPA, and in both proceedings the same five MCOs intervened and opposed the Request. As will be more particularly set forth below, a number of findings of fact and conclusions of law in the prior proceeding will, therefore, determine the resolution of questions in the instant proceeding.

A. The Relevant Requests in Each Proceeding

In the instant proceeding, the Request dated October 3, 2012 asked for:

> Each and every document, including contracts, rate schedules and correspondence in DPW's possession, custody, or control that . . . sets forth the amount for any one or more dental procedure codes that any Medicaid HMO and/or Medicaid Dental Subcontractor pays or has paid to dentists (and/or other providers of dental services) for the provision of dental services to Medicaid recipients in Southeastern Pennsylvania.
>
> and
>
> Each and every document, including contracts, rate schedules and correspondence in DPW's possession, custody, or control that . . . otherwise establishes the rate of payment by which any Medicaid HMO and/or Medicaid Dental Subcontractor compensates or has compensated dentists (and/or other providers of dental services) for the provision of dental services to Medicaid recipients in Southeastern Pennsylvania.

By contrast, on June 17, 2011, in the prior proceeding, the Requester had, among other requests, asked for:

> Each and every document including correspondence and appendices, in DPW's possession, custody, or

> control that sets forth the amount for any one or more individual dental procedure codes that any Medicaid HMO pays to provide dental services to Medicaid recipients in Southeastern Pennsylvania.

The Hearing Examiner in the prior proceeding ruled, in response to objections from the MCOs' counsel, that the immediately-above-quoted language did not extend to amounts that the dental subcontractors pay to dentists or dental providers, although the OOR did rule in the prior proceeding that DPW must produce records of what the MCOs have paid directly to dental providers as well as to dental subcontractors to carry out the program. See Eiseman v. DPW, AP 2011-1098, at 16-18. Moreover, it appears from DPW's November 13, 2012 response to the instant appeal, see pp. 1-2 thereof, that DPW understands that the amounts the MCOs directly pay to dental providers as well as what the MCOs pay as capitation to the dental subcontractors were covered by the June 17, 2011 Request and, therefore, excluded from the meaning of the October 3, 2012 Requests. Accordingly, the decision in Eiseman v. DPW requires DPW to produce the documents in DPW's possession, custody, or control concerning the capitation rates the five MCOs pay their dental subcontractors, and that matter is not before the OOR in this proceeding as some of the affidavits submitted in support of the MCO and dental subcontractors' briefs sometimes appear to suggest by the extent to which they dwell on the subject of those capitation rates.

B. The Key Determinations of the Decision in AP 2011-1098

In its September 17, 2012 decision upon the June 17, 2011 Request for documents between the MCOs and their contractors, the OOR applied two key legal determinations that also control the outcome of the instant proceeding.

First is the decision in Lukes v. Department of Public Welfare, 976 A.2d 609, 626-27 (Pa. Commw. Ct. 2009). The OOR in its September 17, 2012 decision correctly held that, despite the fact the Lukes decision was made under the predecessor Right-to-Know Law, Lukes should be applied under the current Right-to-Know Law to require DPW to produce documents that set forth how DPW's agents, including Medicaid MCOs, such as the Interveners here, are disbursing public funds, notwithstanding protections for "trade secrets" in the current Right-to-Know Law.[3]

In Lukes, the requester sought documents that showed how much DPW was paying through Medicaid MCOs to certain hospitals for Medicaid patients. Here, Requester is seeking information on how much of DPW's Medicaid funds are being

[3] The Intervenors cite cases that distinguish Lukes on the grounds that it was decided under a prior version of the Right-to-Know Law. These cases are readily distinguishable, because they deal solely with Lukes's interpretation of what constitutes an agency's "possession" of a document. Lukes remains binding law for the proposition that the records involved here are not exempt from being public documents as "trade secrets." The definition of "trade secret" in force in the instant case, 65 P.S. § 67.102, is identical in all material respects to the language defining "trade secret" in Lukes, and the Pennsylvania Supreme Court has recognized that Lukes has continuing vitality under the new version of the statute, see SWB Yankees LLC v. Wintermantel, 45 A.3d 1029, 1044 n.19 (Pa. 2012). The OOR should therefore apply Lukes to the instant matter.

paid through the MCOs and their dental subcontractors to dental providers who take care of Medicaid patients.

Second, the OOR's decision in the prior case correctly held that both the "trade secret" and "confidential proprietary information" protections of the current Right-to-Know Law, 65 P.S. § 67.708(b)(11), were inapplicable, because of the provision at 65 P.S. § 67.708(c), which applies to "financial records such as those demanded by the Request." Eiseman v. DPW at 15. That holding of the OOR applies to keep any "trade secret" or "confidential proprietary information" exception from shielding from disclosure the documents sought here.

"Financial records" are defined, in pertinent part, by the Right-to-Know Law as follows:

> "FINANCIAL RECORD." Any of the following:
>
> (1) Any account, voucher or contract dealing with:
>
> (i) The receipt or disbursement of funds by an agency or
>
> (ii) An agency's acquisition, use or disposal of services, supplies, materials, equipment or property.

65 P.S. § 67.102.[4] Clearly, the substantial funds DPW funnels through the MCOs via the dental subcontractors to the dentists who provide services to SEPA Medicaid enrollees qualify as DPW's "use" of "services" to carry out its Medicaid program.

[4] The definition of financial records quoted in the letter brief submitted by Mr. Myers at p. 6 n.5 omits the language of subsection (ii) and, therefore, should be disregarded by the Appeals Officer.

The Intervenors contend in their letter briefs that the dental subcontractors' records of what they pay dentists and dental providers do not meet the above definition because the MCOs funnel most of the dollars for dental care through dental subcontractors rather than directly to the dentists. But if simply employing a subcontractor is all a Medicaid MCO would have to do to avoid public scrutiny of its use of public funds, the Right-to-Know Law's provisions could be easily avoided. This cannot be what the Right-to-Know Law means. See SWB Yankees v. Wintermantel, 45 A.3d 1029 (Pa. 2012) (RTKL decision requiring a public authority, which had been set up to create and operate a sports stadium, to disclose the bids made by all prospective concessionaires to a contractor of the authority who was managing the stadium business for the authority); see also id. at 1044 n.19 (noting the continuing vitality of Lukes "particularly when considering that the Legislature intended greater, not lesser, openness under the new open-records regime").

C. The MCOs' Allegedly "Secret" and "Confidental" Information Sought Here is Already Known to Outsiders

The reasoning in the OOR decision in AP 2011-1098 applies with even greater force to the present request, as a single business—DentaQuest—knows all of the "secret" and "confidential" information of four of the MCOs.[5] The MCOs have all taken the position that the disclosure of their rate information to their competitors would substantially harm their ability to compete fairly in the market for reasonable

[5] The discussion in this subsection does not apply to United, which does not subcontract with DentaQuest. The rest of the analysis in this letter brief applies with equal force to all five MCOs.

contract rates. *E.g.*, Affidavit of William C. Morsell ("Morsell Aff."), at ¶ 10, attached as Exhibit C to Letter Brief of Christopher H. Casey, Esq., dated Jan. 14, 2013. Yet each of the four MCOs discloses such information to an agent, DentaQuest, that also acts as agent to competitor MCOs.[6]

The Intervenors cite Bimbo Bakeries USA, Inc. v. Botticella, 613 F.3d 102, 109 (3d Cir. 2010), for the factors to determine whether information is a trade secret. The first of these factors—"the extent to which the information is known outside of the company's business"—overwhelmingly militates against a finding of trade secrecy here, as the information is known by an agent of the company's competitors. The second and third factors—"the extent to which the information is known by employees and others involved in the company's business" and "the extent of the measures taken by the company to guard the secrecy of the information"—are also unsatisfied, because of the nebulous and general averments in the affidavits.[7] And to

[6] Mr. Morsell makes the odd claim that "[o]ther than required reporting to governmental agencies or as required by applicable law, Keystone never discloses provider rates to anyone outside Keystone." Morsell Aff. ¶ 6. These assertions are plainly incomplete, as Keystone discloses its provider rates to **DentaQuest** as a necessary component of their business negotiations. In addition, individual dentists and other providers who treat Keystone enrollees know well how much Keystone pays them, but no evidence in the record of this case establishes that Keystone or DentaQuest requires providers to keep confidential such information concerning Keystone enrollees. The affiants from Health Partners and Aetna make assertions that are identical to Mr. Morsell's and that are flawed for exactly the same reasons.

[7] A DentaQuest official has submitted an affidavit making conclusory averments such as that "DentaQuest takes steps to ensure that internal disclosure of rate information is as limited as possible." Affidavit of Mark Haraway, at ¶ 6, attached as Exhibit D to Letter Brief of Christopher H. Casey, Esq., dated Jan. 14, 2013. But this

the extent that the test is different for "confidential proprietary information," here the information sought has already been disclosed to the very party in whose hands it could do the most harm: a subcontractor negotiating on behalf of competitor MCOs. See also Moffitt v. Pa. Dep't of Gen. Servs., Docket No. AP 2012-147, 2012 PA O.O.R.D. Lexis 1297, at *10 (Pa. OOR Oct. 15, 2012) (the party asserting trade secrecy or confidential proprietary information must "establish how disclosure would harm [its] competitive position").

D. The Documents Sought By the Instant Request Are Within DPW's Possessions, Custody, or Control

The Intervenors contend in their briefs that the documents disclosing the rates paid to dental providers by DentaQuest and DBP are not in the "possession" of DPW and, therefore, that Requester's appeal should be rejected. DPW has made no such representation.

The Intervenors' argument is belied by the terms of the standard agreement that is signed each year by DPW and by each of the MCOs.[8] Under the terms of this standard agreement, "all contracts or Subcontracts that cover the provision of medical services to the PH-MCO's Members must include . . . [a] requirement that ensures that the Department [of Public Welfare] has ready access to any and all

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affidavit is notably vague about which DentaQuest employees have access to such information, see id. ¶¶ 6-7, and it says nothing about protections to keep any one DentaQuest employee from accessing the information of more than one MCO.

[8] These contracts are judicially noticeable public records available (with redactions) pursuant to Chapter 17 of the RTKL, 65 P.S. §§ 67.1701-.1702, on the website of the Pennsylvania Treasury Department, http://www.patreasury.gov/eContracts.html.

documents and records of transactions pertaining to the provision of services to Recipients." HealthChoices Physical Health Agreement effective July 1, 2010, attached as Ex. A, at 163.[9] It is beyond dispute that documents indicating provider payment rates, including contracts between an MCO and a dental subcontractor, "pertain[] to the provision of services to" Medical Assistance enrollees.

Moreover, the Right-to-Know Law defines "agency possession" as follows:

> A public record that is not in the possession of an agency but is in the possession of a party with whom the agency has contracted to perform a governmental function on behalf of the agency, and which directly relates to the governmental function and is not exempt under this act, shall be considered a public record of the agency for purposes of this act.

65 P.S. § 67.506(d)(1). Again, the Intervenors, but not DPW, appear to suggest that solely because the MCOs have chosen to discharge through subcontractors their contractual obligation to provide dental services to Medicaid enrollees in SEPA, the record of their contracts with dental providers are exempt from disclosure under the Right-to-Know Law, notwithstanding the indisputable fact that implementing the Medicaid program is a governmental function. The Intervenors propose an exception that would swallow the rule, because if MCOs could shield their expenditures of public funds from public scrutiny under the Right-to-Know Law simply by delegating some or all of their functions to subcontractors, it would be trivial for any

[9] Exhibit A is an excerpt from the voluminous contract between DPW and Aetna, effective July 1, 2010, available at http://contracts.patreasury.gov/View.aspx?ContractID=88205.

entity contracting with a public agency to do so. Surely, the Right-to-Know Law and the meaning of "agency possession" therein may not be read so narrowly and must be read to encompass any subcontractor as well as contractor to a government agency.

E. The Department of Public Welfare Documents Requested Are Not Shielded From Disclosure by Department of Health Regulations

The MCOs and their dental subcontractors seek to avoid production of the Department of **Public Welfare** documents requested on the ground that the rates the documents set forth are not public records because of the Department of **Health** regulation that appears at 28 Pa. Code § 9.604. In summary, this argument fails: (a) because it is devoid of merit, as detailed below; and (b) because it was raised by the MCOs in their proposed conclusions of law in Eiseman v. DPW, AP 2011-1098 but not sustained in the OOR's September 17, 2012 decision therein.

65 P.S. § 67.102 defines "public record," on which MCOs and their dental subcontractors rely, as follows:

> "PUBLIC RECORD." A record, including a financial record, of a Commonwealth or local agency that:
>
> (1) is not exempt under section 708;
>
> (2) is not exempt from being disclosed under any other Federal or State law or regulation or judicial order or decree; or
>
> (3) is not protected by a privilege.

The regulation on which the MCOs and their dental subcontractors now seeks to rely, 28 Pa. Code § 9.604, is a regulation of the Department of Health (not DPW) that requires health plans to make annual reports to the Department of Health which, pursuant to subsection 8 (28 Pa. Code § 9.604(a)(8)) are to include:

> Copies of the currently utilized generic or standard form health provider contracts including copies of any deviations from the standard contract and reimbursement methodologies.

The regulation then proceeds to provide as follows:

> Reimbursement information submitted to the Department under that paragraph may not be disclosed or produced for inspection or copying to a person other than the Secretary or Secretary's representatives without the consent of the plan which provided the information, unless otherwise ordered by a court.

Merely to read this language is readily to see that it is simply inapplicable to the present situation. The documents sought by PILCOP's October 3, 2012 Request are not the reports to the Department of Health submitted by the MCOs or their dental subcontractors to which 28 Pa. Code § 9.604, by its terms applies; the documents sought by PILCOP's October 3, 2012 Request are documents in the possession, custody, or control of DPW by virtue of the facts that the MCOs and the dental subcontracts are parties to contracts to spend public funds that DPW is using to implement a governmental program, i.e., Medicaid. 28 Pa. Code § 9.604(a)(8) can have no greater application than its plain terms, and its plain terms cover certain

reports that MCOs and their dental subcontractors are required to make to the Department of Health and nothing more.

In Eiseman v. DPW, the June 17, 2011 Request sought from DPW documents of the same character as those sought from DPW in PILCOP's October 3, 2012 Request. In that earlier proceeding as well, certain of the MCOs sought to block production of documents based on 28 Pa. Code § 9.604(a)(8). See Post Hearing Brief of Interested Parties Aetna Better Health, Inc., Health Partners of Philadelphia, Inc. and Keystone Mercy Health Plan, filed July 13, 2012. The OOR's opinion in Eiseman v. DPW, while not explicitly addressing the MCOs' argument based on 28 Pa. Code § 9.604(a)(8), effectively rejected it by ruling in favor of the Requester and requiring DPW to produce the documents described in Item 2 of the June 17, 2011 Request, which contained rate information.

For the above two reasons, OOR should reject the Intervenors' objection to producing the document based on 28 Pa. Code § 9.604(a)(8).

F. The Documents Requested Are Not Shielded From Disclosure by Federal Regulations

Mr. Myers's letter brief cites federal regulations governing competitive bidding to assert that disclosure of the information requested would jeopardize the Commonwealth's eligibility to receive federal funds. This argument appears to raise the specter that the federal government would invoke very general regulations regarding fair competitive practices to end Pennsylvania's multibillion dollar Medicaid grants if DPW released to the public information that is already available

to DPW, to the subcontractors, and to dentists throughout Greater Philadelphia, and that it would do so in spite of the public release of such information in Pennsylvania following Lukes and in other states as well, see, e.g., Wilmington Star-News v. New Hanover Reg'l Med. Ctr., 480 S.E.2d 53 (N.C. Ct. App. 1997). DPW asserted and then abandoned this very argument in the prior proceeding, see Transcript, dated May 22, 2012, at 148-49, attached as Ex. B, and it should carry no more weight in the present proceeding.

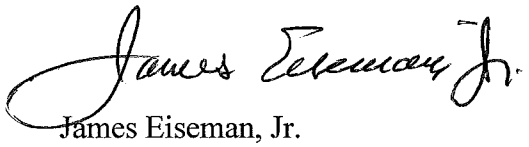
G. Requester Does Not Seek Production of Any Documents Setting Forth Rates Paid to Dental Providers That Also Contain Information Identifying Individual Medicaid Recipients or Their Personal Health Information

The MCOs and their dental subcontractors seek to avoid DPW's releasing to Requester those documents showing what fees are paid to dentists and other dental providers by contending they also contain information identifying individual Medicaid recipients and their individual health information. The simple answer to this argument is that Requester does not seek any documents that reveal the identity of an individual Medicaid recipient and/or his or her individual health information and, to the extent its Request could be so construed, hereby withdraws any portion of its Request that seeks such documents. In other words, the October 3, 2012 Request is limited to those documents that set forth the fees the MCOs and/or their dental subcontractors pay dentists that do not contain any such individual identifying information or individual health information.

## III. Conclusion

For all of the foregoing reasons, the OOR should grant the Request and order the Department of Public Welfare to disclose the requested records.

Respectfully submitted,



James Eiseman, Jr.
Benjamin D. Geffen

cc: Christopher H. Casey, Esquire (via e-mail)
Leonard W. Crumb, Esquire (via e-mail)
Karl S. Myers, Esquire (via e-mail)

# Exhibit A

2. In the event that the Department or federal agencies request access to records, subject to this Agreement, after the expiration or termination of this Agreement or at such time that the records no longer are required by the terms of this Agreement to be maintained at the PH-MCO's location, but in any case, before the expiration of the period for which the PH-MCO is required to retain such records, the PH-MCO, at its own expense, must send copies of the requested records to the requesting entity within thirty (30) days of such request.

## SECTION XIII: SUBCONTRACTUAL RELATIONSHIPS

### A. Compliance with Program Standards

As part of its Contracting or Subcontracting, with the exception of Provider Agreements which are outlined in Section V.S.1 of this Agreement, Provider Agreements, the PH-MCO agrees that it must comply with the procedures set forth in Section V.O.3 of this Agreement, Contracts and Subcontracts and in Exhibit II, Required Contract Terms for Administrative Subcontractors.

The written information that must be provided to the Department prior to the awarding of any contract or Subcontract must provide disclosure of ownership interests of five percent (5%) or more in any entity or subcontractor.

All contracts and Subcontracts must be in writing and must contain all items set forth in this Agreement.

The PH-MCO must require its subcontractors to provide written notification of a denial, partial approval, reduction, or termination of service or coverage, or a change in the level of care, according to the standards outlined in Exhibit M(1) of this Agreement, Quality Management and Utilization Management Program Requirements and using the denial notice templates provided in Exhibits N(1) – N(7) and Exhibits BBB(3) – (5), Standard and Pharmacy Denial Notices. In addition, all contracts or Subcontracts that cover the provision of medical services to the PH-MCO's Members must include the following provisions:

1. A requirement for cooperation with the submission of all Encounter Data for all services provided within the time frames required in Section VIII of this Agreement, Reporting Requirements, no matter whether reimbursement for these services is made by the PH-MCO either directly or indirectly through capitation.

2. Language which ensures compliance with all applicable federal and state laws.

3. Language which prohibits gag clauses which would limit the subcontractor from disclosure of Medically Necessary or appropriate health care information or alternative therapies to Members, other Health Care Providers, or to the Department.

4. A requirement that ensures that the Department has ready access to any and all documents and records of transactions pertaining to the provision of services to Recipients.

5. The definition of Medically Necessary as outlined in Section II of this Agreement, Definitions.

6. The PH-MCO must ensure, if applicable, that its Subcontracts adhere to the standards for Network composition and adequacy.

7. Should the PH-MCO use a subcontracted utilization review entity, the PH-MCO must ensure that its subcontractors process each request for benefits in accordance with Section V.B.1 of this Agreement, General Prior Authorization Requirements.

8. Should the PH-MCO subcontract with an entity to provide any information systems services, the Subcontract must include provisions for a transition plan in the event that the PH-MCO terminates the Subcontract or enters into a Subcontract with a different entity. This transition plan must include information on how the data shall be converted and made available to the new subcontractor. The data must include all historical Claims and service data.

The PH-MCO must make all necessary revisions to its Subcontracts to be in compliance with the requirements set forth in Section XIII.A of this Agreement, Compliance with Program Standards. Revisions may be completed as contracts and Subcontracts become due for renewal provided that all contracts and Subcontracts are amended within one (1) year of execution of this Agreement with the exception of the Encounter Data requirements, which must be amended immediately, if necessary, to ensure that all subcontractors are submitting Encounter Data to the PH-MCO within the time frames specified in Section VIII.B of this Agreement, Systems Reports.

**B. Consistency with Policy Statements**

# Exhibit B

SARGENT'S COURT REPORTING

Quality Work. Quality People.

# Eiseman v. DPW

**Date:** May 22, 2012

**Before:** Hearing Examiner Finkelstein

Printed On: January 28, 2013

Sargent's Court Reporting Services, Inc.
Phone: 814-536-8908
Fax: 814-536-4968
Email: schedule@sargents.com
Internet: www.sargents.com

want to remain disclosed, in particular in this matter because there's been testimony that Mercer and not the Department develops the rate ranges. And I want to find out --- I want to examine this witness to learn if there's some other rate range developed by the Department, or if alternatively when she says developed by the Department, she is saying that the rate range developed by Mercer are also developed by the Department. And that would also clarify what she meant in the first bullet point.

ATTORNEY CRUMB:

The evidence already shows rate ranges in the Mercer reports that you already have.

ATTORNEY GEFFEN:

Well, if she's saying that there's something else that would inevitably disclose the rate ranges --- you know, this is in a letter to which was --- we're happy to give you ---.

ATTORNEY CRUMB:

In this proceeding if we did not raise or defend the provision. So, for instance, I started out in my opening statement by asserting a statement that DPW would not be asserting that the --- a disclosure of the PMPM rates that we pay the MCOs would result in DPW's loss of federal funds. That's a ground that we

did assert in this letter. We offered no evidence to that point of view. The citations --- particular federal regulations in support that grounds are the ones in this. Because we have not asserted or defended that ground in this proceeding and offered no evidence, it's irrelevant to this proceeding because the OOR could not hold that that denial was the proper denial because that's not the real evidence. We certainly have not carried our burden of proof in regard to that ground.

ATTORNEY GEFFEN:

Okay. Well, in that case, can Counsel for DPW stipulate that there are no rate ranges developed by the Department other than those --- that Ms. Bankes said in this letter that she would provide to us?

ATTORNEY CRUMB:

If you're inquiring about the rate ranges for the Southeast Zone for the years in question?

ATTORNEY GEFFEN:

Yes.

ATTORNEY CRUMB:

Okay.

ATTORNEY GEFFEN:

Then that stipulation now takes care of