IN THE COMMONWEALTH COURT OF PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF PUBLIC WELFARE Petitioner, v. JAMES EISEMAN, JR. AND THE PUBLIC INTEREST LAW CENTER OF PHILADELPHIA, Respondents.	No. 1935 CD 2012
AETNA BETTER HEALTH, INC., HEALTH PARTNERS OF PHILADELPHIA, INC., AND KEYSTONE MERCY HEALTH PLAN, Petitioners, v. JAMES EISEMAN, JR. AND THE PUBLIC INTEREST LAW CENTER OF PHILADELPHIA, Respondents.	No. 1949 CD 2012
UNITEDHEALTHCARE OF PENNSYLVANIA, INC. D/B/A UNITEDHEALTHCARE COMMUNITY PLAN AND HEALTHAMERICA PENNSYLVANIA, INC. D/B/A COVENTRYCARES, Petitioners, v. JAMES EISEMAN, JR. AND THE PUBLIC INTEREST LAW CENTER OF PHILADELPHIA, Respondents.	No. 1950 CD 2012

REPLY BRIEF FOR PETITIONERS AETNA BETTER HEALTH, INC., HEALTH PARTNERS OF PHILADELPHIA, INC., AND KEYSTONE MERCY HEALTH PLAN

Petition for Review of the Final Determination of the Office of Open Records, at Docket No.: AP 2011-1098

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TABLE OF CONTENTS

TABLE OF CITATIONS

Page

CASES

STATUTES

I. ARGUMENT

A. *Lukes* is Not Binding Precedent, and Should Not be Applied Here.

In his brief, Eiseman makes the bold claim that *Lukes v. Dep't. of Public Welfare*, 976 A.2d 609 (Pa. Commw. 2009), a case decided under a repealed statute and construing statutory language that no longer exists, is "binding" precedent that this Court must follow in this case, which deals with totally new statutory provisions that did not exist when *Lukes* was decided. But Eiseman goes further, urging this Court to ignore two of its own prior decisions where, under nearly identical circumstances, this Court correctly decided not to apply *Lukes*, since *Lukes* was decided under a repealed law. This Court should reject Eiseman's unsupported and illogical argument.

Eiseman acknowledges that *Lukes* involved totally different statutory provisions than the provisions of the current RTKL that are in issue in this case. Eiseman Brief, at 15. ("It is true, as the Petitioner MCOs note, that the 'confidential proprietary information' exception did not appear in the version of the RTKL that was at issue in *Lukes*. ... But neither did the 'trade secrets' exception."). Nonetheless, Eiseman attempts to evade this obvious flaw in his argument by retreating from the text of both the old law and the new law to a public policy appeal, arguing that *Lukes* should apply here because to not apply it "would accomplish the opposite of what the Legislature intended when it

liberalized the RTKL." *Id.* (citing *SWB Yankees v. Wintermantel*, 45 A.3d 1029, 1044 n.19 (Pa. 2012)). But this Court has previously cautioned parties against substituting public policy arguments for textual analysis:

> Requester also asserts that as a matter of public policy, this information *should* be available for public scrutiny. We decline Requester's invitation: we cannot permit the public's right to know to devolve from a matter of statutory interpretation into a subjective exercise that varies depending on the perspective of the beholder.

Second Chance v. Parsons, 61 A.3d 336, 347 (Pa. Commw. Jan. 14, 2013).

The unavoidable fact is that this Court's decision in *Lukes* relied on a now-repealed right-to-know law with different provisions than the current RTKL. This Court had it right in holding that *Lukes* ***does not apply*** where the issue is whether the requested documents must be disclosed pursuant to the new RTKL, the relevant sections of the law have changed, and the requester is seeking to apply *Lukes* to these facts. *In re: Silberstein*, 11 A.3d 629 (Pa. Commw. 2011); *Office of the Budget v. OOR*, 11 A.3d 618 (Pa. Commw. 2011). Eiseman attempts to distinguish these two cases by arguing that they dealt not with the "trade secrets" portion of the *Lukes* opinion, but rather with the "agency possession" portion of the opinion. But this amounts to a distinction without a difference. What this Court stated in *Silberstein* and *Office of the Budget* is that a prior decision of this Court that relied upon a repealed law is "not controlling" in a case involving a new law with different statutory provisions. *See Silberstein*, 11 A.3d at 632 n.8 ("[O]ur decision

in *Lukes* was rendered pursuant to the former version of the RTKL, which as noted herein, was repealed by the current RTKL. Therefore, our decision in *Lukes* is not controlling in this matter."); *Office of the Budget*, 11 A.3d at 623 ("[U]nlike in *Lukes*, this Court is not free to consider factors beyond the statutory language because the current RTKL is not ambiguous on this point."). If any precedent be "binding" on this Court in this appeal, it is *Silberstein* and *Office of the Budget*, not *Lukes*.

In a further attempt to persuade this Court that *Lukes* should control the outcome here, Eiseman, like the OOR, finds support for its argument in the Pennsylvania Supreme Court's opinion in *SWB Yankees*, *supra*. In that case—which dealt not with the trade secret or proprietary confidential information exemptions, but with the "governmental function" section of the RTKL—the Supreme Court referenced *Lukes* twice, both times in *dicta* and both times in footnotes. As Petitioners argued in their opening brief, neither reference can fairly be read to indicate that "the Supreme Court has explicitly recognized that *Lukes* has ongoing vitality under the new RTKL." Eiseman Brief, at 14. Eiseman seizes on a single phrase in footnote 19 to the *SWB Yankees* opinion, *i.e.*, "particularly when considering that the Legislature intended greater, not lesser, openness under the new open-records regime." But the Supreme Court was merely noting in *dicta* that its decision in *SWB Yankees* was consistent with another decision of the

Supreme Court under the old RTKL. *See* 45 A.3d at 1044 n.19. To interpret that statement as affirming the "ongoing vitality" of *Lukes* is a stretch.[1]

Eiseman also attempts to argue that Section 506(d)(1) of the RTKL, 65 P.S. § 67.506(d)(1), the governmental function section, supports his argument. In fact, section 506(d)(1) is not even at issue in this case.

Eiseman states that "the OOR's conclusion ... is supported by section 506(d)(1) of the current RTKL," and then cites that section, as well as several cases in which section 506(d)(1) was in issue, including *SWB Yankees*, to support his argument. *See* Eiseman Brief, at 15-16. Unlike the cases that Eiseman cites, however, there was never an issue in this case as to whether the MCOs were contracted to perform a governmental function; the MCOs have not contested that "implementing the Commonwealth's Medicaid program is a governmental function." *Id.* at 16. Thus, the cases he cites for this purpose are inapposite.

What Eiseman fails to discuss is that section 506(d)(1) ***only applies to a "public record" that is "not exempt."*** Subsection 506(d)(1), entitled "Agency possession," states that "[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

[1] Eiseman's citation to *Levy v. Senate of Pa.*, 65 A.3d 361 (Pa. Commw. Apr. 24, 2013), does not help his argument. *Levy* dealt with the attorney-client privilege and procedural rules relating to an agency's duties under the RTKL, which are not at issue here.

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) (emphasis added). Clearly, only a "public record" that is "not exempt" can be deemed a "public record of the agency." This Court made this point clear in one of the cases that Eiseman cites, *Allegheny Cnty. Dep't of Admin. Servs. v. A Second Chance, Inc.*, 13 A.3d 1025 (Pa. Commw. 2011) (en banc):

> We, therefore, interpret Section 506(d)(1) as providing that a record in the possession of a party with whom an agency has contracted to perform a governmental function on behalf of the agency shall be deemed a "public record," and, as a consequence, shall be accessible under the RTKL, so long as the record (a) directly relates to the governmental function ***and (b) is not exempt under the RTKL***.

Id. at 1039 (emphasis added).

Eiseman's attempt to buttress his argument by using section 506(d)(1)—while leaving out the "exempt" part of that subsection—is misleading, and should be rejected by this Court.

B. Eiseman's Argument That the Rates are "Too Old" and "Too Stale" to Have Competitive Significance Flies in the Face of the Record Below.

With respect to both the DPW's rates to the MCOs (Item 1), and the MCOs' rates to the subcontractors and providers (Item 2), Eiseman argues that the rates are "stale historical information," the release of which would not "undermine competitive processes going forward." Eiseman Brief, at 17-18, 22-23. With this argument, Eiseman ignores the substantial evidence presented at the hearing before

the OOR hearing officer of competitive harm that the MCOs would suffer if their rates were released. A brief sampling of this testimony suffices:

John Sehi of Health Partners:

> Q. Would you be concerned about a release of rate information? A. I would be concerned if the rate information was released. Q. Why? A. Again, I think it would give us a competitive disadvantage.

(R. 336a-337a).

Deborah Nichols of Aetna Better Health, Inc.:

> And do you feel that it would be harmful if those rates were exposed to the outside world and to your competitors? A. We do.

(R. 435a).

William Morsell of Keystone Mercy Health Plan:

> Q. Do you think that the disclosure of the rates to your competitors – the disclosure of your rates to the competitors would disadvantage your competitiveness? A. I would believe so. Q. You believe what? A. It would be to their advantage. Q. And would that be to your disadvantage? A. I believe so.

(R. 521a).[2]

In the face of this and other ***actual evidence*** of competitive harm presented at the hearing (which Eiseman fails to mention in his argument), Eiseman theorizes

[2] In Eiseman's Statement of Record Facts, he completely omits any mention of the testimony of the MCOs on the steps they take, because of these competitive concerns, to protect the confidentiality of their rates, which even the OOR conceded was "extensive." Eiseman Brief, at 8-9; OOR Final Determination, at 17.

that "[e]ven if, arguendo, disclosure of the current year's rates would harm the competitive position of an MCO vis-à-vis the other MCOs or vis-à-vis its subcontractors and providers, the disclosure of information that was already one year old at the time of the hearing would be less harmful—and the Court can reasonably infer that the disclosure of five-plus-year-old information would be less harmful still." Eiseman Brief, at 22. Putting aside the fact that Eiseman is in effect asking this Court to penalize the Petitioners for taking an appeal—after all, by Eiseman's logic, the rates are getting more and more outdated as the appeal proceeds—there is very little evidence in the record below to support his theory that the passage of time eliminates the competitive harm that all the MCOs' witnesses testified to at the hearing.

Eiseman points to the testimony of two witnesses, John Sehi from Health Partners and Heather Cianfrocco of United, that, he claims, "explicitly acknowledged that outdated pmpm rate information would be of no value in setting rates going forward." Eiseman Brief, at 18. But those two witnesses gave extensive testimony—covering a total of nearly 100 pages in the transcript—showing that the rate information has competitive value to their respective companies. (R. 322a-365a, 366a-416a.) Eiseman's selective citation of one page of testimony from each witness (R. 358a, 390a), which amounts to unremarkable

testimony that the relevance of rate information decreases over time, cannot overcome this strong showing.

What Eiseman fails to acknowledge is that the standard of proof for the exemptions is preponderance of the evidence. 65 P.S. § 67.708(a)(1). What this means is "only that one party has presented evidence that is more convincing, by even the smallest amount, than the evidence presented by the other party." *Lehigh Valley Transportation Services, Inc. v. Public Utility Commission*, 56 A.3d 49, 56 n.6 (Pa. Commw. 2012). Here, Eiseman presented ***no evidence*** on the issue of competitive harm, and when the two pages of testimony that Eiseman mentions is compared to the hundreds of pages of testimony that he does not, it is clear that the Petitioners have met their burden of showing that the rates have "economic value, actual or potential" (definition of "trade secret") and that "the disclosure of [the rates] would cause substantial harm to the competitive position of" the Petitioners (definition of "confidential proprietary information"). *See* 65 P.S. § 67.102.[3]

C. Eiseman's "Single Subcontractor" Theory Should Be Rejected.

Eiseman then goes on to posit another theory, *i.e.*, that because one subcontractor, DentaQuest, receives rate information from four of the five MCOs

[3] Eiseman also cites to the OOR's recent decision in a related case, *Eiseman v. DPW*, Dkt No. AP 2012-2017 (Pa. OOR May 7, 2013), as support for his argument. Eiseman Brief at 22-24. But of course that OOR decision is not binding on this Court, and DPW and the Interested Parties (including Petitioners) have filed petitions for review of that decision, which are currently pending before this Court.

that contract with DPW, "[i]t is impossible to square the Petitioner MCOs' insistence that they jealously guard the secrecy of their provider rates with the fact that most of them share that 'highly confidential' information with DentaQuest, the same agent that also acts as agent to competitor MCOs." Eiseman Brief, at 24. But upon close examination, this theory falls apart.

First, again, Eiseman fails to acknowledge the extensive testimony at the hearing before the OOR that shows that the MCOs scrupulously protect, and treat as secret and confidential, their rates to their subcontractors, including Dentaquest. This means that despite the fact that DentaQuest knows the rates, the MCOs' competitors do not. So the fact that Dentaquest may know each MCO's rates tells us nothing about the status of those rates as trade secrets or confidential proprietary information. Moreover, Eiseman ignores the fact that the contracts that the MCOs have with Dentaquest contain specific confidentiality provisions that require Dentaquest to keep all rate information secret. (R. 162a, 433a-434a, 493a, 517a). Eiseman has presented no evidence that Dentaquest has ever violated these confidentiality provisions. In short, Eiseman's "single subcontractor" theory does not hold up in the face of the record.[4]

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[4] Eiseman states that DentaQuest subcontracts cover 90% of the Medicaid enrollees in SEPA. Eiseman Brief, at 5. But this figure is based upon the unwarranted assumption that Keystone Mercy's enrollment in the Medicaid program is 300,000 people. In fact, the Keystone Mercy witness, William Morsell, testified (in response to Eiseman's lawyer's questions on cross-examination) that Keystone Mercy had, as of June 2011, approximately 300,000 total enrollees

D. Eiseman's Use of Evidence From States Other than Pennsylvania is Outside the Record on Appeal, and Should be Rejected.

As he did before the OOR, Eiseman again attempts to use information from other states—some of which he did not even offer at the OOR hearing, and some of which the hearing officer specifically excluded from the hearing—to support his argument that release of the documents at issue in this case will not be harmful. Eiseman Brief, at 21, 25. But these arguments have no merit.

Eiseman urges this Court to take judicial notice of a letter opinion of the North Dakota Attorney General from 15 years ago (Eiseman Exhibit 1), and a report issued by the Wisconsin Legislative Audit Bureau in 2008 (Eiseman Exhibit 2), in support of his argument that other states have released information such as that sought in Item 1 (the rates paid by DPW to the MCOs). He claims that "[t]his multi-state phenomenon undermines the argument that the release of such information does not or must not occur, or that it would devastate the competitive marketplace." Eiseman Brief at 21.

First, Eiseman's request that this Court take judicial notice of documents from other states is unsupported. The Pennsylvania statutes he cites in support of this request, namely, 42 Pa.C.S. § § 5327-5328, say nothing about judicial notice. Courts may only take judicial notice of "adjudicative facts," Pa.R.E. 201, and

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in the Southeast Zone. (R. 538a-539a). He did *not* testify that all 300,000 were enrolled in the Medicaid program.

Eiseman presented no evidence at the hearing on these "facts." Eiseman attempted to introduce the Wisconsin report into evidence at the hearing, but the hearing officer excluded it, stating "I still don't see the relevance of what Wisconsin is doing that pertains to Pennsylvania." (R. 658a-660a). Eiseman did not even attempt to introduce evidence from North Dakota or North Carolina at the hearing. Moreover, his argument that this Court should consider the (apparent) release of certain documents in Pittsburgh following this Court's *Lukes* decision is being raised for the first time on appeal, and is therefore waived. Pa.R.A.P. 302(a).

Second, Eiseman erroneously claims that it is part of the MCOs' burden to "explain[] why the release in other states of information like that sought ... has not had the negative competitive effects they fear." Eiseman Brief, at 21. The MCOs' burden is to prove by a preponderance of the evidence that the exemptions from disclosure apply here, not to disprove every allegation that Eiseman makes, however weak.

Third, even if considered on its merits, the information from other states does not help Eiseman.

Even if we accept Eiseman's statement that the Wisconsin Legislative Audit Bureau report is "an instance in which pmpm Medicaid rates paid by a state to MCOs have been publicly disclosed" (Eiseman Brief at 21 n.6), the report shows nothing about what happened in Wisconsin after the disclosures contained in the

document. Therefore, even if this Court considers it, the report cannot overcome the extensive testimony at the hearing that the rate information here has independent economic value to the MCOs, and that disclosure of such information could competitively disadvantage one or more of the MCOs. (R. 291a, 294a-295a, 297a, 334a-337a, 381a-383a, 434a-435a, 484a, 496a, 517a-521a, 545a-546a). Moreover, the MCOs' expert, Dr. Henry Miller, who has worked as a healthcare consultant for 40 years in approximately 40 states, testified that he has never seen instances where MCOs publicly release their rates. (R. 282a-284a, 293a-294a). This testimony, which is uncontested, clearly overwhelms disclosure of rate information in one state.

Nor does the letter opinion of the Attorney General of North Dakota help Eiseman's cause. The letter, dated March 2, 1998, to the executive director of that state's Department of Human Services, concerned whether the capitation rates paid to a contractor for medical coverage under the state's Medicaid program were "confidential" under North Dakota law. The opinion concluded that they were not. The opinion was rendered without the benefit of a factual record, unlike here, where the MCOs have presented extensive evidence showing the confidential nature of the documents at issue. Thus, even if this Court considers it, the opinion letter has no relevance to this case.

In arguing that the documents sought in Item 2 should be disclosed, Eiseman cites this Court's *Lukes* decision, which (Eiseman appears to be arguing) led to the release of certain documents in Pittsburgh, and a 16-year-old North Carolina case decided under that state's open records law. Eiseman Brief, at 25. As to the *Lukes* decision, even if the Court determines that Eiseman has not waived this argument by failing to raise it below, Eiseman presents no facts showing that rate information such as that involved in this case was in fact released, much less that any such disclosures undermine the Petitioners' argument.

In the North Carolina case, *Wilmington Star-News v. New Hanover Reg'l Med. Ctr.*, 480 S.E.2d 53 (N.C.Ct. App. 1997), the court held that price lists for services provided by a public hospital to subscribers of an HMO were public records that were not entitled to the "trade secret" exemption in that state's open records law. But the North Carolina law at issue in that case required, for application of the trade secret exemption, that the document be the record of a "private person." Despite its determination that a reasonable trier of fact could conclude that the price lists constituted trade secrets, the court held that they did not meet the "private person" test, and therefore were not protected. 480 S.E.2d at 57. The case is inapposite because Pennsylvania's law contains no such "private person" requirement.

Thus, this Court should reject Eiseman's invitation to consider information from other states and to speculate about what may have happened "in Pittsburgh" following *Lukes*.

E. This Court Should Apply the Pennsylvania Uniform Trade Secrets Act and the Pennsylvania Department of Health Regulations to Protect the Requested Documents from Disclosure.

Eiseman argues that the OOR was correct in deciding not to apply the Pennsylvania Uniform Trade Secrets Act, 12 Pa.C.S. §§ 5301 *et seq.* ("PUTSA"), even though under PUTSA, trade secrets are protected from disclosure. Eiseman Brief, at 26-27. In a footnote, Eiseman attempts to argue that PUTSA does not exempt trade secrets from disclosure, distinguishing PUTSA from the provisions of the Pennsylvania Vehicle Code that were at issue in *Advancement Project v. Pa. Dept. of Transp.*, 60 A.3d 891, 895 (Pa. Commmw. 2013), where this Court protected the documents from disclosure. He claims that under the RTKL, a state law must "specifically forbid" disclosure of documents, "as opposed to merely providing remedies for a party concerned about their disclosure," in order for the state law to protect the documents. *Id.* at 27. But this interpretation of the RTKL and PUTSA is erroneous.

Inexplicably, Eiseman uses the term "forbid," a term used in the definition of "public record" in the repealed right-to-know law, rather than the language "exempt from being disclosed," the language in the current RTKL. *See* 65 Pa.C.S.

§ 67.102. But using either formulation, PUTSA makes unlawful the disclosure of trade secrets, which is why the statute provides for damages and injunctive relief for parties who are the victims of such disclosure. *See* 12 Pa.C.S. §§ 5302 ("Misappropriation. --Includes: (1) acquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means; or (2) disclosure or use of a trade secret of another without express or implied consent"); 5303 ("Actual or threatened misappropriation may be enjoined."); and 5304 ("a complainant is entitled to recover damages for misappropriation."). Thus, just as the Motor Vehicle Code makes it unlawful for PennDot to disclose driving records, PUTSA makes it unlawful for citizens to misappropriate trade secrets. Eiseman's attempt to draw a distinction between the PUTSA and Pennsylvania Vehicle Code section at issue in *Advancement Project* has no merit.

Eiseman argues in a footnote that "reimbursement information" in standard form health care provider contracts, which are submitted annually to the Pennsylvania Department of Health, and which "may not be disclosed or produced for inspection or copying to a person other than the Secretary [of Health] or the Secretary's representatives, without the consent of the plan which provided the information, unless otherwise ordered by a court," 28 Pa. Code § 9.604(a)(8), are "irrelevant." Eiseman Brief, at 19 n.5 ("Merely to read this language is to see that

it is inapplicable to the present situation."). Eiseman's argument that § 9.604(a)(8) does not apply here because "the documents sought here are not reports submitted by the Petitioner MCOs or their dental subcontractors to the Department of Health" (*id.*), ignores the plain language of the regulation. The regulation states that "reimbursement information" contained in "standard form health care provider contracts" (not "certain reports") are protected from disclosure. In fact, the Department of Health regulation at 28 Pa. Code § 9.604(a)(8) covers the very information that Eiseman seeks in the Request. Because that information is "exempt from being disclosed under ... [a] State ... regulation," the documents are not "public records," and therefore cannot be disclosed.

F. The RTKL's "Financial Records" Provision Cannot Justify Disclosure

Eiseman does not dispute that the OOR's *sua sponte* raising of the "financial records" provision of the RTKL with respect to the documents sought in Item 1 of the Request was improper. But Eiseman argues that any such error of the OOR was "harmless," because Petitioners had an opportunity, before this Court, to make its argument on the issue. But Eiseman does not stop there. Instead, he goes beyond even the OOR decision, arguing that the documents sought in ***Item 2*** are "financial records" as well, and therefore cannot be exempt from disclosure. This argument is flawed on many levels.

First, in arguing that if the OOR erred in *sua sponte* considering and deciding the "financial records" issue, "it was entirely harmless error," Eiseman misstates the standard of review to be employed by this Court. The standard is not harmless error, but rather plenary review. *Bowling v. Office of Open Records*, 990 A.2d 813, 820, 822 (Pa. Commw. 2010).

Second, Eiseman misconstrues the cases that Petitioners cited in support of their argument that the OOR's *sua sponte* consideration of the "financial records" provision requires reversal. Eiseman attempts to distinguish this Court's decision in *Orange Stones Co. v. Borough of Hamburg Zoning Hearing Board*, 991 A.2d 996 (Pa. Commw. 2010), where this Court stated that "raising issues *sua sponte* after the record is closed and without notice to the parties constitutes a due process violation," *id.* at 999, by claiming that unlike in *Orange Stones*, there are no relevant factual issues in dispute. Eiseman Brief, at 30. But this argument assumes that if the parties had known that the "financial records" section of the RTKL was an issue before the OOR, that this knowledge would have had no effect on the evidence that they chose to present at the OOR hearing. Eiseman's argument (at page 31 of his brief) that the documents sought in Item 2 constitute "financial records"—a determination that not even the OOR made—is an issue that would seem to require additional factual development by Petitioners to rebut. Moreover, *Orange Stones* and the other cases that Petitioners cited in their briefs

do not make a distinction between factual and legal issues. Rather, the cases condemn *sua sponte* decisionmaking because it "deprives counsel of the opportunity to ***brief and argue the issues*** and the Board of the benefit of ***counsel's advocacy***." *Orange Stones*, 991 A.2d at 999. Thus, the rule against *sua sponte* decisionmaking is not confined to cases where facts are in dispute; rather, the focus is on counsel's opportunity for advocacy and the court's having the benefit thereof.[5]

Third, even considering on the merits Eiseman's "financial records" argument with respect to the documents sought in Item 2, it makes little sense.

Section 708(c) states that the 708(b) exemptions (including the exemptions for "trade secrets" and "confidential proprietary information") do not apply to "financial records." 65 P.S. § 67.708(c). The definition of "financial record" is "[a]ny 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 (emphasis added).

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[5] Eiseman's argument that *Yount v. Department of Corrections*, 966 A.2d 1115 (Pa. 2009) shows that the OOR's decision should be affirmed is meritless. In *Yount*, the Pennsylvania Supreme Court condemned *sua sponte* consideration of issues, yet decided that remanding ***that particular case*** was unnecessary. Because both parties were afforded argument on the issue in dispute, and therefore, even if it remanded the case to the lower court, the Court's "interpretation of prevailing law would be based on the same record and advocacy," the Supreme Court stated that "***in the narrow circumstances of this case***, no party will be prejudiced" by an affirmance. *Id.* at 1119. Here, there has been no argument yet and it is not clear that the factual record is complete on the "financial records" issue. Thus, the "narrow circumstances" that supported an affirmance in *Yount* are not present here.

Eiseman argues that the highlighted language brings the subcontracts sought in Item 2 within subsection (ii), "because the substantial funds DPW funnels through the Petitioner 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." Eiseman Brief, at 31.

"The object of all interpretation and construction of statutes is to ascertain and effectuate the intention of the General Assembly." 1 Pa.C.S. § 1921(a). "Generally, the best indication of the General Assembly's intent is the plain language of the statute." *Allstate Life Ins. Co. v. Commonwealth*, 52 A.3d 1077, 1080 (Pa. 2012).

Here, the part of the definition of "financial records" upon which Eiseman relies—"an agency's acquisition, use or disposal of services, supplies, materials, equipment or property"—encompasses an agency's procurement of goods and services, rather than an agency subcontractor's payment for health care services. The word "use" means "to put into action or service, avail oneself of." Merriam-Webster Dictionary (online edition). It is ***the subscribers of the MCOs, not DPW***, who "avail [themselves] of," or "use," the services of the dental providers.

PILCOP's strained interpretation of the plain language of the "financial records" definition should be rejected. Regardless of whether the "financial records" definition applies to DPW's rates to the MCOs, that definition cannot be

contorted to cover the rates ***two steps removed from the agency***, *i.e.*, rates that a subcontractor pays to dental providers.

II. CONCLUSION

For all these reasons, Petitioners again respectfully request an order of this Court reversing the September 17, 2012 Final Determination of the OOR with respect to Items 1 and 2 of the Request and ordering that no further action need be taken by DPW with respect to this matter.

Respectfully submitted,

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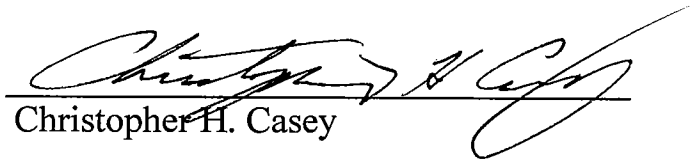
DATED: June 26, 2013

CERTIFICATION OF WORD COUNT

I, Christopher H. Casey certify that the foregoing Reply Brief of Petitioners Aetna Better Health Inc., Health Partners of Philadelphia, Inc., and Keystone Mercy Health Plan contains 4,382 words without footnotes and 4,771 words with footnotes and was verified by Microsoft Word 2010 word processing software program.



Christopher H. Casey

Dated: June 26, 2013

CERTIFICATE OF SERVICE

I, Christopher H. Casey, hereby certify that on the 26th day of June 2013, I caused to be served two (2) copies of the Reply Brief of Petitioners Aetna Better Health Inc., Health Partners of Philadelphia, Inc., and Keystone Mercy Health Plan, by the following means of service, on the following:

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Commonwealth Keystone Building
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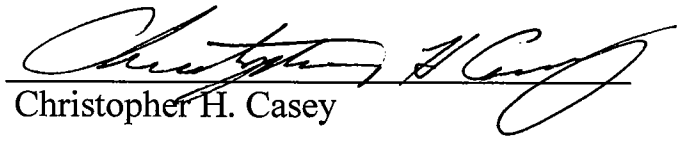
Harrisburg, PA 17120



Christopher H. Casey

Dated: June 26, 2013