IN THE SUPREME COURT OF PENNSYLVANIA

No. 48 EAP 2014

JAMES EISEMAN, JR. and THE PUBLIC INTEREST LAW CENTER OF PHILADELPHIA,

Appellants,

v.

DENTAL BENEFIT PROVIDERS, INC., UNITEDHEALTHCARE OF PENNSYLVANIA, INC. d/b/a UNITEDHEALTHCARE COMMUNITY PLAN, and HEALTHAMERICA PENNSYLVANIA, INC., d/b/a COVENTRYCARES,

Appellees.

REPLY BRIEF OF APPELLANTS

On Appeal from the Order of the Commonwealth Court in Case No. 945 C.D. 2013, Reversing the Final Determination of the Office of Open Records in No. AP 2012-2017
(*Eiseman II*)

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IN THE SUPREME COURT OF PENNSYLVANIA

No. 49 EAP 2014

JAMES EISEMAN, JR. and THE PUBLIC INTEREST LAW CENTER OF PHILADELPHIA,

Appellants,

v.

AETNA BETTER HEALTH INC., HEALTH PARTNERS OF PHILADELPHIA, INC., KEYSTONE MERCY HEALTH PLAN, and DENTAQUEST, LLC,

Appellees.

REPLY BRIEF OF APPELLANTS

On Appeal from the Order of the Commonwealth Court in Case No. 957 C.D. 2013, Reversing the Final Determination of the Office of Open Records in No. AP 2012-2017
(*Eiseman II*)

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IN THE SUPREME COURT OF PENNSYLVANIA

No. 50 EAP 2014

JAMES EISEMAN, JR. and THE PUBLIC INTEREST LAW CENTER OF PHILADELPHIA,

Appellants,

v.

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF PUBLIC WELFARE,

Appellee.

REPLY BRIEF OF APPELLANTS

On Appeal from the Order of the Commonwealth Court in Case No. 958 C.D. 2013, Reversing the Final Determination of the Office of Open Records in No. AP 2012-2017
(*Eiseman II*)

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I. SUMMARY OF ARGUMENT

This case concerns records showing the rates by which dentists are paid to treat Medicaid enrollees. The Department of Human Services (here referred to by its former acronym, DPW) has both the duty and the power to review these Provider Rates. Requesters' opening brief explained why even if DPW lacks actual possession of the requested records, it still must produce them for two independent reasons: its Standard Contract with the MCOs requires the latter to ensure that DPW has "ready access" to the requested documents, and the documents are "public records" of DPW under Section 506(d)(1) of the Right-to-Know Law (RTKL). Appellees have failed to rebut these arguments, and the Court should reverse the decision below and order DPW to produce the requested documents.

The requested records are within DPW's custody and control, or constructive possession, both as a matter of contract and as a matter of law under the RTKL. And for the reasons set forth in Requesters' briefs in *Eiseman I*, such records are "financial records" required to be disclosed regardless of whether they reveal trade secrets or confidential proprietary information.

It is troubling that DPW has not taken actual possession of the requested records, as it cannot fulfill numerous obligations under federal and state law without reviewing the Provider Rates paid to dentists. The Medicaid Act requires DPW to ensure that the Provider Rates give Medicaid enrollees access to medical

care with "reasonable promptness," 42 U.S.C. § 1396a(a)(8), and that the Provider Rates "be set at levels that are sufficient to meet recipients' needs," *Pa. Pharmacists Ass'n v. Houstoun*, 283 F.3d 531, 538 (3d Cir. 2002) (en banc) (Alito, J.). State law requires DPW to submit a biannual report to the General Assembly showing the "cost per service" for Pennsylvania's Medicaid program. 62 P.S. § 201(6). The Standard Contract that DPW has signed with each of the Appellee MCOs gives it the tools to obtain the rates and other information necessary to assess compliance with these mandates. Nevertheless, DPW has not obtained the Provider Rates to verify compliance with these requirements. Appellees now attempt to wield DPW's inaction as a sword to keep members of the public from examining how taxpayer funds are spent to provide dental services to needy Pennsylvanians. The Court should not allow them to do so.

II. ARGUMENT

A. Verifying Compliance With the Medicaid Act and State Law Requires Access to the Provider Rates

DPW apparently neglects to monitor the Provider Rates for compliance with federal and state law. As noted in Requesters' opening brief (pp. 23-24), this failure only intensifies the public's interest in reviewing the Provider Rates.

Federal and state Medicaid laws require the rates paid to providers to meet certain standards, and DPW must examine the Provider Rates to ensure compliance. Among these requirements are for the Provider Rates to be sufficient

for enrollees to receive dental services with "reasonable promptness," 42 U.S.C. § 1396a(a)(8), and to be "sufficient to enlist enough providers so that care and services are available under the plan at least to the extent that such care and services are available to the general population in the geographic area," *id.* § 1396a(a)(30)(A).[1] State law requires DPW "to provide the General Assembly with adequate information to determine the most cost-effective allocation of resources in the medical assistance program," including "the cost per service" for "the medical assistance population," 62 P.S. §§ 201(5)-(6). Requesters' Reply Brief in *Eiseman I* (pp. 9-10) discusses these laws in greater depth.

B. The Ready Access Requirement and RTKL Section 506(d)(1) Both Establish the Public Nature of the Records

There are two independent grounds on which the Court should find that the records containing the Provider Rates are financial records "of" DPW: (1) the Ready Access requirement of the Standard Contract establishes that DPW has custody and control, or constructive possession, of the records, and (2) Section

[1] When provider payment rates have fallen short of these standards, Medicaid enrollees have brought enforcement actions. *See, e.g.*, *Lewis v. Alexander*, 685 F.3d 325, 344 (3d Cir. 2012) (noting that there is a private right of action to enforce "the statutory right [in Medicaid] to receive medical assistance and to receive it with reasonable promptness"); *Clark v. Richman*, 339 F. Supp. 2d 631, 634 (M.D. Pa. 2004) ("Plaintiffs also allege that DPW violated 42 U.S.C. § 1396a(a)(30)(A) by failing to take necessary steps, such as adequate reimbursement rates, to ensure equal access to dental services for [Medicaid] recipients . . . .").

506(d)(1) of the RTKL establishes that they are "public records" as a matter of law.

1. Constructive Possession Suffices for Agency Possession

DPW constructively possesses the requested records, even if it does not actually possess them. Requesters' opening brief (pp. 17-24) explains that the MCOs' Standard Contract with DPW contains a "Ready Access" requirement that binds the MCOs to give DPW ready access to contracts pertaining to the provision of dental services to Medicaid enrollees. By its own terms, the Ready Access requirement must be reproduced in the contracts the MCOs sign with the subcontractors, so that DPW will maintain ready access to downstream contracts.

The Group A Appellees[2] offer no rebuttal of Requesters' interpretation of the Standard Contract. Instead, they focus on textual differences between RTKL Sections 305 and 901, 65 P.S. §§ 67.305, .901. They cite *Office of the Budget v. Office of Open Records*, 11 A.3d 618 (Pa. Commw. Ct. 2011), a three-judge decision, for the proposition that Section 901 "is merely a procedural section specifying the duty of an agency" to determine "whether 'the agency has possession, custody, or control of the identified record.'" Group A Br. at 11. Such a narrow reading of Section 901 is incorrect; indeed, the Commonwealth Court

[2] The five MCOs and two dental subcontractors in this case are represented by two different attorneys, who have filed separate briefs. This brief will refer to Appellees Health Partners of Philadelphia, Keystone Mercy Health Plan, and DentaQuest as the "Group A Appellees," and to Appellees Dental Benefit Providers, UnitedHealthcare of Pennsylvania, HealthAmerica Pennsylvania, and Aetna Better Health as the "Group B Appellees."

itself recently jettisoned it in an en banc decision. *Dep't of Labor & Indus. v. Heltzel*, 90 A.3d 823, 833-34 (Pa. Commw. Ct. 2014) (en banc) ("Under the RTKL, a Commonwealth agency must disclose requested records within its possession, custody or control, unless it can establish the records are exempt. Sections 701 and 901 of the RTKL, 65 P.S. §§ 67.701, 67.901.").[3] Section 305 establishes only a "presumption" about the public nature of a record: "A record in the possession of a Commonwealth agency or local agency shall be presumed to be a public record." That presumption applies even when, as here, the agency has constructive possession of the record. *Barkeyville Borough v. Stearns*, 35 A.3d 91, 96 (Pa. Commw. Ct. 2012) (citing *Tribune-Review Publ'g Co. v. Westmoreland Cnty. Hous. Auth.*, 833 A.2d 112, 118 (Pa. 2003)). Under any of these provisions, then, the requested contracts are public records of DPW.

Unlike the Group A Appellees, the Group B Appellees offer a textual argument concerning the Ready Access requirement, but it is grounded on ignoring two key words in that provision. The Ready Access requirement states:

[3] Even if it had not been abrogated, *Office of the Budget* would be readily distinguished from this case. It concerned the payroll records of a masonry subcontractor on a project that received Redevelopment Assistance Capital Project funds from the Office of the Budget. 11 A.3d at 619. The Commonwealth Court concluded that the payroll records were not public records, because although a "government agency has a legal right to review" them, they were "not in the possession of a government agency ***and not related to a contract to perform a governmental function***." *Id.* at 623 (emphasis added). But here, "[i]t is not disputed . . . that DPW's provision of dental services to Medicaid recipients through the managed care model is a governmental function." Group A Br. at 14.

> [A]ll contracts or Subcontracts that cover the provision of medical services to the PH-MCO's Members must include the following provisions: . . . 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.

Standard Contract at 163 (emphasis added).[4] The Group B Appellees unaccountably omit the words "documents and" from their discussion of the Ready Access requirement. Group B Br. at 16 ("It permits the Department only to access records 'of ***transactions*** pertaining to the ***provision of services to Recipients***.'").

When read in full, the Ready Access requirement refers to both:

1) documents pertaining to the provision of services to Recipients; and

2) records of transactions pertaining to the provision of services to Recipients.

The contracts containing the Provider Rates are "documents," and they "pertain[] to the provision of services to Recipients."[5] Contrary to Appellees' claims, this provision does not "permit the Department to have access to ***any and all*** records

[4] The Standard Contract is reproduced in the *Eiseman I* record at 680a-849a. The quoted passage appears at 842a, and it is also included at R. 234a in the Reproduced Record of this case and in Exhibit E to Requesters' opening brief in this case.

[5] Even if the Court were to take the Group B Appellees' truncated version of the Ready Access requirement at face value, such contracts would be not only "documents" but also "records of transactions." Appellees characterize "records of transactions" as limited strictly to "individual patient medical records showing the dental treatment provided to an individual HealthChoices enrollee," Group B Br. at 17, but this characterization reads "individual" and "patient" into the contract without any basis. *See, e.g.*, *Black's Law Dictionary* 1535 (8th ed. 2004) (defining "transaction," in the first definition, as "[t]he act or an instance of conducting business or other dealings; esp., the ***formation***, performance, or discharge ***of a contract***" (emphases added)). "Records of transactions" thus describes not only individual patient data but also the contracts containing the Provider Rates.

held by a dental sub-contractor," Group B Br. at 17, such as the sub-contractor's utility bills or office leases. Rather, it permits DPW access to documents that pertain to the services a dental provider furnishes to Recipients, including the contracts setting forth the relevant Provider Rates by which the dentist is paid to furnish services.[6]

2. Section 506(d)(1) of the RTKL Establishes an Independent Basis for Reversal

Section 506(d)(1) of the RTKL 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 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). This Court construed Section 506(d)(1) in *SWB Yankees LLC v. Wintermantel*, 45 A.3d 1029 (Pa. 2012), which ordered the disclosure of bids submitted by private subcontractors to a private contractor that was performing a governmental function. Dissenting from the Commonwealth Court's decision in the present case, Judge McCullough correctly concluded that Section 506(d)(1), as construed in *SWB Yankees*, establishes DPW's possession of the

[6] The Group B Appellees also contend, without reference to the language of the Standard Contract, that "the evident purpose of the contract's exemption for provider agreements" is "to remove any agreements with the providers from requirements that would apply to other lower-tier contractors." Group B Br. at 17 n.8. This ignores the need to differentiate the term "Provider Agreements," which applies only to agreements between an MCO and a Provider, from the contracts at issue here, which are between dental subcontractors and providers. Requesters' opening brief (pg. 20 & n.8) details this argument's fallacy.

requested records: because DPW is the party principle to the subcontracts between the MCOs (which are DPW's agents) and the subcontractors (which have actual possession of the requested records), the requested contracts are public records per Section 506(d)(1). Dissent at 4.

The Group B Appellees assert that Judge McCullough's "argument rests on the erroneous premise that any of the parties in HealthChoices act as principal or agent[.] None do. Every contracting party is in an arm's length contract. There is no evidence supporting the theory that records may be reached on an 'agency' theory." Group B Br. at 20 n.11. Appellees' "no agency" argument cannot be sustained, because it misapprehends Medicaid managed care as just another government contracting program. DPW is Pennsylvania's Medicaid agency and cannot delegate away its duties under federal law, and as a matter of law the MCOs here act as its agents. *See, e.g.*, *Catanzano v. Dowling*, 60 F.3d 113, 119-20 (2d Cir. 1995) (holding that decisions made by a home health care agency, with which the state agency had contracted to provide Medicaid benefits, constituted action on behalf of the government); *John B. v. Goetz*, 879 F. Supp. 2d 787, 860 (M.D. Tenn. 2010) (MCOs "are the [state Medicaid officials'] agents, not independent third parties"). *See generally SWB Yankees*, 45 A.3d at 1044 n.19 ("Particularly in the context of a government agency's wholesale delegation of its own core governmental function to another entity, we find that a reasonably broad

perspective concerning what comprises transactions and activities of the agency should be applied.").

The Group A Appellees attempt to distinguish *SWB Yankees* on the grounds that here there is not "a sufficient nexus" between the subcontractors and DPW, as the MCOs and subcontractors "bear all of the financial risk of providing dental services." Group A Br. at 15. Whether or not they bear financial risk, the subcontractors' agreements with providers "directly relate to the governmental function" of supplying dental treatment to Medicaid enrollees. The Standard Contract abounds with duties devolved from DPW onto the MCOs, and from the MCOs onto the subcontractors. (*E.g.*, Standard Contract at 35 (*Eiseman I* R.R. 714a) ("[T]he PH-MCO must arrange for the provision of medical and related services to Recipients through qualified Providers in accordance with the terms and conditions of this Agreement."); *id.* at 36 (*Eiseman I* R.R. 715a) ("The PH-MCO agrees to participate in the [Medicaid] Program and to arrange for the provision of those medical and related services essential to the medical care of those individuals being served, and to comply with all federal and Pennsylvania laws generally and specifically governing participation in the [Medicaid] Program.").) It was not optional for DPW to include such provisions in the Standard Contract: they are mandated by exhaustive federal statutes governing Medicaid managed-care programs. *E.g.*, 42 U.S.C. §§ 1396b(m), 1396u-2. The suggestion that the

Commonwealth's only interest in these contractual terms is financial protection, and that it does not have an interest in assuring the provision of effective services to its citizens, is belied by these extensive statutory provisions. *See also Christ the King Manor, Inc. v. Sec'y U.S. Dep't of Health & Human Servs.*, 730 F.3d 291, 308 (3d Cir. 2013) (reiterating that 42 U.S.C. § 1396a(a)(30)(A) requires a state's Medicaid rate-setting methodology to "consider[] more than simply budgetary factors, and [to] result[] in payments that are sufficient to meet recipients' needs").

Furthermore, the MCOs' exposure to financial risk does not mean that "the financial interests of the Commonwealth are severed from the Provider [R]ates," Group A Br. at 15. As noted before, the Commonwealth is obligated to assure Provider Rates are high enough so that dental care is "furnished with reasonable promptness to all eligible individuals," 42 U.S.C. § 1396a(a)(8), and so that "payments are consistent with efficiency, economy, and quality of care and are sufficient to enlist enough providers so that care and services are available under the plan at least to the extent that such care and services are available to the general population in the geographic area," *id.* § 1396a(a)(30)(A). If Provider Rates do not comply with these provisions, DPW faces federal disapproval of its Medicaid plan, *see Christ the King Manor*, 730 F.3d at 312, and the risk of private lawsuits, *e.g.*, *Sabree v. Richman*, 367 F.3d 180 (3d Cir. 2004); *Clark v. Richman*, 339 F. Supp. 2d 631 (M.D. Pa. 2004).

The Group A Appellees also attempt to distinguish *SWB Yankees* on the grounds that "the Provider Rates pertain only to the cost of providing the dental services at issue, and not to their actual performance." Group A Br. at 15 (citing *Buehl v. Office of Open Records*, 6 A.3d 27 (Pa. Commw. Ct. 2010)); *accord* Group B Br. at 22-23 & n.13.[7] Once more, this misconceives the nature of the Medicaid program. *See generally* 42 U.S.C. § 1396d(a) ("The term 'medical assistance' means payment of part or all of the cost of the following care and services or the care and services themselves, or both . . . ."). If reimbursement rates for dental providers are too low to cover dentists' costs, many dentists will opt out of the Medicaid program, making dental care hard to access in violation of the "reasonable promptness" requirement and other provisions of the Medicaid Act. *See, e.g.*, *Fla. Pediatric Soc'y/Fla. Chapter of Am. Acad. of Pediatrics v. Dudek*, No. 05-cv-23037, 2014 U.S. Dist. LEXIS 179434, at *184-86 (S.D. Fla. Dec. 29, 2014); *see also* Brief of Amicus Curiae The Pennsylvania Coalition of Medical Assistance Managed Care Organizations at 9-10 (conceding that low Provider Rates would drive providers away from accepting Medicaid patients). Accordingly, the records showing the Provider Rates "directly relate to the governmental function" of providing Medicaid.

[7] *Buehl* concerned records of the prices paid for clothing and electronics by a company operating a prison commissary. It does not need belaboring that the price a business pays for shoes to sell to inmates is very different from the factual scenario here. In addition, *Buehl* predates *SWB Yankees* and is of course not binding on this Court.

C. There is No Need to Remand

Appellees propose that if this Court reverses the decision below, it should remand this matter to the Commonwealth Court for analysis of whether the records are exempt from disclosure as containing trade secrets or confidential proprietary information. Group A Br. at 15-16; Group B Br. at 9 n.5. But if this Court reverses in *Eiseman I*, there will be no need for a remand: the same reasoning would apply in this case with equal force, and the Court should simply enter an order directing the release of the requested records.

III. CONCLUSION

Requesters respectfully request that the Court reverse the Commonwealth Court's Order.

Dated: February 3, 2015

Respectfully submitted,

/s/ Benjamin D. Geffen

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with the 7,000 word limit established by Pa. R.A.P. 2135.

/s/ Benjamin D. Geffen
Benjamin D. Geffen

Dated: February 3, 2015

CERTIFICATE OF SERVICE

I hereby certify that on this day I am causing to be served this **Reply Brief of Appellants** by e-mail, per agreement of the parties under Pa. R.A.P. 121(c)(4), and by United States Postal Service First-Class Mail to:

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